Mixing Law, Religion and Politics

Professor Frank Brennan SJ AO
Professor of Law
Institute of Legal Studies
Australian Catholic University (ACU National)

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(8,500 words – One hour delivery, with questions then to follow for 30 minutes)

My background in coming to ACU National

I am honoured to accept appointment as Professor of Law at the Institute of Legal Studies at Australian Catholic University (ACU National). In this inaugural lecture, I have the opportunity to share my vision of what such an institute might contribute to legal studies in Australia.

Australia is a robust democracy. Though an increasingly secular society, Australia is home for believers from all the major religious traditions. The majority of citizens still have some religious affiliation, most of them being influenced by the Judeo-Christian tradition. Never an election goes by and rarely does a parliamentary session conclude without some public controversy erupting, spiced with moral outrage and religious overtones. Since September 11, 2001, we have had to become more attentive to the religious tradition of non-Christian Australians. Though a federation with a written Constitution, Australia does not have a bill of rights, with the result that many controversies that would be resolved in part by judges in similar countries such as the US, the UK, Canada and New Zealand, are more likely to be resolved by elected politicians unhindered by unelected judges.
I was a first year law and politics student at the University of Queensland in 1971. Joh Bjelke Petersen declared a state of emergency during the Springbok rugby tour so the government could more ruthlessly repel the protests of those demonstrating against the apartheid regime in South Africa. The university Vice Chancellor Sir Zelman Cowen walked a fine, judicious line questioning the need for government to suspend the rule of law and scrutinising the actions of the Queensland Police who clashed with the protesters. The protesters called attention to racist laws and policies in Queensland as well as in South Africa. For the first time in Australian history, a court had just ruled in August 1971 that Aborigines who had come to court seeking recognition of their land rights had no rights to land that survived the assertion of British sovereignty. Young Turks from Aboriginal reserves came onto the university campus telling horror stories of human rights violations on the Queensland reserves. Church leaders issued cautious statements urging a fair consideration of grievances in South Africa and Queensland.

My study of politics and law was complemented by a growing religious sensibility. By 1975, I had completed my initial university studies and entered the Jesuit order of the Catholic Church. Ever since, I have been involved in legal and political issues which have a strong moral edge, and which invite attention and comment by citizens with religious convictions sometimes resulting in formal statements and joint action by church leaders. Over the years, I have wondered whether there are rules, principles or prudential guidelines to offer for those involved in public controversies with religious, legal and political elements. I had cause to wonder aloud whether I had breached any of those rules, principles or guidelines in 1998 when Paul Keating, the ex-Prime Minister came out of retirement, and labelled me a meddling priest during the Wik debate.

Keating wrote in the Sydney Morning Herald, “Talk about meddling priests! When Aborigines see Brennan, Harradine and other professional Catholics coming they should tell them to clear out.” He claimed that Harradine and I had “saved Howard from paying the price of his folly, and made the Aborigines pay instead”. Keating thought Howard was “beatable” at the polls. He not only thought that Harradine and I had no right to make and act on predictions about the government’s prospects at the polls. He thought Harradine and I were demonstrably wrong in any predictions we might have made.

Keating said: “Harradine and Brennan have taken the view that Labor, which would take a different approach to Wik, cannot win the election. They have second guessed the electorate. They are like a lot of people in and out of politics: they talk loudly and often about principle, and when the weights are on and permanent interests are at stake they look for a way to slide out.

“Unwilling to let the electorate play out the issue – and play out this Government’s role in it – they have done their best to take the pressure off.”

If Wik had been left unresolved, Howard would have had no option but to return to the matter after an election in which his 10 point plan would have been an electoral issue, at least in the bush. Howard would have won the election, and One Nation would have obtained a handful of seats in the Senate. And one way or another, the 10 point plan would have been legislated - either with support from One Nation in the Senate, or by a joint sitting of the Houses if there were a double dissolution. In
hindsight, no one has seriously suggested that Beazley could have won an election in 1998 with Wik unresolved.

