

## NOTRE DAME RELIGIOUS FREEDOM CONFERENCE BOOK LAUNCH<sup>1</sup>

Prof Quinlan, distinguished guests, ladies and gentlemen -

I begin by paying my respects to the traditional owners of the land on which we meet, the Gadigal People of the Eora Nation and to their elders past and present. I also pay my respects to all persons here today of Aboriginal and Torres Strait Islander heritage.

I am grateful to Prof Quinlan for his kind invitation to offer some observations on the occasion of the launch of these two important books.<sup>2</sup> I would also like to offer my congratulations to Prof Quinlan and his collaborators here in the University of Notre Dame Australia's School of Law at Sydney on the organisation of this Second Annual Religious Freedom Conference. The programme looks to have been a very interesting one and I regret that court commitments have meant that I have been unable to attend the various presentations. However, having had the opportunity to read through both Prof Benson and Prof Adolphe's books (and in referring to them that way I intend to include their co-editors), I have no doubt that both of these books make very worthwhile "takeaways" from this conference.

As an audience interested in human rights law generally, and questions of religious liberty in particular, you are gathered at a very interesting time, both locally and internationally. Let me give three examples, all of which I assume will be familiar.

A few weeks ago the Royal Commission into Institutional Responses to Child Sexual Abuse published its Criminal Justice Report. Recommendation 35 of that

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<sup>1</sup> Remarks delivered by the Hon Justice François Kunc, a judge of the Supreme Court of NSW, on 20 October 2017 at the University of Notre Dame Australia Sydney Campus at the conclusion of the Second Annual Religious Freedom Conference "Freedom of Belief Freedom of Action".

<sup>2</sup> I T Benson and B W Bussey (Eds), *Religion, Liberty and the Jurisdictional Limits of Law*, LexisNexis Canada Inc, 2017; R J Rychlak and J F Adolphe, *The Persecution and Genocide of Christians in the Middle East – Prevention, Prohibition & Persecution*, Angelico Press, 2017.

report was to the effect that the proposed “failure to report” offence should apply to information disclosed in a religious confession and that no excuse, protection or privilege should apply to such disclosures. That recommendation may be contrasted with Canon 983(1) of the Catholic Church’s Code of Canon Law which provides that “The sacramental seal is inviolable; therefore it is absolutely forbidden for a confessor to betray in any way a penitent by words or in any other manner and for any reason”.

While the Commonwealth Government’s response to that recommendation is unknown, it is possible that the stage has been set for what may be one of the most serious confrontations between Church and State in Australia since the state aid debates. Father Frank Brennan SJ, a law professor and Jesuit priest, has written in the national press that if the civil law protecting the confessional seal will change, “I will conscientiously refuse to comply with the law because in good faith I will be able to claim that it is a bad law which does nothing to protect children and which may take away the one possibility that a sex offender will repent and turn himself in.” The Roman Catholic Archbishop of Melbourne has announced that he would go to prison before breaking the seal of the confessional.

A second example of these interesting times is that on 15 November 2017 the results of the Australian Marriage Law Postal Survey will be published. According to newspaper reports, even high profile supporters of the “No” case expect the “Yes” case to receive the majority of votes. In that event, it is expected that Parliament will move to enact legislation to give effect to the result of the survey. That legislation will bring to a head a debate about the extent to which provision should be made for religious and other conscientious objections.

It is, as yet, unclear what the bill to amend the *Marriage Act 1961* (Cth) will look like. According to media reports, at least one private member’s bill is waiting in the wings. However the debate proceeds, it will be taking place against the background of what seems to have been an entirely unexpected finding of the

February 2017 report of the Senate Select Committee on the exposure draft of the *Marriage Amendment (Same-Sex Marriage) Bill*. That bipartisan report concluded (at paragraph 3.142) that “overall the evidence supports the need for current protections for religious freedom to be enhanced. This would most appropriately be achieved through the inclusion of “religious belief” in federal anti-discrimination law.”

A third interesting development, this time from Canada, which I might refer to as the “home” of Prof Benson’s book, is that on 30 November and 1 December this year, the Supreme Court of Canada will hear the appeals in those cases concerning the accreditation of Trinity Western University. Leave has been granted to 26 groups to intervene in that litigation, including those representing LGBTQIA organisations.

