PROPOSAL FOR HONOURS THESIS IN LAW 2000

Sonya Gorman

1. INTRODUCTION

The following is a proposal for an Honours thesis in Law for the 2000 academic year, to be submitted for approval by the Honours Committee in accordance with Law School policy.

2. TITLE

The proposed title of my thesis is "Matters of Faith and Trust: Court Intervention in Doctrinal Disputes".

3. SUPERVISOR

Mr Daniel Stepniak has agreed to supervise me in the writing of this thesis. Mr Stepniak's endorsement appears at the end of this document.

4. SYNOPSIS

Australia is a secular society. The framers of the Commonwealth Constitution were so concerned that religion and the State not become entangled that they inserted a specific provision in the Constitution (s.116) prohibiting the Commonwealth from passing laws establishing any religion or from impeding the free exercise of any religion.

One aspect of the 'wall' between the State and religion is that churches are afforded a substantial degree of legal autonomy to deal with internal disputes involving such matters as church procedures, the saying of mass, and the interpretation of the Scriptures. Consequently, purely doctrinal or liturgical disputes are generally outside the scope of the civil jurisdiction of the courts.

There is, however, limited scope for the courts to intervene in doctrinal disputes where that dispute affects the property of the church. Thus, a complaint about a doctrinal matter must be recast as a property dispute is required before the matter can be determined by a civil court. The most popular way in which to do this, so it seems, is to allege that there has been a breach of trust.

In my honours thesis I intend to explore the problems which arise from doctrinal interpretation by the courts and the limitations (both legal and policy-based) which should be placed on such intervention. I will argue that the use of trusts as a basis for judicial intervention is little more than a 'legal fiction' whereby the more conservative members of a church seek to challenge liturgical or doctrinal developments with which they do not agree.¹

¹ This is exemplified by the recent NSW Court of Appeal case of Scandrett v Dowling (1992) 27 NSWLR 483 in which members of the Anglican Church challenged the validity of bishop's decision to ordain women as priests. Although the question of breach of trust was only addressed indirectly, this case is nevertheless indicative of the circumstances in which the civil courts are called upon to settle what are essentially internal doctrinal disputes.
Such an approach subjects religious practices to the civil court's estimation of the essential doctrines held by its original members, inevitably preferring ecclesiastical conservatism over progression. This simplistically ignores the historical and social reality that churches do evolve doctrinally.

The cornerstone of my thesis is the notion of a religious trust. A trust is a convenient legal mechanism by which property is held by one person (the trustee) for the benefit of another person or group of persons (the beneficiaries). A charitable trust (as opposed to a private trust) is a trust for the benefit of purposes, not persons. One type of charitable trust is a trust for the advancement of religion. The objects of a trust for the advancement of religion are frequently expressed to be "for the purposes of the ... [eg. Anglican Church of Australia]", or more particularly, "for the building of a church for the purposes of the ... [eg. Anglican Church of Australia]."

In Chapter 1 I consider the involvement of the courts in the execution of religious trusts. The court has the power to enforce the performance of charitable trusts and to redress breaches of trust. In doing so, the court must determine the intentions of the founder of the trust. This is particularly difficult where the trust is for purposes. Where the trust is for the advancement of religion, two assumptions arise: firstly, that the trust was intended for the inculcation or observance of some particular form of doctrine or worship, and, secondly, that the form intended was that professing by the founder or founders. The task of ascertaining the particular doctrines for which the trust was intended to be employed is critical where the court is called upon to determine whether, in the execution of the trusts, the principles of the founders had been departed from. I will consider the manner in which the courts attempt to ascertain the essential doctrines for which the trust was intended to be employed and outline the difficulties which are faced by the court in fulfilling this task.

The courts have tended to assume, in the absence of express intention to the contrary, that the founder of a religious trust intended to advance the religion as it stood at the time the trust was brought into existence. The court must then make a judgment as to what the essential doctrines of the religion were at that time. This process of reasoning assumes (perhaps erroneously) that the if the founder of the trust had intended the trust property to be applied to the doctrines of the church as they developed over time, the founder would have made provision for that in the trust deed. The validity of these assumptions will be considered in my thesis together with an examination of what form of words would, in fact, allow doctrinal development in a religious trust and the problems attending the adoption of such a form of words.