The prudential choice was simple. Aborigines and their supporters had the choice of a bird in the hand (the Howard 10 points plus the Harradine compromise) and none in the bush (the unamended Howard 10 points passed after Howard won the next election). The hard political choices are when you have the choice of a bird in the hand and two in the bush.

When Harradine was retiring from the Senate in June this year, Andrew Bartlett, Deputy Leader of the Democrats, made this acknowledgment of Harradine’s acumen on Wik. “The agreement he reached on the Wik legislation was one of the few cases I would point to where John Howard was bested in negotiations,” Bartlett said.

“Whilst the legislative merits of the Wik agreement were less than ideal, the sort of race election, focused on Indigenous people, that our country would have faced in 1998 if that agreement had not been reached would have been far worse even than the one we endured in 2001,” Bartlett said.

These were complex political issues and I still have a strong self-interest in agitating a particular view of it all. But without resolving all the outstanding questions, one needs to ask: Would it have been good enough in 1998 for one in my position simply to critique the Howard legislation without working to create the space for Harradine to effect a compromised outcome which was more beneficial to Aborigines, and at the same time avoiding the prospect of a race based election?

Whatever the internal contradictions of the High Court’s Wik decision, I believed that the decision entitled Aborigines a right to negotiate with mining companies wanting access to traditional lands which were also subject to pastoral leases. The government was wrongly claiming that equal treatment of Aboriginal native title holders and pastoralists required that native title holders have no right to put their case about the effects of mining on their sacred sites and other areas of land used for residence or traditional activities. The Aborigines’ own lawyers had crafted a compromise on the right to negotiate. I thought it right to create the space and pressure for government to accept that compromise, thereby avoiding the need for the legislation to be held over until a subsequent election when a returned Howard government would have been more emboldened to legislate without the compromise crafted by lawyers for the National Indigenous Working Group (NIWG).

It was complex politics. It was complex law. And the place of a church person who was not an Aborigine, a miner or a pastoralist was very fraught. I can understand Paul Keating’s annoyance at a cleric’s involvement in the process. Even if I was right in assessing the political outcome of any likely election, was I right to involve myself so intimately in the political process? Mind you, my involvement in the lead-up to the third and critical Senate debate was confined to a series of letters to government which I shared with a senior member of the NIWG. I then absented myself from the country and from the debate for the critical weeks of the final negotiations. That did not deter Keating from telling the Daily Telegraph that the
compromise had my “fingerprints all over it”. Ever since, I have had cause to reflect acutely on how to mix law, religion and politics responsibly.

**The Questions That Confront Us**

Tonight I want to address two questions jointly.

- What is the relevance of our religious beliefs when it comes to participating in the life of the polis, contributing to the development of law and policy, whether as citizens or as public officials?
- What role is appropriate for religious authorities participating in the life of the polis, wanting to contribute to the development of law and policy?

In answering these questions, I think we always need to have an eye to distinguishing principle, strategies and tactics. And we need to be very attentive to three distinct types of claim in public debate about legal and political issues: (1) Claims that some course of behaviour is immoral; (2) Claims that there should be a law banning or regulating some course of behaviour; and (3) Claims that the law banning or regulating some course of behaviour should be enforced or interpreted in a strict or lax way.

Happily we are leaving behind the era in which it was thought that we should all leave our religious beliefs at home when it came to participating in public life. Things may have been simpler for some public actors when it could be blithely asserted that religion was irrelevant to public life.

In a democracy, we must start with the presumption that the individual citizen is free to vote for the candidate or party of their choice for whatever collection of reasons or intuitions they wish. There is no point in political philosophers moralising about what factors ought and ought not to influence a prospective voter. Such philosophers may draw up a list of criteria which satisfy them and their academic circle in their assessment of the relative merits of voters. But in a democracy, we do not need to expend much energy on making moral assessments of voters and their voting intentions. Such energy is better directed at assessments of those who are elected and of those other citizens who are appointed to positions of public trust requiring them to act in the public interest.