Having, I hope, established that questions of religious liberty in human rights law are topical, I would like to say a few words about each of the books that is being launched this afternoon and then conclude with some observations about the signs of the times and how these books might be seen to cast light on the issues of the moment.

As I leafed through the various papers in Prof Benson’s book, I was left with the overwhelming desire to find a time machine that could take me back to the University of Toronto in May 2015 to attend the symposium at which the papers were given. It must have been an absolutely fascinating event and Prof Benson and Prof Bussy have done an invaluable service in collecting the papers from the symposium into this book.

In the time available – as I stand between you and drinks at the end of two days of conferring - it is, of course, impossible to say something about all of the papers in Prof Benson’s book. I will touch briefly on some of the themes which that struck me as being of particular importance. However, I hope you will believe me that it is more than just the *hommage* of one judge to another when I draw

particular attention to Justice Lauwers' article on "Liberal Pluralism and the Challenge of Religious Diversity". It sets out the issues with clarity and fairness and should be standard reading for law and philosophy undergraduates and anyone interested in these issues generally.

However, because he is present with us today, I wish to look at some of the ideas in Prof Benson's introduction and then substantive article in the book. This requires considering four important ideas.

First, he reminds that "law does not create liberty, or religious rights, but rather recognises them". I agree. One of my own reservations about much human rights discourse is its appeal to the word "toleration" or "tolerance". I have never liked it because of its connotation of a grudging concession by one part of the community to another. While I acknowledge that this is a contestable proposition, in my respectful opinion fundamental human rights are prior to the social unit which recognises and gives effect to them.

Second, it is a very healthy thing for lawyers, policy makers and even judges to be reminded that law has its limits. This is something which the rule *of* law necessarily recognises. It may be contrasted with rule *by* law, which assumes that there are no limits to the role that law can play in regulating society. This is an important distinction which is often forgotten. The latter view is the preferred position of tyrants.

Third, Prof Benson argues that, as far as possible, the state must be impartial between legitimate different positions. In today's environment this is undoubtedly important because a hard secularism can develop all too easily which, once adopted, becomes almost impossible to shift as the *de facto* order. With time its status can become *de jure*. This is what I understand various authors in the book to refer to as "civic totalism".

The previous three considerations inform Prof Benson’s central insight, which is based on the laudable desire to cease thinking about conflicts of rights as a zero sum game with a winner and loser. I was struck by his comment that “what is needed is a set of principles that genuinely provide for living together with disagreement”. Those principles operate by reference to the context in which any given conflict of rights arises and is to be resolved.

This culminates in Prof Benson’s fundamental suggestion of a rebuttable presumption in favour of diversity. In Australia, the adoption of such principle would either have to be legislated or accepted by the High Court as a legitimate principle of constitutional interpretation.

I think it is a fascinating idea, but for present purposes I confine myself to asking whether the same result can be achieved by applying either or both of the concepts of proportionality and unreasonable or impermissible burden. These are more familiar to Australian lawyers from the High Court’s development of the implied constitutional freedom of expression of political opinion, most recently this week in its decision in *Brown v State of Tasmania*<sup>3</sup>.

Two starting points might be a consideration of Sir Anthony Mason’s article on “The Use of Proportionality in Australian Constitutional Law”<sup>4</sup> and Justice Virginia Bell’s 2016 Sir Ninian Stephen Lecture, “Equality, Proportionality and Dignity: the Guiding Principles for a Just Legal System”<sup>5</sup>. Reference to Sir Anthony’s article allows me to acknowledge a further Canadian contribution in this area, as he points out that the foundational common law formulation of proportionality is the judgment of Dickson CJ in *R v Oakes*<sup>6</sup>.

It seems to me that measuring a proposed presumption in favour of diversity against the concepts of proportionality and unreasonable or impermissible

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<sup>3</sup> [2017] HCA 43

<sup>4</sup> (2016) 27 PLR 109

<sup>5</sup> (2017) 13(2) TJR 167

<sup>6</sup> [1986] 1 SCR 103

burden might at least identify the particular contribution that Prof Benson's proposed presumption might make to the jurisprudence.

