Synopsis

The next Floor CPD will explore the intersection of law and religion.

Although Australia is a constitutionally secular country (s.116), legal questions involving religious matters (such as questions of status and contractual rights) regularly come before the Courts.[1]

In Australia and the UK, disputes involving votaries and religious bodies were historically determined on the basis that spiritual functions negate legal relationships[2]; and in the US on the basis that such disputes were non-justiciable on First Amendment grounds.[3]

Following deferential starts, there has been a steady shift in the UK, the US and Australia towards a stronger recognition of the application of the general law to spiritual arrangements. In *Ermogenous v Greek Orthodox Community of SA Inc* [2002] HCA 8; 209 CLR 95 the Court rejected the notion that there is a presumption that contracts involving ministers of religion are not intended to be legally enforceable.

Yet Brereton J recently found that a Rabbi's contract could not be terminated on common law grounds because the relationship between the parties was governed by religious law (Halacha): *In the matter of South Head & District Synagogue (Sydney) (Administrators appointed)* [2017] NSWSC 823 (Brereton J).[4]

Robert Goot AM SC and Bilal Rauf have kindly agreed to discuss this topic in the context of their involvement in the *South Head & District Synagogue* matter.

As the end of the month coincides with school holidays, we will push this CPD back one week to Friday 6 October 2017, at 4pm for a 4.15pm start in the 'break-out' room. Refreshments will be provided.

See you all there for what promises to be a very interesting discussion!

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[1] Uche Okereke-Fisher has one such matter in the Supreme Court at present.
[2] (eg) *Diocese of Southwark v Coker* [1997] EWCA Civ 2090; [1998] ICR 140.
[3] (eg) *Jones v Wolf* [1979] USSC 147; 443 US 595 at 602 (1979).
[4] *Cf* the Court's approach to the termination of tenured employment in *NSW Cancer Council v Sarfaty* (1992) 28 NSWLR 68.

Some Talking Points

The debates surrounding the intersection of laws and religion are not new: "*Woe to those enacting crooked statutes and writing oppressive laws*": Isaiah. 10:1.

Australian courts have traditionally been generous in defining the scope of religious freedoms.[5] Similarly, State and Federal governments in Australia have adopted a comparatively deferential, soft regulatory approach in dealing with the issue of religious autonomy.[6] Thus in balancing the principles of anti-discrimination and religious freedom, the federal Government has tended to recognise religious exemptions to what would otherwise be unlawful conduct. For example, in the case of accommodation, discrimination against a person on the basis of that "*person's sex, marital status, pregnancy or potential pregnancy*" is unlawful, but an exemption is given for "*accommodation provided by a religious body*".[7]

Despite traditional judicial deference to religious autonomy, Courts nevertheless have to grapple with the undeniable influence religion has on the functioning of the institutions of state.

In *Bowers v. Hardwick*, 478 U.S. 186 (1986), the US Supreme Court held that a State law criminalising sex between gay couples was valid as there was a rational basis to justify the law, namely the government's interest in promoting 'morality'. Chief Justice Burger wrote that "*Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards*".[8]

Bowers was overruled in *Lawrence v. Texas*, 539 U.S. 558 (2003). Kennedy J, who delivered the opinion of the Court, took issue with Burger CJ's appeal to religious standards: "*The Bowers Court was, of course, making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral, but this Court's obligation is to define the liberty of all, not to mandate its own moral code*" (at 571).

The absence of a bill of rights means that Australian Courts do not have to make the kind of value judgments that are more commonplace in the US and the European Court of Human Rights. But issues of religion and morality nevertheless continue to permeate important constitutional issues.[9]

The High Court had to grapple with the nineteenth century religious interpretation of 'marriage' in its recent determination that the marriage power in the Constitution extended to same sex unions. In *Commonwealth v Australian Capital Territory* [2013] HCA 55; (2013) 250 CLR 441, the Court dealt with the question of whether Territory legislation which provided for same sex marriage was inconsistent with the *Marriage Act 1961* (Cth) and thus invalid. This question in turn required the Court to determine

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[5] (eg) *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* [1983] HCA 40; (1983) 154 CLR 120 ("*Scientology case*"); *Canterbury Municipal Council v Moslem Alawy Society Ltd* (1985) 1 NSWLR 525, 544 (McHugh JA); *Evans v New South Wales* (2008) 168 FCR 576, [79] (French, Branson & Stone JJ).

[6] See (eg) the Victorian religious tolerance legislation in the *Catch the Fire Ministries Case* (2006) 15 VR 207.

[7] Section 23 of the *Sex Discrimination Act 1984* (Cth).

[8] At p.198.

