CASE NOTE AND COMMENTARY

AN AUSTRALIAN DEFINITION OF RELIGION*

I. INTRODUCTION

The question of the character of Australian religion and the legal status of churches has been a matter of interest recently because of some decisions in the High Court and reports such as that of the Anti-Discrimination Board of New South Wales. Discussion of multiculturalism has also raised a nest of questions related to the constitutional and legal position of religious bodies in Australia. A proposed amendment to Clause 116 of the Constitution was recently rejected decisively at a referendum.

The way in which the High Court has handled this matter is of direct interest to the churches as it affects their institutional place in Australian law. This is particularly so in the 1983 judgement of the court in the matter of Scientology which considered the issue of taxation privilege for the church of the New Faith.

This judgement is of more direct interest to a theologian because the court undertook to settle the issue before them by answering the question, "What is religion?" Previous cases before the High Court had not directly sought to define religion. In 1912, *Kryger v Williams*[1] was concerned with the third

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clause in Section 116 as to whether compulsory military service was a contravention of the constitutional guarantee for the free exercise of religion. In 1943, *Jehovah's Witnesses v Commonwealth*[2] concerned the limits of the guarantees of the third clause of Section 116. The Court held that the Constitution did not prevent the Commonwealth Parliament from making laws prohibiting the advocacy of doctrines or principles which, though advocated in the pursuance of religious convictions, are prejudicial to the prosecution of a war in which the Commonwealth is engaged. The so-called DOGS case in 1980-81[3] was concerned with the establishment clause of section 116. These and other cases in other courts are of considerable importance in identifying the status of religious freedom and religious institutions in the Australian legal hierarchy.[4]

It may be of interest to lawyers to have the 1983 High Court judgement considered by a theologian in the light of current concerns of scholarship in the study of religion. This is what is offered here.

II. THE 1983 HIGH COURT JUDGEMENT

(*Church of the New Faith v Commissioner of Payroll Tax* [Victoria])

On the 27th October, 1983, the Full High Court of Australia handed down its judgement in the case of an appeal by the Church of the New Faith against a decision of the Supreme Court of Victoria in favour of the Commissioner for Payroll Tax in that State.[5] The issue related to the *Payroll Tax Act* 1971 (Vic), section 10 of which provides; "[t]he wages liable for payroll tax under this act do not include wages paid or payable... (b) by a religious or public benevolent institution, or a public hospital." The Church of the New Faith was the name of an organisation previously known by the term Scientology and existing for the promotion of Scientology. The organisation had been assessed by the

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1 (1912) 15 CLR 365.

2 *Adelaide Company of Jehovah's Witnesses v Commonwealth* (1943) 67 CLR 116.

3 *Attorney General of Victoria Ex. Rel. Black v Commonwealth* (1980-81) 146 CLR 559.

4 See for example the judgement of the Federal Court, Fisher, Lockhart and Wilson JJ. *Ogle and Another v Strickland and Another* (1987) 71 ALR 41, which involved a question of blasphemy in a film, *Onus vs Alcoa of Australia Ltd* (1981) 149 CLR 27 which involved sacred Aboriginal remains, and the 1984 South Australian Supreme Court case in the field of education, *Grace Bible Church Inc v Reedman* 54 ALR 571. See also CL Pannam, "Travelling Section 116 with a US Road Map" (1963-64) 4 *Melbourne University Law Review* 41.

5 *Church of the New Faith v Commissioner of Payroll Tax (Victoria)* (1983-84) 154 CLR 120. See also in the English jurisdiction *Mandle v Dowell Lee* (1983) 2 AC 548 which is concerned more particularly with the relation between religion and ethnicity, and more generally St JA Robillard, *Religion and the Law*, Manchester, 1984.

Commissioner for Taxation in Victoria for payroll tax on the basis that it was not a "religious institution". The church appealed to the Supreme Court where Justice Crockett dismissed the appeal. In a second appeal to the Full Supreme Court of Victoria, the church was again unsuccessful. In late 1983 the church sought leave to appeal to the High Court of Australia and in a unanimous decision the appeal was upheld and the previous judgement of the Victorian Supreme Court set aside.

Three separate judgements were handed down by the High Court, two of them jointly written. The first was jointly written by Mason A-CJ and Brennan J, the second by Murphy J and the third by Wilson and Deane JJ. The case was argued before the Court in relation to the Victorian Payroll Tax Act and by both applicant and respondent on the question of whether or not Scientology was a religion. Several of the judgements remark on these terms on which they were asked to make judgement. According to Mason A-CJ and Brennan J, being asked to make judgement in these terms conceals to a certain extent the issue of the purpose and activities of an institution in determining whether it is a religious institution.

It is surprising that the Court felt obliged to consider the question before it in precisely the terms of whether or not Scientology was a religion. The question concerned the payment of Victorian payroll tax by a "religious...institution." From a theologian's point of view there is a significant distinction between the idea of religion and that of a religious institution. Different religions, and even sub-sets of a particular religion, view institutionality in, or connected with, their religion quite differently. Within the Christian tradition one thinks of the contrast between medieval Catholicism and extreme protestant groups such as Anabaptists. In Islam the widely different conceptions of an Islamic Republic found amongst Muslims would be another example. Even if not from the standpoint of the law, the terms in which the Court considered the case are somewhat surprising, to say the least of it, from the standpoint of the study of religions.

The three judgements reflect quite different interpretations of the question of the definition of religion and shed considerable light upon the difficulties that are raised for understanding the position of religion, legally and constitutionally, in the Australian environment. Each of the three judgements can be briefly considered here before setting them in the context of religious studies.