The vote of the person who likes Mr Howard’s smile is worth as much as the vote of the person who passionately agrees with Mr Latham’s view on the US Alliance. In a democracy citizens are entitled to urge their fellow citizens to consider seriously the reasons they would vote for a candidate or a party. Some of these advocates may even occupy official positions in churches or other religious organisations. They may want to influence members of their own congregations to consider particular moral or religious issues before they cast their vote. They may even be so presumptuous as to urge other citizens, not members of their flock, to heed their message about such moral or religious issues. Being a free country, we can urge or be urged as much or as little as we choose.

In the past, there was a presumption that in the public forum religious leaders should speak about issues only in terms comprehensible to those with no religious faith, with
the voice of public reason. There may be good pragmatic reasons for this. But once again there is no rule of political morality which would render religious urgings outside the church circle improper. Such urgings may simply be wasted breath, and even counter productive. That does not make them wrong or improper.

In the past, some liberal atheists conducted themselves in the public forum as if the forum was their privileged place, and the rest of us had to play by their rules, choosing only from the policy options they would countenance. Persons with religious views or religious motivations were not only treated as if they held no trump cards at the table. They were treated as if they had no cards at all. The only cards which could be played from the hand were cards which would be valued by liberal atheists. The religious person had the responsibility to translate his religious view or religious motivation into a comprehensible non-religious view or non-religious motivation. If complete translation was not possible, that which could not be translated was to be cast aside.

Now there is a greater mutuality in the public forum. In the name of equality, it has to be accepted that the religious person has no more obligation than the non-religious person to translate her views or motivations into propositions acceptable to the other. But given that we live in a very secular environment, it is sensible for the religious person to put in the work making their case comprehensible and appealing to the non-religious person. Religious authorities have to be especially careful because of the strong public suspicion and dislike of persons in religious authority. Mark Latham is not the only person to have been in public life to have a strong distrust of religious authorities. He has just been more public, bilious and blunt in the expression of his views.

It is sensible for citizens who urge others to vote in a particular way or who urge others to exercise their public functions in a particular way to be prepared to give a public account of themselves, explaining their reasons and motivations. Once again there is no moral imperative for this. But if they are unwilling to do it, they may do their position and their cause some harm.

In a democracy like Australia, those elected to public office are expected to give a public account of themselves. In the interests of truth, they should be prepared to explain their reasons for voting legislation or policy up or down. In many instances, the member of parliament may simply invoke the party policy and the need to follow party discipline. But even on those occasions, the member will usually attempt to appropriate the party decision and reasons to himself. There may be occasion when the member has her own reasons and even own distinctive position on a law or policy. Occasionally, the member's conscience dictates that she take a stand. In all cases, the member should be prepared to give an account of herself. What if her stand depends not on a party decision, not on her own conscience, but on the dictates of her church? What would be the situation if a politician thought she should not only vote against her party's policy but also thought she should vote against her own conscience? Why? Because her church taught that the proposed law or policy was wrong. She would be obliged at the very least to declare to the voters and the parliament that she was voting against the policy not because she believed the contrary to be the moral good or the greater good but because her church commanded her obedience. Presumably this would be electoral folly. Electors in a parliamentary democracy are entitled to have members of parliament who will vote either according to conscience or in conformity
with their party policy. The electors would be ill-served by a member who thought he was compelled to vote against his party policy and against his own conscience simply because his church commanded a contrary position.

**The Complexity of Law, Religion and Politics**

In a democracy, absolute primacy must be accorded the conscience of the voter and the elected politician. A church which questioned such absolute primacy would rightly be perceived as a threat to democracy, maintaining to itself the entitlement to interfere in the affairs of the state with decrees issued by persons not necessarily citizens of the state. Even the senior church authorities who happened to be citizens of the state would have to admit that their position and activity was not necessarily the result of their acting on their own conscience but rather the result of their implementing the church discipline imposed by their superiors who were not citizens of the state. There would be no way of escaping the charge of outside interference by pleading that local church hierarchs were themselves citizens. You would need to offer the assurance that the local hierarchs were free to act according to their consciences. And if they could, why couldn’t the rest of us?