In Chapter 2, I examine the proposition that the breach of the "essential doctrines" of a religion will constitute a breach of trust. In Wylde v Attorney General of NSW (Ex Rel Ashelford) (1948) 78 CLR 224 the High Court, by a statutory majority, held that the Bishop of Bathurst was in breach of trust by using a particular form of service (encapsulated in a book called "The Red Book.") The basis for the majority's conclusion was that the Red Book required the use of a sanctus bell during the Eucharist and the sign of the cross during the absolution and the benediction and advocated the doctrine of the Real Presence in the Eucharist. Both of these elements were held to be inconsistent with the doctrines of the Church of England which, it was held, required the service to be in strict accordance with The Book of Common Prayer. In my thesis, I contend that the notion of "essential doctrines" inevitably requires the court to enter into an evaluation of the relative
significance of particular doctrines or beliefs. This process of evaluation risks drawing the courts into consideration of the 'truth' of the religion or religious belief.

The involvement of the courts in determining essential doctrines of religions renders them vulnerable to allegations of infringing freedom of religion. In Chapter 3, I examine the scope of the freedom of religion clause in section 116 of the Commonwealth Constitution and consider whether the intervention of the courts in doctrinal disputes amounts to an interference in the "free exercise of religion". An analysis of jurisprudence in the United States in relation to the equivalent provision in the First Amendment suggests that, were the US approach to be adopted, such intervention may indeed be unconstitutional.

Drawing upon the exposition of the issues in the previous three chapters, I intend to formulate proposals for change to the court's role in the enforcement of religious trusts in Chapter 4.

5. METHODOLOGY

(i) Sources

In researching my thesis I will rely on a range of sources, including case law, journals, monographs and on-line sources. Because of its interdisciplinary slant, I intend on referring to some non-legal materials, such as materials relating to religious organisations and liturgical disputes. The legal materials used with focus on trusts law and constitutional law. Reference to historical material will be necessary in order to establish the institutional context within which the issues considered arise.

(ii) Comparative analysis

Comparative analysis enables appropriate inferences and analogies to be drawn from other jurisdictions or areas of law which may be usefully applied in Australia.

My analysis of the approach of Australian courts to intervention in doctrinal disputes will be developed through extensive comparison with case law in the United Kingdom and in the United States of America. In drawing comparisons between Australia and the UK and USA, consideration of the vastly different judicial cultures in the UK and USA which are determined, to a large extent, by the position which the church holds in the respective countries. In the UK, where the Anglican Church is the established religion, the presence of specialist, state-sanctioned ecclesiastical courts provide a mechanism by which the civil courts can avoid dealing with doctrinal disputes. In the United States, the religious freedom clause in the First Amendment of the Constitution has been interpreted as requiring a strict separation of church and State, thus preventing the courts from intervening at all internal church disputes. In comparison, in Australia the limitation imposed by section 116 of the Commonwealth Constitution (and, in particular, the 'free exercise' clause), has been interpreted relatively restrictively.

The nature and circumstances of court intervention in religious trusts must be judged through comparison with the law relating to other types of trusts. In some instances, comparison with other charitable trusts (such as trusts for the advancement of education or trusts for the relief of poverty) will be necessary. At other times, the principles relating to private trusts, and, in particular, trusts
for non-profit voluntary associations (eg. sporting associations etc) may provide an appropriate analogy.

(iii) Primary research

There will be relatively little scope for primary research related to my thesis topic. However, I intend to seek the views of leaders of selected religious organisations in order to determine contemporary perceptions from within the church on the appropriateness of the court's intervention in doctrinal disputes.

6. OVERVIEW OF THESIS STRUCTURE

Introduction
My introduction will consist of a general introduction to the subject matter of my thesis. I will emphasise the secular nature of Australian society, as reflected in section 116 of the Constitution. I will introduce the key principles of trusts law underpinning my topic and undertake a brief overview of each chapter.

Chapter One
*The involvement of the courts in religious trusts*

I will consider the nature of religious trusts as a class of religious trust. As with all trusts, the court has control over the execution of religious trusts. However, the objects of a religious trust, being "for the purposes of" a particular religion, give rise to particular interpretative problems for the court which must be considered. The approaches taken by the courts in trying to ascertain the founders' intention in religious trusts and the assumptions adopted by the court in this process will be examined. Comparisons will be made, where appropriate, with other types of charitable and non-charitable trusts. The dramatic consequences of a particular mode of interpretation on liturgical development will also be considered.