A. MASON A-CJ AND BRENNAN J

Mason A-CJ and Brennan J begin by remarking upon the difficulty of defining religion. It is not a question of personal religious freedom. Nonetheless, a narrow definition would not be acceptable. "The statutory syncretism which a parliament adopts in enacting a provision favouring religious institutions is not to be eroded by confining unduly the denotation of the term religion and its derivatives." This does not, however, mean that any

claim to be a religion can be entertained, "a more objective criterion is required."[6]

That criterion is found in indicia exhibited by the acknowledged religions. In other words the Justices are seeking a definition according to those essential indicia of religions which already attract that freedom or "immunity", at law. "It is in truth an enquiry into legal policy."[7]

The Justices say they are consciously seeking to formulate a specifically Australian judgement on the issue. They refer to judgements made in other courts in the United States and England. "The opinions of those Courts are helpful, but it is time for this Court to grapple with the concept and to consider whether the notions adopted in other places are valid in Australian Law".[8] Paucity of precedent and the different judgements of the full Court in the case before them make it manifest that there is a need "for an authoritative Australian exposition of the concept of religion."[9] It may be that the opportunity to outline a specifically Australian view of the question was an attraction in dealing with the case in the broad terms of what is a religion. This has been a question in the United States, and it has a certain interest in a society which is increasingly said to be multicultural. Though, of course, one might be making a mistake in taking too seriously these references by the justices to establishing a specifically Australian view.

Mason A-CJ and Brennan J conclude that religion is more than a cosmology, "it is a belief in a supernatural being, thing or principle", and secondly, "the acceptance of conduct to give effect to that belief".[10] In other words the concept of religion encompasses conduct no less than belief and furthermore such conduct which is so encompassed "is prima facie within the area of legal immunity".[11]

This is not to say that the Justices are supporting a Theistic definition of religion. "We would hold the rest of religious belief to be satisfied by belief in supernatural Things or Principles and not to be limited to belief in God or in a supernatural Being otherwise described."[12] The core of this approach is that the belief is something that goes beyond the senses, its object is supernatural.

The Justices review the broader definitions of the Supreme Court in the United States of America and those of Adams J in the American jurisdiction. They reject these broad definitions and also the narrower definition which was the basis of the presentation before the Court of the Commissioner for payroll tax. In an examination of the evidence presented before them in relation to the

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6 *Ibid* at 132.
7 *Ibid* at 133.
8 *Ibid* at 130.
9 *Ibid* at 131.
10 *Ibid* at 136.
11 *Ibid* at 135.
12 *Ibid* at 140.

beliefs and practices of the leaders and of the general community of Scientologists, the Justices conclude that, according to their material, "the general group of adherents have a religion."[13]

B. MURPHY J

Murphy J begins by drawing attention to the many tax exemptions and privileges enjoyed by religious institutions, and therefore he says one can understand a certain scepticism when new religions appear. Religious freedom is fundamental to our society, but even so, the truth or falsity of religions is not the business of officials or the courts. It is difficult to define religion and there is no satisfactory single criterion. It is better he says, "to state what is sufficient, even if not necessary, to bring a body which claims to be religious within the category."[14] There then follows a strategic and fundamental statement by Murphy J as to his approach to a definition of religion.

> On this approach, any body which claims to be religious, whose beliefs or practices are a revival of, or resemble, earlier cults, is religious. Any body which claims to be religious and to believe in a supernatural Being or Beings, whether physical or visible such as the sun or the stars, or a physical invisible god or spirit, or an abstract god or entity, is religious. For example, if a few followers of astrology were to found an institution based on the belief that their destinies were influenced or controlled by the stars, and that astrologers can, by reading the stars, divine these destinies, and if it claimed to be religious, it would be a religious institution. Any body which claims to be religious and offers a way to find meaning and purpose in life, is religious. The Aboriginal religion of Australia and of other countries must be included. The list is not exhaustive; the categories of religion are not closed."[15]

Here Murphy J lays down the lines for the broadest possible definition for religion. The definition turns on whether or not the body claims to be religious and at the same time offers a way to find meaning and purpose in life. In reference to the Church of the New Faith, Murphy J outlines briefly its origins as scientology and its more recent transformation into a church. He refers to the fact that the church was recognised as a denomination under Section 26 of the Marriage Act and that it is granted exemption as a religious institution, from payroll tax in South Australia, Western Australia, New South Wales and the Australian Capital Territory.

Murphy J then goes on to look at what he regards as unacceptable criteria which were applied in judgements in the Supreme Court of Victoria. These were: belief in a God, the quality and character of the writings and beliefs of scientology, the revision of its beliefs, the character of its code of conduct, its growth from traditional religions, the absence of notions of propitiation and propagation, the extent of its public acceptance in Victoria as a religion, its failure to claim to be the true faith and its apparent commercialism. Murphy J

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13 *Ibid* at 148.

14 *Ibid* at 151.

15 *Ibid* at 151.

consistently regards these considerations as unacceptable and therefore, in line with his earlier fundamental definition, he finds in favour of the appellant.