Prof Adolphe's book is the record of another conference, with some additional papers, which I also wish I could have attended. My most recent personal insight into the circumstances of Christians in the Middle East came a few weeks ago. In my capacity as the NSW Lieutenant of the Equestrian Order of the Holy Sepulchre of Jerusalem – the ancient order of the Catholic Church which funds the Latin Patriarchate of Jerusalem – I had the privilege to host a visit by the LPJ's Episcopal Vicar, Bishop Giacinto-Boulos Marcuzzo.

The bishop was quite clear about the Church's principal pastoral challenge in many parts of the Middle East: creating an environment to encourage young Christians, in particular, to stay, including accommodating the needs of the many refugees who have flooded into the Holy Land and Jordan. This meant not just education and spiritual care, but creating employment opportunities and civic communities that would give the next generation a reason to stay. For us it was a graphic reminder that persecution can come in many forms: not just injury to the person and damage to property, but also economic and social exclusion.

The articles in Prof Adolphe's book pull no punches, in that it is not only about persecution. As the title suggests, it looks at the serious assertions that have been made that genocide has been committed, as well as considering issues of prevention, prohibition and prosecution. The photographs used throughout the book are, as the saying goes, also worth many thousands of words.

As with Prof Benson's book, time requires me to confine my remarks about Prof Adolphe's book tonight. Overall I have no doubt that it is an excellent legal, political and, importantly, theological resource. Again may I single out a contribution by Prof Adolphe by reason of her virtual presence with us this afternoon. Her chapter on "Sexual Violence as a Tactic of Terror: the Plight of Christian Women and Girls" based around a case study of Boko Haram's

abduction of Christian schoolgirls in Nigeria is a model of relevant and rigorous scholarship. International humanitarian law is often criticised because of its complicated and uncertain operation, especially the long delay that often accompanies bringing perpetrators to justice before the International Criminal Court or special tribunals. This is a point made by Prof Rychlak in his contribution on “The Failed Promise of the International Criminal Court”.

Nevertheless, a telling point is made by Prof Adolphe’s article: the international legal framework serves an important purpose by encouraging and governing political and policy responses that are engaged to deal with problems as they happen, rather than just to create legal consequences after the fact.

I would also like to mention Mr Geoffrey Strickland’s chapter on “Sharia Law, the “Islamic State”, and the Persecution of Christians: Moving Past Phobia and Neologisms”. Exposing and criticising what I understand to be the warped theology of ISIS or Daesh is an area where Christian and Muslim scholars of Islam and Sharia law can make common cause, because Muslims and Christians are also its victims. This is just one area where Christians and Muslims can create intellectual bonds which might then inform a joint approach to broader questions of religious liberty in civil society. In that context, I was delighted to see that the organisers of this conference had included a presentation by the distinguished Muslim Sydney Law School scholar Dr Ghena Krayem.

Before leaving this topic it is important to note that in focusing on the persecution of Christians, I in no way intend to minimise the sufferings of other religious and ethnic groups. However, as Prof Rychlak says in his introduction: “While we are concerned about horrors faced by all people, the focus of the book is on Christian victims. Too frequently they are overlooked”. There does seem to be a significant body of evidence to demonstrate that the persecution of Christians does not, in the West, attract the degree of public (which really means media) attention that it deserves.

Having briefly looked at both of the books which have been launched this afternoon, let me return to the signs of the times and how the lessons and ideas from these books speak to the present moment.

Although on their face these two books might be thought to have little in common, I would like to suggest that in one way they represent two sides of a coin that is very much at home in a conference about human rights and religious liberty. Prof Benson's book offers the interested reader a compendium of the vocabulary and ideas that are essential for a respectful and intellectually rigorous conversation about the place of religious liberty in civil society. On the other side of the coin, Prof Adolphe's book offers a stark reminder of what happens when religious protections under the rule of law disappear to be replaced by unchecked religious persecution.