Chapter Two
* Determination of the essential doctrines of a religion *

In Chapter 2, I examine the proposition that the breach of the "essential doctrines" of a religion will constitute a breach of trust. The process of interpretation involved in application of this proposition is ascertained through consideration of key cases, such as the *Attorney-General v Wylde*, in which civil courts in Australia have intervened in doctrinal disputes. I consider whether the notion of "essential doctrines" requires the court to enter into an evaluation of the relative significance of particular doctrines or beliefs and whether this process of evaluation risks drawing the courts into consideration of the 'truth' of the religion or religious belief.

Chapter Three
*The free exercise clause*

The involvement of the courts in determining essential doctrines of religions renders them vulnerable to allegations of infringing freedom of religion. In Chapter 3, I examine the scope of the freedom of religion clause in section 116 of the Commonwealth Constitution and consider whether the intervention of the courts in doctrinal disputes amounts to an interference in the "free exercise of religion". An analysis of jurisprudence in the United States in relation to the equivalent provision
in the First Amendment suggests that, were the US approach to be adopted, such intervention may indeed be unconstitutional.

Chapter Four
Proposals for change
In Chapter 4 I consider various proposals which may facilitate resolution of the problems associated with the court's determination of breaches of religious trust where the alleged breach involves doctrinal change. In particular, I consider whether a broader interpretation of the 'free exercise' clause in section 116 of the Commonwealth Constitution is warranted in order to limit court intervention in doctrinal disputes. Consideration is also given to the position in the UK where there is an established religion and state-sanctioned ecclesiastical courts

Conclusion
My conclusion will consist of a brief summary of preceding chapters and concluding remarks.

PROPOSED BIBLIOGRAPHY

1. JOURNAL ARTICLES

(a) Law

Mortensen, Reid. “Church Legal Autonomy” (1994) 14 Queensland Lawyer 217-226


(b) **Religion**

Graves, Stephen. "Church and State in Australia", (1981) 34 *Church and State* 11-14, 16-17

Conway, Ronald. "The Once and Future Church" (1994) 38 *Quadrant* 49-55


2. **MONOGRAPHS**

(a) **Law**


(b) **Religion**


Bentley, Peter and Hughes, Phillip. *The Uniting Church in Australia*, AGPS, Canberra, 1996.


Moore, English Canon Law (1967)

*The Ecclesiastical Law*

Hooker, R. *Of the Laws of Ecclesiastical Polity*

3. **CASES**

(a) **Australia**

High Court

*Church of the New Faith v Commissioner for Pay-Roll Tax* (1983) 49 ALR 65

*Macqueen v Frackleton* (1909) 8 CLR 673
Wylde v Attorney General (NSW); Ex Rel Ashford (1948) 78 CLR 224
Attorney-General (NSW) (Ex Rel McLeod) v Grant (1976) 135 CLR 587
AA to JC Inclusive v Hickey (1996) 187 CLR 691
Simball v Sacred Heart Mission (New Britain) Property Trust (1973) 2 ALR 203
Attorney-General (Victoria) (Ex Rel Black) v The Commonwealth (1981) 146 CLR 559
Adelaide Company of Jehovah’s Witnesses v The Commonwealth (1943) 67 CLR 116

Supreme Court

(i) NSW

Attorney General v Wylde (1948) 48 SR (NSW) 366 (NSW Sup Court)
Scandrett v Dowling (1992) 27 NSWLR 483 (NSW Sup Court CA)
Archbishop of Perth v AA to JC (1995) 18 ACSR 333 (NSW Sup Court CA)
Beard v Baulkham Hills Shire Council (1986) 7 NSWLR 273 (NSW Sup Court CA)
Ex parte King (1861) Legge 1307 (NSW Sup Court FC)
Ex parte Thackeray (1874) 13 SCR (NSW) 1 (NSW Sup Court FC)
Attorney General (NSW) (Ex Rel Elisha) v Holy Apostolic & Catholic Church of the East (Assyrian) Australian NSW Parish Association (1989) 37 NSWLR 293; 95 FLR 392 (NSW Sup Court)
Glebe Administration Boar v Commissioner of Pay-Roll Tax (1987) 10 NSWLR 352
Lang v Purves (1862) 1 SCR (NSW) (App) 4
Baker v Gough (1962) 80 WN (NSW) 1263 (NSW Sup Court)
Solicitor General v Wylde (1945) 4 (1945) 46 SR (NSW) 83 (NSW Sup Court FC)
Ex parte Hay (1897) 18 LR (NSW) 206 (NSW Sup Court FC)
Macpherson v Sutherland (1885) 6 LR (NSW) EQ 114 (NSW Sup Court FC)
Bishop of Newcastle v Walker (1898) 14 WN (NSW) 191 (NSW Sup Court)
(ii) South Australia