In the conclusion to his judgement, Murphy J returns to the point which he had made at the beginning, namely that religious bodies enjoy considerable financial advantages by way of exemptions and that the Commissioner for Taxation should not be criticised for attempting to minimise the number of tax exempt bodies.[16]

C. WILSON AND DEANE JJ

The Justices concentrate their attention on the constitution of the Church of the New Faith which presents it as a church. They note that the general members of the organisation have not been challenged before the Court as not being sincere. They note, however, that Scientology fails on a test of belief in a supreme Being or God but say that this is not a satisfactory legal test. The Justices refer to a number of indicia of a religion which they regard as aids in determining the question of what a religion might be. They are: belief in a supernatural, ideas which relate to man's nature and place in the universe and his relation to things supernatural, ideas that are acceptable by adherents requiring or encouraging them to observe particular standards or codes of conduct or to participate in specific practices which have supernatural significance, whether the adherents constitute an identifiable group or identifiable groups, however loosely knit their beliefs and practices may be and, finally, that the adherents themselves see the collection of ideas or practices as constituting a religion. None of these indicia is necessarily determinative but they are aids for deciding a particular case in its own context. "Ultimately, however, that question will fall to be resolved as a matter of judgement on the basis of what the evidence establishes about the claimed religion."[17]

The Justices associate their judgement with judgements made in the United States. "The view which we have expressed of the meaning of "religion" accords broadly with the newer, more expansive, reading of that term that has been developed in the United States in recent decades".[18] According to the list of indicia the Justices conclude that "evidence establishes that Scientology must, for relevant purposes, be accepted as a "religion" in Victoria".[19]

These three judgements reflect quite different definitions of religion. Mason A-CJ and Brennan J seek to define religion in the more particular and precise

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16 S Walker "Is Scientology a Religion?" (1984) 58 *Law Institute Journal* 62 at p 63 after making the somewhat optimistic assertion that this High Court decision makes it easier to determine whether religious status should be conferred on an organisation, goes on to say that "a more difficult question of a political nature will now arise - to what extent should government provide special benefits, privileges and exemptions for religious institutions."

17 Note 6 *supra* at 174.

18 *Id.*

19 *Ibid* at 176.

context of Australian legal tradition and arrive at a narrower and more precise definition. Murphy J accepts a definition which includes almost anything, Wilson and Deane JJ offer a much broader definition of religion or a range of indicia which falls somewhere between that of the first two judgements. Even though they have such different definitions of religion all the judgements concluded that the Church of the New Faith falls within their particular definition of religion and therefore, according to the terms upon which the case has been argued, the appeal was unanimously upheld.

III. ISSUES IN THE STUDY OF RELIGION

From the standpoint of the study of religions, and more particularly of the experience of the Christian religion in western societies, three questions suggest themselves in relation to these judgements. First of all there is the problem of relativism in the identity of religion, secondly, the social significance of religion and thirdly, the phenomenon of secularisation and social pluralism in western societies and the associated tendency to the privatisation of religion in those societies.

In the last fifteen years there has been a plethora of literature concerned with the question of religious pluralism and the way in which the major religions relate to each other. This is often set in terms of how Christians are to relate to this phenomenon of religious pluralism.[20] Various trends have contributed to the development of this situation; first, significant emigration from the traditional locations of the major religions has led to societies which are much more mixed and to the adherents of the major religions being in closer juxtaposition with each other than previously was the case; second, a revitalised sense of mission in some of the ancient religions in contrast to the decline of Christian vitality in European civilizations; third, the greatly increased knowledge not only of the major religions of the world but of all sorts of religious traditions as a result of the development of the study of religions in the last fifty years.

The study of religions in its broadest scope, such as is carried on in religious studies departments in universities around the world, has itself raised fundamental problems of definition. At the Fifteenth Congress of the International Association for the History of Religions, the theme was "Identity Issues and World Religions". Throughout many of the papers the question of

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20 See Kenneth Cracknell, *Towards a New Relationship*, London, 1986; Alan Race, *Christians and Religious Pluralism*, London, 1983; Anderson, GH and Skransky, TF (eds), *Christ's Lordship and Religious Pluralism*, Maryknoll, 1981; Paul F. Knitter, *No Other Name?*, London, 1985; Kenneth Cragg, *The Christ and the Faiths*, London, 1986, Sir Normal Anderson, *Christianity and World Religions*, Leicester, 1984.

how one defines religions or how one identifies a religion was pervasive.[21] Ninian Smart said some time ago that

> we are not confronted in fact by some monolithic object namely religion. We are confronted by religions. And each religion has its own style, its own inner dynamics, its own special meanings, its uniqueness. Each religion is an organism, and has to be understood in terms of the interrelation of its different parts.[22]

W.C. Smith argues a further point, "the concept religion and the religions... ought to be dropped altogether... [F]or fundamentally one has to do not with religions but with religious persons".[23] While recognising that each individual religious person has his or her own individuality and to that extent he or she is not replicable, it is nonetheless the case that almost all religions involve some corporate activity and to that extent become more than simply religious individuals. Ninian Smart's point however, which is very widely accepted in the discipline, carries with it the implication that the identification of a religion requires it to be studied and examined in its own particular historical social context as well as according to the inner dynamics of its beliefs, practices and organisation. Eric Sharpe, expressing a widely held view within the discipline, suggests that religion has to do with man's commerce with the supernatural. It is not particularly helpful to seek to define religion or a religion, he suggests, but rather one ought to know by what criteria the student might identify "a belief, an action or an organism as "religious"."[24]

> To my mind, the only tenable criterion is that of the firm conviction *on the believer's part* (not the observers) of the actual existence of a supernatural, supersensory order of being, and of the actual or potential interplay through a network of sacred symbols, of that order of being with the world in which his normal life is lived. The interplay may take part on the individual or on the corporate level; it may involve rules of conduct or it may not; it may rest on an intensely personal experience or it may not; it may be intellectually worked out or it may not.[25]

In these discussions the particularity of the phenomenon which is being identified as a religion provides the precise parameters for a judgement on the question. A religion is identified as such in its context, as well, of course, in relation to a consideration of its inner dynamics. This way of approaching the

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21 See Victor C Hayes (ed.), *Identity Issues and World Religions*, Selected Proceedings of the Fifteenth Congress of the International Association for the History of Religions, Bedford Park (AASR), 1986. See also, B N Kaye, "Christianity and Multiculturalism in Australia", *Zadok Perspectives* 542, Canberra, 1989, and "Manning Clark's Interpretation of Religion in Australia", in *Australian and New Zealand Religious History 1788-1988*, RSM Withycombe (ed.), Canberra 1988 at pp 93-112.