There can be no objection to church leaders participating in public life when there are moral issues to be discussed. The precondition for such participation is the acknowledgement of the absolute primacy of conscience for all citizens in the public forum of the democratic nation state, regardless of the position adopted within any church in the governance of its own affairs.

Many citizens are elected or appointed to positions in the state, positions which carry obligations to the state and the citizens. To what extent can the religious views and motivations of these citizens affect or dictate their discharge of their public trust? And to what extent is it proper for religious authorities to try and influence their co-religionists who happen to occupy these posts?

I return to Australia realizing that the United States engages in very robust discussion about the appropriate mix of law, religion and politics. During last week’s US judicial confirmation hearing for John Roberts, the senators harked back to the 1960 address by the Catholic presidential aspirant John F Kennedy who made his way down to Texas to address the Greater Houston Ministerial Association. Kennedy told his Protestant audience: “I believe in an America that is officially neither Catholic, Protestant nor Jewish - where no public official either requests or accepts instructions on public policy from the Pope, the National Council of Churches or any other ecclesiastical source - where no religious body seeks to impose its will directly or indirectly upon the general populace or the public acts of its officials - and where religious liberty is so indivisible that an act against one church is treated as an act against all.”

He went on to declare: “I am not the Catholic candidate for President. I am the Democratic Party’s candidate for President who happens also to be a Catholic. I do not speak for my church on public matters - and the church does not speak for me.”

Just as Kennedy was elected as the first Catholic president, so now Roberts will be selected as the first Catholic Chief Justice on a court that now has close to a majority of Catholic members. It is this near majority which in part informs some of the concern
on Capitol Hill with the Roberts nomination and the next nomination needed to fill the vacancy left by Sandra Day O’Connor. When the questioning of Roberts started in earnest last Tuesday, Senator Specter the chair of the committee did not dally. He announced: “Judge Roberts, there are many subjects of enormous importance that you will be asked about in this confirmation hearing, but I start with the central issue which perhaps concerns most Americans, and that is the issue of the woman’s right to choose and Roe v. Wade.”

Roberts assured the committee that “there’s nothing in my personal views based on faith or other sources that would prevent me from applying the precedents of the court faithfully under principles of stare decisis.” He went on to claim that “my faith and my religious beliefs do not play a role in judging. When it comes to judging, I look to the law books and always have. I don’t look to the Bible or any other religious source.”

Specter then asked whether Roberts subscribed to the Kennedy dictum “I do not speak for my church on public matters and the church does not speak for me”. Roberts replied, “I agree with that, Senator. Yes.”

Roberts may have an orthodox Catholic view about the morality of abortion. But that view will not affect his judicial determination in choosing whether there are compelling precedents in the Supreme Court jurisprudence providing and setting coherent limits to a constitutional right to abortion or whether abortion, at least in some circumstances, is more properly a matter for regulation or prohibition by state legislatures. In the same way, a state legislator’s religious views about the morality of abortion would have nothing to do with the determination by state officials deciding whether to leave some abortion practices unpunished, regardless of the state of the law. Morality, law, and the administration of the law are different matters. Even if there be agreement about moral principle, there may be a significant diversity of view about the wisdom of legislation and the prudence of strict law enforcement. Even if the majority of Catholics were to agree on the morality of a matter, they might disagree on the desirability of a law to deal with the matter, and they would inevitably disagree on how best to implement the law so as to educate the public, protect the vulnerable and maintain the integrity of the legal processes. The politics of law reform in highly contested moral areas calls not just for moral clarity and prudence but also political savvy and perhaps even some cunning.