Wadham v Lord Bishop of Adelaide (1868) 2 SALR 127 (SA Sup Court FC)

Gent v Robin [1958] SASR 328 (SA Sup Court)

Plenty v Seventh Day Adventist Church of Port Pirie (1986) 43 SASR 121 (SA Sup Court FC)

(iii) Victoria

Attorney General (Victoria) (Ex Rel Murray) v Clarke [1914] VLR 71 (Vic Sup Court FC)

Elliott v Johnstone (1902) 28 VLR 259 (Vic Sup Court FC)

His Grace Metropolitan Petar v Kostovski; Alexander v Branov, Unreported, Supreme Court of Victoria, 8037/96, 27 October 1997

(iv) Tasmania

R v Bishop of Tasmania Unreported: see 10 February 1874, Mercury, (Newspaper).

(v) Queensland

Bailey v Uniting Church in Australia Property Trust (Qld) [1984] 1 Qd R 42 (Qld Sup Court FC)

Clark v The Corporation for the Trustees of the Roman Catholic Archdiocese of Brisbane & Anor [1996] QSC 255, [1988] 1 Qd R 26 (Qld Sup Court)

(v) Northern Territory

Catholic Church of the Diocese of Darwin Property Trust v Monteiro (1987) 87 FLR 427 (NT Sup Court)

Other

Free Daist Communion of Australia Ltd v Comptroller of Stamps (Vic) (1987) 19 ATR 3104 (Vic AAT)

(b) United Kingdom

Lang v Purves (1862) 15 ER 541 (PC)

R v Chancellor of St Edmundsbury and Ipswich Diocese; Ex parte White [1947] KB 263

Attorney General v Cock (1751) 28 ER 177
Caudreys case (1590) 5 Co Rep la

Mackonochie v Lord Penzance (1881) 6 App Cas 424

R v Barker (1762) 97 ER 823

Free Church of Scotland v Lord Overtoun [1904] AC 515

Barker v O’Gorman [1971] 1 Ch 215

(c) United States

Watson v Jones (1872) 80 US 679 (Supreme Court)

Gonzalez v Roman Catholic Archbishop of Manila (1929) 280 US 1 (Supreme Court)

Kedroff v Saint Nicholas Cathedral of the Russian Orthodox Church of North America (1952) 344 US 94

Kreshnik v Saint Nicholas Cathedral of the Russian Orthodox Church of North America (1959) 363 US 190

Presbyterian Church v Mary Elizabeth Bulu

4. LEGISLATION

(a) Australia

Uniformity Act

Commonwealth Constitution, s.116

(i) WA

Anglican Church of Australia Act 1976
Anglican Church of Australia Constitution Act 1960
Anglican Church of Australia Lands Act 1914
Churches of Christ, Scientist, Incorporation Act 1961
Presbyterian Church Act 1908
Presbyterian Church of Australia Act 1970
Roman Catholic Church Lands Act 1895
Roman Catholic Church Lands Amendment Act 1902
Roman Catholic Church Property Act 1911
Roman Catholic Church Property Acts Amendment Act 1916
Roman Catholic Church Lands Ordinance 1858
Salvation Army (Western Australia) Property Trust Act 1931
Uniting Church in Australia Act 1976
(b) United Kingdom

_Ecclesiastical Jurisdiction Measure 1963 (UK)_

(c) United States of America

First Amendment, Constitution

5. MEDIA ARTICLES


6. ONLINE SOURCES

ENDORSEMENT OF SUPERVISOR

I, Daniel Stepniak, confirm that I have agreed to supervise Sonya Gorman during the LLB Honours Programme. I confirm that I have approved Sonya’s chosen thesis topic of “Matters of faith and trust: Court Intervention in Doctrinal Disputes”.

(Signed)

Dated: 3 March 2000