22 N Smart, *The Religious Experience of Mankind*, London, 1971 at pp 31f.

23 W C Smith, *Meaning and End of Religion*, London, 1978 at p 153.

24 E J Sharpe, *Understanding Religion*, London, 1983 at p 48.

25 *Id.*

question inevitably introduces a degree of relativity in any judgement about a particular religion, and about the coherence of any "genus" religion.

In connection with the historical experience of Christianity, particularly in the last one hundred and fifty years, a similar phenomenon can be observed, though in this case it is not on the contemporary plane but rather on the historical plane. With the emergence of the historical critical method and its development during the course of the nineteenth century, especially in Germany, it has become increasingly apparent that particular generations and expressions of Christianity owe a great deal to the particularities of their own age. The way in which David Friedrich Strauss identified earliest Christianity as of its own age and fundamentally different from nineteenth century Germany, is an example. He was following in the footsteps of Gotthold Lessing in this analysis.[26]

This theme came to be more fully developed in the twentieth century by Ernst Troeltsch. The work of Troeltsch has recently been crucially important in the rediscovery of the social world of earliest Christianity.[27] The social scientific investigation of the New Testament and the origins of Christianity has brought to expression that same particularity of context of apostolic Christianity which the modern study of religions has done in our own generation. The theme is, of course, very well known and developed in the literature of Christianity in the last one hundred and fifty years. It is a central point in the interpretation of one of this century's most famous theologians Rudolf Bultmann.

One ought to observe, however, that in both cases there is not such discontinuity either between generations or between different contemporary cultural contexts that communication is not possible. What is involved here is not just a question of discontinuity but of continuity as well. The issue is really about how different kinds of continuity and discontinuity relate together and enable understanding and commitment to continue and develop, as they most manifestly do.

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26 See, for example, in Lessing's discussion of the miracle stories in the gospel, "I live in the eighteenth century in which miracles no longer happen", *On the Proof of the Spirit and of Power*, 1777, quoted from H Chadwich, *Lessing's Theological Writings*, London, 1956 at p 53. See also B N Kaye, "Lightfoot and Baur on Early Christianity" (1984) 26 *Novum Testamentum* 193.

27 See P Henry, *New Directions in New Testament Study*, London, 1979, HC Kee, *Christain Origins in Sociological Perspective*, Philadelphia, 1980, G Thiessen, *Sociology of Early Palestinian Christianity*, Philadelphia, 1977, *The Social Setting of Pauline Christianity*, Edinburgh, 1981. Troeltsch set out his views most comprehensively in *The Social Teaching of the Christian Churches*, 2 vols, London, 1931 (ET of Die Soziallehren der christlichen Kirchen und Gruppen, 1911. NW Wildiers, *The Theologian and His Universe*, New York, 1982, traces the interaction of theology with contemporary cosmologies from the Middle Ages to the present.

There is a second theme in terms of religious identity highlighted by the work of the sociology of religion. Here the focus is upon the particular social function that religion has in a given society. A number of studies of this kind have been conducted in Australia as, of course, elsewhere. The work of Hans Mol, Gary Bouma and others is well known.[28] One of the important elements in the sociological analysis of religion is the question of the social function that religion performs particularly in the matter of personal and social identity, the question of how far meaning in life is dependent upon or influenced by this sense of reality. The idea of what the world is really like regularly relates directly to religion, whether one speaks of the Sacred Canopy[29] or the Sacralisation Process.[30]

Because the sociology of religion focuses on the expressive and social significance of religious beliefs and practices it directly relates to a third phenomenon in the contemporary scene namely, social pluralism and its relationship to the process of secularisation.[31] Here again the question of religion is cast in the context of the general interpretation of developments of modern societies. Thus where a society is conceived of as pluralistic then religion becomes one of a number of options. Indced within the broad spectrum of religion there is a plurality of different religions on offer and competing with each other in the market places. The process of secularisation, the removal of religious motifs and meaning from the life of society as a whole, has had a significant impact on the way in which the religions actually present themselves. They tend to function in line with the categories of the market place, offering a product, usually of a personal and individual kind. These plural and secular movements in modern industrialised societies have the effect of making religion a private matter, and pushing it to the margins of the way in which society thinks of itself. This "privatisation" and "marginalisation" of religion has potential implications for the way in which public policy is brought about.

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28 H Mol, *The Faith of Australians*, Sydney, 1985; G Bouma and B Dixon, *The Religious Factor in Australian Life*, Melbourne, 1986. See also Alan W Black and Peter E Glasner (eds), *Practice and Belief*, Sydney, 1983; Anti-Discrimination Board of NSW, *Discrimination and Religious Conviction*, Sydney, 1984; Peter Kaldor, *Who Goes Where? Who Doesn't Care?*, Sydney, 1987; M Mason (ed.), *Religion in Australian Life; A Bibliography of Social Research*, Bedford Park, 1982.

29 P Berger, *The Sacred Canopy, Elements of a Sociological Theory of Religion*, New York, 1969.

30 H Mol, *Meaning and Place, An Introduction to the Social Scientific Study of Religion*, New York, 1983 and *Identity and the Sacred*, Oxford, 1976.