Despite John Roberts’ affability and judicious modesty, groups such as Planned Parenthood have opposed his nomination because they presume he will not uphold the court’s decisions on abortion. Presumably the White House is fairly confident that Roberts, like Rehnquist, would question the efficacy of the precedents on abortion. The president of the Catholic bishops in the United States took the extraordinary step of writing to President Bush on 6 July 2005 when Sandra Day O’Connor had announced her retirement, saying: “[B]ecause of the Supreme Court’s ability to affect both principles and policies, I urge you to consider for the Court qualified jurists who, pre-eminently, support the protection of human life from conception to natural death, especially of those who are unborn, disabled, or terminally ill.”

This came after a very divisive election campaign last year when John Kerry had said that he would “only nominate individuals to the federal bench whose records demonstrate …the right to choose”. Raymond Flynn the former Mayor of Boston and former ambassador to the Vatican under the Clinton administration placed a full page
advertisement in the New York Times asking, “Why do you, Senator Kerry, have a ‘litmus test’ for judicial candidates that discriminates against Faithful Catholics?”

Two days later, Archbishop Charles Chaput was being quoted on the front page of the New York Times declaring that a person who voted for a candidate who supported abortion rights and stem cell research required absolution. He said, “If you vote this way, are you cooperating in evil? And if you are cooperating in evil should you go to confession? The answer is yes.” Chaput denied that he was promoting the Republican Party. He said, “We are not with the Republican party. They are with us.”

Some Catholics like Mark Roche, Dean of Arts at Notre Dame University, had pointed out that abortion was not the only life issue in the election. There was the Iraq war, the death penalty, universal health care and environmental protection. Even if one confined attention to abortion, Roche claimed there was a gulf between the Republican rhetoric and the outcomes with a Republican administration. His figures were not contested when he wrote an op ed piece in the New York Times pointing out that the number of legal abortions increased 5% during the Reagan presidency and dropped by 36% during the Clinton presidency, presumably because Clinton provided a better safety net for poor women confronting the reality of single motherhood.

After the election Cardinal McCarrick, Chair of the Task Force on Catholic Bishops and Catholic Politicians, told the USCCB on 17 November 2004: “[B]ishops can come to different prudential and pastoral judgments on how to apply our teaching to public policy. Our task is to help our Conference move forward, reflecting our unity in our teaching and respecting diversity in pastoral practice in a spirit of collegiality.”

Now that the election is over, we have an important opportunity to come together around our common commitment to protect human life and dignity and advance the common good.

I have painted a sufficiently complex picture of just one moral issue in the United States where the mix of law, religion and politics is much more hotly contested than it is here in Australia. Here in Australia, there is no such thing, if there ever was, as the “Catholic vote”. There is probably not even a Catholic position on any contested political issue commanding the assent of most Catholics informed by Catholic social or moral teaching. There probably never was a regimented Catholic vote in Australia.

Though involved for years in public debate about issues such as Aboriginal rights, refugee rights, euthanasia and abortion, I would never pretend to speak for the Catholic Church or for the Catholics of Australia. However I do think you can responsibly argue for a Catholic position on the principles applicable to some key moral and political questions, regardless of whether Catholic voters would be split on the application of the principles to such questions in much the same way as the community generally.

In a liberal democratic society, you cannot expect to be taken seriously in the public square unless you are prepared to give an account of yourself and your convictions. It is not good enough to espouse a position just because some religious authority figure asks you to or because that authority says it is the true position. Respecting our own integrity as citizens and the integrity of our fellow citizens we can agitate only for
proposals that command our real assent. Though we respect the authority of our church, we must accord absolute primacy to the conscience of the citizen engaged in public discourse about issues of law and policy, taking seriously our own conscience and the conscience of those charged with authority in the state.