[9] *Krygger v Williams* (1912) 15 CLR 366; AG (Vic) *Ex rel. Black v Commonwealth* (1981) 146 CLR 559; *Williams v Commonwealth of Australia* [2012] HCA 23; (2012) 248 CLR 156.

whether the marriage power in s.51(xxi) of the Constitution permitted the federal Parliament to make laws with respect to same sex marriage.[10]

If the Court had taken the approach that "marriage" in the Constitution was to be defined by reference to what the Framers understood it to mean, then the outcome may well have been very different. Quick and Garran[11] for example had written that "*[a]ccording to the law of England a marriage is a union between a man and a woman on the same basis as that on which the institution is recognized throughout Christendom, and its essence is that it is (1) a voluntary union, (2) for life, (3) of one man and one woman, (4) to the exclusion of all others.*" The 19th Century decision of Lord Penzance in *Hyde v Hyde*[12] is most often cited in support of this definition. Other nineteenth century cases used terms such as 'Christian marriage' and 'marriage in Christendom' as distinct from 'infidel' marriages to define what marriage was.[13] In an early case on the *Marriage Act 1961* (Cth), Windeyer J had said of Parliament that "*clearly what it has legislated for is Christian marriage*."[14]

The Court held that these descriptions did not confine the marriage power to its historical definition, confirmed in the 24th session of the Council of Trent. Rather, the term marriage in s.51(xxi) is 'a recognized topic of juristic classification', broad enough to encompass same sex unions (and indeed polygamous marriages).

The approaches in *Lawrence* and in *Cth v ACT* at first blush appear consistent with the legal philosophy of John Stuart Mill and Jeremy Bentham who reject legal moralism, and more recently H.L.A. Hart who made famous the claim that legal positivism involves '*a separation of law and morals*'. That is, the issues in those cases were resolved on a 'strict and complete legalism' approach to construction.[15]

But it must be recognized that there is a significant counter-movement which rejects this positivist separation thesis and holds that laws can and should improve morality.

Leslie Green, for example, argues that critical social morality[16] (eg, decriminalizing homosexuality as in *Lawrence*) can change conventional social beliefs: "*the most important changes in our morality in the last century or two - the repudiation of chattel slavery, the rise of the view that individuals have rights even against their lawful sovereigns, and the idea men and women are moral equals ... were changes brought about intentionally if indirectly by people who protested, boycotted, wrote pamphlets, preached sermons, and organized unions - but also by people who voted, legislated, and litigated. In doing so they changed the law, and in changing the law they helped change our morality*".[17]

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[10] as the Territory legislation would have been able to validly operate concurrently with the federal Act if the federal Parliament had no power to make a law providing for same sex marriage.
[11] The Annotated Constitution of the Australian Commonwealth, (1901) at 608-609.
[12] (1866) LR 1 P & D 130 at 133.
[13] *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441 at [31], [36]
[14] *Attorney-General (Vic) v Commonwealth* ("the *Marriage Act Case*") [1962] HCA 37; (1962) 107 CLR 529 at p.600.
[15] Although Kennedy J has often employed normative arguments to extend the fundamental liberties protected by the Fourteenth Amendment's Due Process Clause to certain personal choices central to individual 'dignity': eg *Obergefell v. Hodges*, 576 U.S. ___ (2015).
[16] H. L. A. Hart, in *Law, Liberty and Morality* explains that there is the morality that a society does in fact endorse and practice ('social' or 'positive' morality) and there is the morality that it ought to endorse and practice ('normative' or 'critical' morality).
[17] Leslie Green, "Should Law Improve Morality?" *Crim Law and Philos* (2013) 7:473–494 at p.494.

The insistence in these natural law theories on the moral nature of law appears to equate moral nature to something good – which, of course, is not necessarily always so[18]: see the discussion by Kirby J of the doctrine of 'manifest abuse' in *Kartinyeri v The Commonwealth* [1998] HCA 22 from [159].[19] And as can be seen in the current debate on same sex marriage, there are divergent views as to what the criteria of legal validity for marriage laws should be, and whether they explicitly incorporate or exclude principles of equality and justice, or alternatively substantive moral or religious values.

Law should be just, but it may be deeply unfair; it should promote the common good, but it may be alienating and divisive; it should advance prosperity, but it may be thoroughly regressive. In this context, whilst our debate is ostensibly about cases on the intention of parties to include or exclude various elements of law or religion in their dealings, it touches on a deeper jurisprudential topic: do the essential properties of law in a pluralistic society include moral or religious bearings?

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[18] see the discussion of this dilemma in Thomas Aquinas. "*Summa Theologica*", Third Article [I-II, Q. 93, Art. 3].
[19] *The Hindmarsh Island Bridge Case.*