31 Daniel Bell, "The Return of the Sacred? The Argument on the Future of Religion" (1977) 28 *British Journal of Sociology* 268; Michael Hill, *A Sociology of Religion*, London, 1973; Hans Mol, *id*; S S Aquaviva, *The Decline of the Sacred in Industrial Society*, New York, 1979.

Four issues or concerns are thus apparent in the recent study of religion. First there is the question of relativism in the identity of religion when considered in differing contemporary cultures or the historically sequential periods of a particular culture. The question focuses on the way in which the elements of continuity relate to each other. They sharply focus the importance of *the defining context* of the religion.

Secondly the question of continuity/discontinuity is often considered within a particular culture under the heading of *tradition*. This is often the category used in western cultures in relation not only to religion, but also to law and legal judgements.

Thirdly, the *social identity of religion* draws attention to the relative absence of entirely interior religions. It also draws attention to a necessary point of connection with social life, namely the behavioural aspect of religion. Given the relative absence of totally interior religions, and a behavioural aspect of religion, individual or group, there is an inevitable point of contact with social policy and legal obligation and protection. The fourth issue of secularisation in modern societies, brings the definition of religion into connection with the notion of a value neutral state and question of *pluralism and privatisation.*

These themes from the recent study of religion provide a useful tool for the analysis of the judgements given in the High Court in 1983 on the definition of religion. The application of these four themes will help us to see something of the significance of those judgements.

IV. SIGNIFICANCE OF THE 1983 HIGH COURT JUDGEMENTS IN THE LIGHT OF RELIGIONS STUDIES

A. THE SENSE OF A DEFINING CONTEXT

The judgement handed down by *Mason A-CJ and Brennan J* is a judgement of specific context. The judgement clearly sets out to provide an authoritative Australian exposition of the concept of religion. Mason and Brennan say that, "it is undesirable that the clarification of a concept important to the law of Australia should be left to the courts of other countries when there is an appropriate opportunity for the concept to be clarified by this court".[32] They, of course, allow the aid of appropriate citation from the judgements of courts outside the Australian hierarchy but only "*if* there is no binding or sufficiently persuasive Australian authority".[33] Because there were different approaches in the judgements in the Full Supreme Court of Victoria in the case before the High Court, it is clear that there is a need for such an apodeictic Australian exposition. "It is desirable to grant special leave in order to expound, so far as circumstances of the case require, a concept of religion appropriate to

32 Note 6 *supra* at 131.

33 *Id.*

discriminate in law between what is a religion and what is not".[34] The Justices also take the view that special leave should be granted in order that an exposition of religion may be given by the High Court because of the influence that such a Judgement would have in the decisions of other Courts in the Australian hierarchy as they seek to understand the meaning of Section 116 of the Constitution in relation to cases that come before them.

In due course Mason A-CJ and Brennan J offer the criteria for the identification of religion and then go on to indicate why they dissent from some of the Judgements that have been given in the United States. In particular they say that they are unable to accept the church's submission that the High Court should apply the indicia given by Adams J.[35] Rejection of this is, in part, because the questions before the United States Court were different from those which the High Court was considering and in that sense therefore the question is cast in a different context. Adams J was concerned with cases to do with exemption from compulsory military service for conscientious objection founded on religious grounds rather than non-religious grounds. Such a distinction is not relevant in the Australian legal context.

More than that however it is that they find the criteria for identifying the phenomenon as a religion inadequate in terms of the conclusions which they have reached in the light of Australian precedents. An important point is at issue here. It is not just a question of legal or religious parochialism or nationalism. It is rather the genuine question that different legal jurisdictions may, and indeed do, display different emphases and viewpoints. While the broad western tradition may have some commonality, each jurisdiction has its own distinctions. The same point arises in the study of religions. The identity of a religion is most appropriately, and more precisely understood in its, or one of its, particular defining contexts. The point may be illustrated by considering the differences that clearly exists within the relatively well connected Roman Catholic faith. It is possible, and perfectly intelligible to speak of Polish Catholicism or Italian Catholicism or Australian Catholicism. If one is seeking to identify religion in Australia, then it is not only appropriate, but necessary, to seek that identity in terms of its Australian particularity. The legal and religious discipline points come together in this case in a way which Mason A-CJ and Brennan J clearly reflect.

Wilson and Deane JJ also understand that the law and its administration provides a defining context; but we shall return to that question later under the heading of 'tradition'. It is noteworthy that the precedents appealed to in the development of the criterion by Mason A-CJ and Brennan J are Australian. The specific context in which religion is being identified in this judgement is Australia and the constitutional and legal tradition in Australia.

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34 *Id.*

35 Justice Adams' views were given in *Malnak v Yogi* (1979) 592f (2d) 197.

There is a further sense of defining context in so far as the Justices regard a tenet as religious, not because it is pronounced by a particular teacher but because it is recognised and accepted and acted upon by the adherents of that religion. In this sense the "community of believers" constitutes a defining context for any religion. In this particular case that religious community is the body of adherents to Scientology in Victoria.

For Murphy J there is no discrete defining context. He draws attention at the beginning of his judgement to legal privileges given to religious bodies in Australia which are obviously quite extensive. He offers *obiter dicta* on religious freedom but claims that the court cannot define religion as far as the law is concerned. He refers to the judgement of Latham CJ in regard to that difficulty. The adherents of a religion therefore are the ones whose definition of that religion and whose claim that it is a religion is the one which is to be followed. Thus his general conclusion is that "any body which claims to be religious, and offers a way to find meaning and purpose in life is religious".[36] In the second half of his judgement where he deals with arguments raised in the Supreme Court against the recognition of Scientology as a religion all his rebuttal arguments are in terms of what "most religions" in a general sense hold or practise. There is reference in this long section to Australian sources only in relation to unspecified research at the University of Sydney in regard to the number of religious groups in Australia, the number of registered celebrants under the Marriage Act and a reference in the Macquarie Dictionary to the word Scientology.