**The primacy of conscience in a democracy that respects the dignity of the individual citizen**

The human person is a moral agent who is shaped by his actions. By forming and informing her conscience, the human person is deciding not only what she wants to do but also who she wants to be. It is not only the mind or the will that acts morally but the whole person. As the person changes and grows, the conscience is formed and grows too. So each conscience is unique as each person is unique. For the Catholic, the conscience is sacred ground where the person meets God; all others (including church authorities), unless invited in, are trespassers in this place. Pope Pius XII described conscience as "a sanctuary on the threshold of which all must halt, even, in the case of a child, his father and mother". John Henry Newman had earlier defined conscience "not as a fancy or an opinion, but as a dutiful obedience to what claims to be a divine voice, speaking within us".

The Catholic view of conscience holds in tension the dignity and freedom of the human person, the teaching authority of the Church, and the search for truth and the good. The tension arises because the Catholic concedes not only the possibility but also the common reality of the incompletely formed conscience which may receive guidance from the Church's teaching authority. This tension accounts for the Catholic Church's unequivocal affirmation of the primacy of individual conscience against the State together with its occasional ambivalence about the role of conscience in relation to Church authority.

The conscientious Catholic would deviate from church teaching on moral issues only with deep regret and after careful attention to the developing and changing situation, and only on condition that he is satisfied that he has a greater command of the facts or of his situation than the Church authority issuing universal declarations faithful to a constant tradition. The Second Vatican Council in its Declaration on Religious Freedom said, "In the formation of their consciences, the Christian faithful ought carefully to attend to the sacred and certain doctrine of the Church. For the Church is, by the will of Christ, the teacher of the truth." However, in changing times or particular personal circumstances, there may be true doubt about the certain doctrine of the Church and its application to the changing circumstances. For example, changes to church teaching about slavery and usury were preceded by persons of good conscience speaking against or acting at variance with traditional teaching.

Conscience is engaged when the person looking ahead, asks "What should I do or not do?", or when the person looking back asks, "Should I have done that or not done that?" There are two extremes to be avoided in answering these questions. The person may be tempted simply to do his own thing, choosing according to his own preference on the basis that there is no objective truth or verifiable good. Or the agent may woodenly apply the prescriptions of authority without attending to the voice of
conscience urging him to do the greater good or to be prophetic, not just complying with the mores of his society or church community. Ideally, the actor will follow his conscience.

One does not have to be a natural law theorist to affirm a law implanted in the human heart commanding the person, in freedom, to seek the truth, to do good and to avoid evil. In the very act of seeking the truth and trying to do good, the person further forms and informs her conscience. But what is truth? What is the good in this particular situation? In the Catholic tradition, the person is guided and even directed in the formation and informing of conscience by the Church authorities. Traditionally, the church authorities claim to teach not only that which is revealed in the scriptures but also that which can be derived from the natural law by reflecting on the ends for which man is created. Many Catholics now share the contemporary era's pessimism about an all-embracing natural law based on a single static human nature that permits a wholesale determination of what is right and wrong in each and every situation.

Ultimately every person is obliged to follow their conscience even if that conscience be erroneous. When making a decision to act or to refrain from an action, in good conscience, the Catholic actor is obliged to consider the church teaching on the matter at hand. Before becoming pope, Pope Benedict XVI provided us with a good rule of thumb on conscience: "A man of conscience is one who never acquires tolerance, well-being, success, public standing, and approval on the part of prevailing opinion at the expense of the truth."

The possible conflict between conscience and church authority was highlighted in the dispute between Prime Minister W. Gladstone and John Henry Newman after the First Vatican Council in 1870 taught and defined that the Pope could define infallibly "a doctrine of faith or morals". Gladstone feared that "no one can now become (a Catholic) without renouncing his moral and mental freedom, and placing his civil loyalty and duty at the mercy of another". Newman refuted this fear conceding that there may be "extreme cases in which conscience may come into collision with the word of a Pope, and is to be followed in spite of that word." He asserted that "infallibility alone would block the exercise of conscience" but that "the Pope is not infallible in that subject matter in which conscience is of supreme authority" and thus "no dead-lock, such as is implied in the objection ... can take place between conscience and the pope."