We live in a moment of history when respectful and intellectually rigorous debate is very difficult, and some would say impossible, to conduct. I do not think that is either a novel or controversial impression of the zeitgeist. In September, the Lowy Institute's media award dinner was addressed by the well-known New York Times columnist Mr Bret Stephens. His speech was entitled "The Dying Art of Disagreement". He observed that in the world today, "our disagreements may frequently hoarsen our voices, but they rarely sharpen our thinking, much less change our minds". He went on to say that "Intelligent disagreement is the lifeblood of any thriving society".

Mr Stevens' remarks resonate with those made many years by John Courtney Murray SJ, the *doktorvater* of Vatican II's declaration on religious freedom, *Dignitatis Humanae*. Murray, quoting the Dominican Thomas Gilby, wrote that "civilisation is formed by men locked together in argument. From this dialogue, the community becomes a political community". The editors of the Jesuit journal *America* recently recalled that quotation to make the point that "the use of reason in argument is the specifying note of a civil society".



There is much in Prof Benson's book that can and should inform the debate that it appears we will have in the coming months on issues touching the appropriate balance to be struck between competing social values including what may be imprecisely referred to as the right to religious freedom. I wish to make it clear that, as a sitting judge, I have no view and am not to be taken as expressing any view about what are the appropriate outcomes of such debates. However, at the risk of being thought of as naïve or quixotic, I do respectfully urge on the participants the importance of civility and reason.

I am not sure that Australia is particularly experienced at these kind of debates. I suspect that many people are happy or relieved that is the case.

Why might we be so inexperienced? The obvious reason, of course, is that we do not have a bill of rights. Our constitution is not the product of a popular revolution inspired by a particular view of the rights of men and women. Our national compact is the embodiment of a not always enthusiastic federation mediated through lawyers and politicians and given effect by an act of the Imperial Parliament at Westminster.

Furthermore, our rights culture, such as it is, has been based more on what might be called – to borrow a term from Christian spirituality – the "*via negativa*": all things are permissible unless specifically forbidden. This may be contrasted with a culture such as the United States where rights are positively conferred and, therefore, regularly asserted through the courts.

Another reason – and by no means a bad one – is Australians' natural sunny disposition to deal with such issues by an optimistic assertion of "she'll be right" accompanied by the application of the universal solvent of the "fair go". However, such an egalitarian outlook can only go so far when faced with the complexity and divisiveness of some of the questions which Australians are now being asked to answer.

If I am right to any degree about our relative inexperience in this kind of discourse, then a book such as Prof Benson's is a valuable contribution. On the other hand, if any of us needs reminding about the importance of fundamental human rights, then Prof Adolphe's book is a timely and salutary reminder of the awful human consequences of rights being replaced by repression.

As this event is taking place under the auspices of an avowedly Catholic university, I will conclude by reaching into the Catholic tradition. The most recent issue of *La Civiltà Cattolica*<sup>7</sup> includes an article by Enrico Cattaneo SJ entitled "*Parrhesia*: Freedom of speech in early Christianity". As is explained in that article, *parrhesia* is a rich idea because, quoting Foucault, "*parrhesia* reflects an ethical attitude in that what one has to say is said 'because it is both necessary and useful, as well as being true'. It means a principled frankness in speaking the truth.

Fr Cattaneo SJ concludes with the observation that "one of the key concepts that guides Christian *parrhesia* ... is that of *epieikeia*, which means 'attention to the concrete situation' and therefore 'comprehension', 'meekness' or 'moderation'. It relates to seeing the good that already is, and noting what is lacking or what blocks it."

I imagine that many people in this room will be taking part in the debates that are to come on questions of religious freedom in this country. I hope your participation will exhibit the Christian quality of *parrhesia*: frank but reasonable and respectful speech that begins by seeing the good that already is, both in our civil society and its diverse members.

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<sup>7</sup> 15 October 2017, English edition, p 41 and ff

Prof Benson's book provides many useful ideas which should inform the national conversation. Prof Adolphe's book reminds us of how much we have to be grateful for in this country and the need for mutual respect irrespective of political, social or religious viewpoints. Both books have much to offer and I am honoured to have been given this opportunity to commend them to your attention.