Murphy J takes a strong view on the question of religious freedom but in such a form that the law is there to protect individuals against religion rather than to protect individuals in order that they may hold and promote their religion. "That freedom has been asserted by men and women throughout history by resisting the attempts of government, through its legislative, executive or judicial branches, to define or impose beliefs or practices of religion... religious discrimination by officials or by courts is unacceptable in a free society".[37] This is, of course, undoubtedly one aspect of the right to religious freedom in Australian society and in the West generally. It also reflects the first, second and fourth clauses of Section 116 of the Constitution but it does not reflect the third clause which prohibits the Commonwealth from making any law for "prohibiting the free exercise of any religion".

Murphy J expresses this freedom in some contrast to the form of expression used by Mason A-CJ and Brennan J "the chief function in the law of a definition of religion is to mark out an area of which a person subject to the law is free to believe and act in accordance with his belief without legal restraint".[38]

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36 Note 6 *supra* at 151.

37 *Ibid* at 150.

38 *Ibid* at 130.

Here the emphasis is on freedom *of* religion, whereas Murphy J's emphasis is on freedom *from* religion.

Murphy J is of course sympathetic to the Commissioner in Victoria in seeking to reduce the burden to taxpayers of the privileges granted to religious institutions and at the opening and closing sections of his judgement expresses himself negatively in regard to those privileges.

There is an apparent conflict in Murphy J's position here which can be drawn out because it reveals something of his social strategy. In the case before him Murphy J finds in the broadest possible terms as to the definition of religion. His definition is so broad that almost any person or group could qualify if they so wished. Yet, on the other hand he is sympathetic to the Victorian Taxation Commissioner in his efforts to preserve government tax revenue by restricting the number of exempt bodies. He is also not favourably disposed to the whole idea of taxation concessions for religious bodies anyway. He does not opt for a policy of restricting the benefits to the established and larger existing religious groups. That would, of course, require a tighter and more particular definition of religion. Rather Murphy J defines religion in the broadest possible terms. The consequence for social policy of the acceptance of such a broad definition would eventually be the legislative withdrawal of the taxation privileges. To judge from his opening and closing remarks he would clearly welcome such a development, indeed his judgement could well be seen as vehicle in the promotion of that end.

The judgement of Wilson and Deane JJ is in many respects similar to that of Mason A-CJ and Brennan J except that the defining context is the broad Western context. The question before the Court they say is: "Is Scientology in Victoria a Religion?". One might, they suggest, in a western community think that a narrow definition of religion was appropriate. The examples of two Indian religions suggest to them, for the purposes of law that such a definition would be too narrow. They therefore seek to develop their notion of a religion along much the same lines used by Mason A-CJ and Brennan J using Australian precedent but drawing in qualifying considerations in order to cover minority positions who have an equal right to legal protection. Rejecting a definition which was essentially theistic as constituting the essence of religion, a view taken by Kaye J and which accords probably with what Australians think about religion, Wilson and Deane JJ take the view that it is not possible to define precisely what is a religion, in the Australian context for the purposes of the law.

> There is no single characteristic which can be laid down as constituting a formularised legal criterion, whether of inclusion or exclusion, of whether a particular system of ideas and practices constitutes a religion within a particular State of the Commonwealth. The most that can be done is to formulate the more important of the indicia or guidelines by reference to which that question falls to be answered.[39]

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39 *Ibid* at 173.

The Justices note that this view accords with the broader view of religion which has been developed in the United States of America particularly in judgements of the Supreme Court, though they themselves have not developed their own conclusions on the basis of the American precedents. Wilson and Deane JJ then go on to argue that general guidelines or indicia should be laid down and that these will then enable a particular judgement to be made on the evidence as presented in individual cases as they arise. In some circumstances some indicia will be more important than others depending on these circumstances.

We have therefore two defining contexts interrelating with each other in this approach to the question. On the one hand the broad guidelines approach typical of what we might call the western industrialised community, conceived of in fairly broad plural terms. Intersecting that, is the view that the particular context of each individual case as it is presented before the court is a second defining context and that individual judgements may vary in the degree of emphasis given to particular indicia laid down in the general preliminary context.

One might in summary say that Mason A-CJ and Brennan J highlight the discontinuity side of the relationship between the Australian jurisdiction and other western, particularly British and American, jurisdictions and in the definition of religion they have attempted to draw up their formulation within the framework of an Australian defining context. In the case of Murphy J the defining context is left as open as possible such that it becomes that which might be universally applied anywhere at all. In this respect the specific identity of the Australian jurisdiction is almost entirely evaporated for the purposes of this question. With Wilson and Deane JJ an intermediate defining context is established as the framework within which a narrower particular case by case context is provided for.

It is interesting to note that very similar concerns as have been canvassed here, were discussed in a symposium on duties beyond borders published in *Ethics* in 1988.[40] One of the most important issues debated in this symposium was the moral significance of nationality. In that debate there was a contrast between a particularist approach and a more universalist or individualist approach. Theories of a universalist type emphasise the relevance to all agents, without distinction of fundamental moral obligations. What we owe to one we owe to the other, indeed all others. In this sense, one might say the universal approach is also necessarily individualist. Some particular obligations may be defended from such an approach, such as to parents, children etc, but such

40 *Ethics*, Vol 93, 1988.

commitments are "never regarded as fundamental commitments."[41] Such a universalist/individualist approach is reflected in the judgement of Murphy J.

A particularist approach allows that groupings, such as nations, or other types of communities, may have ethical significance. Membership of such particular groupings may therefore entail moral obligations to fellow members of such groups. It may also mean that such groups not only are ethically significant as such, but they are capable of being themselves committed to certain values. Such a particularist approach is reflected in the judgement of Mason A-CJ and Brennan J.

It may be commonly observed that particular groups of this kind do regularly have group value commitment, indeed it would be hard to imagine such a group existing without some such set of value commitments. No legal system exists that is not based on or expressive of moral values. Certainly the Australian jurisdiction displays value commitments and in doing it is in no sense unique, even though the values may be characteristic, even distinctive. To argue, as Murphy J does, that beliefs and values may only be legitmately defended on universalist grounds simply misses the point, is misleading and unhelpful. It is misleading because it suggests that there are no group categories of moral, legal or religious significance between the total or universal category of human and the individual. In fact, there are discrete legal jurisdictions with their own particular characteristics. The universal religions display particular characteristics in particular social and cultural contexts. It is unhelpful because it distorts the matter and does not facilitate a serious attempt to address significant aspects of the question at issue.

This is not to suggest that any particular grouping, in this case any nation or legal jurisdiction, is not related to universal human considerations. Such a standpoint is hardly thinkable, and certainly not open to a Christian theologian, located as he is in a religion of universal scope. One may emphasise, even overstate, the "sameness", but one may not eliminate the difference by an uncritical universalism.

B. TRADITION

Whereas in the previous section the continuity and discontinuity question is cast mainly in contemporary terms, the question of tradition raises that same issue in an historical way. In the judgements of Mason A-CJ and Brennan J and also of Wilson and Deane JJ, the indicia which they offer are drawn by way of analogy from the acknowledged religions which already enjoy the immunity which is being sought by the Church of the New Faith. In the case of Mason A-CJ and Brennan J this enables them to draw a quite brief summary of indicia which enables them to assess Scientology. In the case of Wilson and Deane JJ

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41. David Miller, "The Ethical Significance of Nationalities" (1988) 98 *Ethics* 649. One might also note the recent book by Alasdair MacIntyre, *Whose Justice? Whose Rationality?*, Notre Dame, 1988.

they have a longer list of indicia and allow for continuing particular judgements in the light of those indicia. In both cases the methodology involves movement from the past into the present. There is a sense in which Wilson and Deane JJ provide for a more ongoing process of tradition. There is a heightened sense of receiving from the past, acting in the present and handing on into the future by means of the particular cases. This is not precluded in any sense from the logic of the judgement of Mason A-CJ and Brennan J but it is more accentuated in the way in which Wilson and Deane JJ formulate their judgement.

On the other hand Mason A-CJ and Brennan J highlight more the tradition-generating activity of the court. They are aware of the influence of High Court rulings on other rulings in regard to the Constitution. They are conscious of the relative absence of judicial exposition of Section 116 of the Constitution and think that it is time now to make a contribution in that direction. In the case of Murphy J, the decision is brief almost apodeictic with little or no sense of historical perspective or evolving tradition.

The role of tradition here in these judgements may well be an indication of the general philosophical outlook of the judger. The virtual rejection of tradition by Murphy J sits well with the philosophical approach of the Enlightenment. There, in various writers, tradition is discounted and its value denied. The orientation is much more to the future and to our present immediate apprehension of truth. The attack on tradition in the Enlightenment was also coupled with an attack on the supernature, for which also, of course, Murphy J has no place in the public domain. The supernatural has a place only in the private idiosyncratic search for meaning in life. Not only in the field of religious studies but also in the social sciences, the reality, fact and variety of tradition is being re-examined and rediscovered.[42] That the past influences the present in a host of different ways is not only a discernible social and cultural fact, but it is a fact of considerable importance in the identity formation of both individuals and groups.

C. SOCIAL IDENTITY

In all three judgements the social expression of religion is referred to. The judgements of Mason A-CJ and Brennan J and also Wilson and Deane JJ raise the question as to whether the terms in which they are asked to make a judgement really cover all the questions which might properly be raised under the terms of the Victorian Taxation Law. Nonetheless in both judgements it is clear and important that a religion comprises not just religious beliefs but practices as well. Mason A-CJ and Brennan J make the point that freedom of religion exists for the adherents of religious beliefs not the tenets to which they subscribe. Nonetheless beliefs, practices and observances stand together. "Religious belief is not by itself a religion. Religion is also concerned at least to

42 See, for example, J. Pelikan, *The Vindication of Tradition*, New Haven, 1984; E. Shils, *Tradition*, London, 1982, and A.M. Ramsey, *Jesus and the Living Past*, 1980.

some extent with the relationship between man and a supernatural order and with supernatural influence upon his life and conduct... what man feels constrained to do or abstain from doing because of his faith in the supernatural is prima facie within the area of legal immunity, for his freedom would be impaired by restriction upon conduct in which he engages in giving effect to that belief".[43] In similar vein, Wilson and Deane JJ concern themselves with the question of "whether a particular system of ideas and practices constitutes a religion within a particular State of the Commonwealth".[44] Murphy J also draws attention to the fact that codes of conduct are common in most of the religions as indeed is commercialism, wealth and a sense of propagation of the religion within a society. On the other hand Murphy J declares that religion has often been a source of social power. In relation to the origins of religion he says, "witch doctors and priests claimed to have the ear of the gods. Consistent with the idea that the gods had human attributes and desired admiration and gifts, priests made idols of human shape. These were served by the witch doctors or priests who gained great social power".[45]

Mason A-CJ and Brennan J make strong statements in regard to religious freedom. "Freedom of religion, the paradigm freedom of conscience, is of the essence of a free society".[46] Religion is in their view, a "concept of fundamental importance to the law".[47] Of course, in the case of Mason A-CJ and Brennan J, and also of Wilson and Deane JJ, not every action prompted by religious beliefs can claim legal immunity. Action of whatever motivation or inspired by whatever beliefs, philosophies or ideas is subject to the ordinary constraints of social behaviour under the law. In terms of the tone and emphasis of Murphy J, religion is peripheral and not of fundamental significance in the general stream of social life and identity. Religious freedom is a freedom guaranteed under the law *from* religion rather than *for* religion. The tone and emphasis of Mason A-CJ and Brennan J is strongest in this area; religious freedom is a paradigm case of freedom of conscience and is of fundamental importance to the law. It is of the essence to a free society. Where such great rights are given, their availability is not surprisingly more strictly demarcated. In this sense, the strong emphasis on the right of religious freedom is matched by a more precise demarcation of what constitutes a religion.

Where there is a heightened sense of legal identity for the Australian hierarchy there is a similarly heightened sense of the significance of religious freedom and a more specific conception of what, in that context, constitutes a religion. The specificity is contained in the criteria and the definitions in Mason A-CJ and Brennan J whereas in Wilson and Deane JJ, it is contained in

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43 Note 6 *supra* at 135.

44 *Ibid* at 173.

45 *Ibid* at 151.

46 *Ibid* at 130.

47 *Id.*

particular judgements cast within the more general context of guidelines as to what might be a religion. The question of the social identity of religion and its protection is understated in the extreme in the case of Murphy J.

D. PLURALISM, PRIVATISATION AND THE NEUTRAL STATE

It is not surprising, given what has already been said, that Murphy J strongly takes the view that religion cannot and ought not to be defined by the courts or by any government officer, since that could well become an instrument for religious discrimination. Undoubtedly there is strength in that point but the emphasis in his judgement is clearly on detachment from the whole area of religion. Religion in this sense is marginalised to the private domain; any public action can be dealt with by other categories under the law. Mason A-CJ and Brennan J specifically deny that point of view. "The mantle of immunity would soon be in tatters if it were wrapped around beliefs, practices and observances whenever a group of adherents chose to call them a religion... a more objective criterion is required".[48] It is clear, of course, in their judgement, that the law seeks to leave a person as free as possible and that in the area of religion the state has no prophetic role, "the state can neither declare supernatural truth nor determine the paths the human mind must search in a quest for supernatural truth".[49]

Nonetheless, not all religious conduct is immune from the law. "The freedom to act in accordance with one's religious beliefs is not as inviolate as the freedom to believe, for general laws to preserve and protect society are not defeated by a plea of religious obligation to breach them".[50] In the case of Murphy J, religion has become a matter entirely for the private citizen and although there may be privileges for religious institutions of one kind or another they are clearly viewed as burdensome on the taxpayer and his judgement is that anyone who claims to be religious and offers meaning in life ought to enjoy the same legal privileges as existing religious institutions currently have. It is a judgement in which the currency of religious status is being devalued to the point where everyone may have it and, in the end therefore, none. On the other hand Mason A-CJ and Brennan J see religion much more positively in terms of social life and as having a recognised status within the framework of the law. It is not surprising therefore that of all these judgements they have sought to hand down a more specific notion of religion in the Australian context.

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48 *Ibid* at 132.

49 *Ibid* at 134.

50 *Ibid* at 136.

V. CONCLUSION

While it is not appropriate for me to comment on the jurisprudential aspects of these judgements, it is apparent that certain of the concerns of current scholarship in regard to the history of Christianity and of the study of religion generally are reflected in these judgements. More particularly questions of *the particularity of religion* and the difficulties of a generalised definition appear in the judgements of Mason A-CJ and Brennan J and of Wilson and Deane JJ. The issue of the interaction between social behaviour and institutional activity within society is present to a certain extent but, again, more in the judgement of Mason A-CJ and Brennan J than in the other two. This is not to say that those judgements reflect all that the honourable justices might in another context or on another occasion say about these questions, but it is to comment on the actual judgements which have been laid down on the very particular question as to whether or not Scientology is a religion in Victoria in 1983.

Similarly, the importance of *the defining context* appears in all three judgements as a most influential issue in the formulations of the judgements. This question, and the companion matter of *tradition*, is crucial in shaping each of these judgements in a way that highlights another matter, which is important to the development of any idea of Australian identity in relation to religion, namely, the role of our perception of the past in shaping the future.

Mason A-CJ and Brennan J give high prominence to the specifically Australian context and to the importance of the tradition of the Australian legal hierarchy. Wilson and Deane JJ diminish the specifity of context and change the emphasis in the role of tradition. Murphy on the other hand dissolves the defining context to total generality and the content to include virtually anything and that leaves him with a definition which is quite vacuous.

Each of these judgements, be it recalled, is addressed to a contemporary legal question; directly related to a matter of current social policy. It is clear that the concerns of current scholarship in the study of religions are more closely reflected in the judgements of Mason A-CJ and Brennan J, and of Wilson and Deane JJ. On the other hand Murphy J reflects little of the concerns of religious studies scholarship and such categories as he does depend upon are more in line with the view at the turn of the century. Are we to be persuaded by Justice Murphy's totally open approach as a description of what is and has been, or are we to take the more cautious, historically conscious and particular view of the past and the present offered by Mason A-CJ and Brennan J. The application of some of the methodological questions from recent scholarly work on religion leave us with more confidence in the approach of Mason A-CJ and Brennan J and not a little disquiet with that of Murphy J.