Thus his notorious declaration: “Certainly, if I am obliged to bring religion into after-dinner toasts, (which indeed does not seem quite the thing) I shall drink - to the Pope if you please - still, to Conscience first, and to the Pope afterwards.”

The Second Vatican Council in its Declaration on Religious Freedom in 1965 teaches: "In all his activity a man is bound to follow his conscience faithfully, in order that he may come to God, for whom he was created. It follows that he is not to be forced to act in a manner contrary to his conscience. Nor, on the other hand is he to be restrained from acting in accordance with his conscience, especially in matters religious."

The Church teaching on conscience gives no consolation to the uninitiated, thinking they can simply do their own thing. But neither does it accord religious authorities the
liberty of insisting upon wooden compliance with their instruction or view of the world. Good conscience must always be accorded primacy even by bishops who would act differently in the circumstances, bearing in mind John Henry Newman’s observation that “conscience is not a judgment upon any speculative truth, any abstract doctrine, but bears immediately on conduct, on something to be done or not done”, and Aquinas’s view that conscience is what I genuinely personally believe, even if mistakenly, that God is asking of me.

As the Vatican Council said in its 1965 Pastoral Constitution on the Church in the Modern World: “Conscience is the most secret core and sanctuary of a person. There we are alone with God, whose voice echoes in our depths.”

We must always accord primacy to the conscientiously formed and informed conscience, regardless of the person’s place in the church hierarchy. The Christians’ contribution to the contemporary world would be greater if there were more attention to the formation of conscience and to the injunction: educate your conscience and to that conscience be true. For most people, the questions of conscience will not be: “Am I to believe this church teaching?” but “Am I to do this particular act or refrain from it?” That act may be one relating to personal relationships; it may be about political engagement and a commitment to make a difference in the public forum. For example, it may be the decision to endorse a war or to condemn it or to remain silent.

Each of us must ensure that we have a formed and informed conscience as we decide not only what we will believe, as that is probably the less problematic part, but also as we decide what we will do. Before acting we will search for the truth insofar as the truth is discoverable. But we will then make prudential decisions about what to do, having applied whatever moral principles might apply to the matter under consideration.

There are many complex issues in the world today which are not susceptible of unequivocal answers about what is true and what is good or what is the greater good in terms of actions and outcomes. In these situations, I cannot acquit my conscience simply by pleading that I followed what the bishops said, did or failed to do. All of us, like the bishops, are obligated to play our respective roles in our society, forming and informing our consciences, and acting according to our consciences. The Second Vatican Council’s 1965 Pastoral Constitution on the Church in the Modern World made clear that often it is the laity and not the church leaders who are the experts about moral quandaries in the world. The laity were not to expect that the bishops would have all the answers.

After the Second Vatican Council, many Catholics made decisions in conscience not to follow Pope Paul VI’s teaching on birth control - a teaching which varied from the teaching of other Christian churches whose hierarchy being free to marry often had personal experience of married life, and a teaching which was at variance from the recommendations made by the majority of theological experts and married persons appointed to advise the pope on the question.

Paul VI taught, “that each and every marital act must of necessity retain its intrinsic relationship to the procreation of human life”. Many Catholics in good conscience accepted the position set out in the Papal Commission’s majority report of 1966 that
“the morality of sexual acts between married people takes its meaning first of all and specifically from the ordering of their actions in a fruitful married life, that is one practised with responsible generous and prudent parenthood. It does not then depend upon the direct fecundity of each and every particular act”. Their consciences are untroubled and even fortified by the fact that other Christian churches whose clergy are often married teach such an ethic. They find unconvincing Catholic hierarchical claims to superior insight into the natural law (as distinct from Revelation) when such insight is proclaimed to be available to every thinking person with insufficient regard for the experience of married Catholics, and contrary to the considered reflection on that experience by competent moral theologians. They are convinced that Pope Paul VI would not have overruled the majority of the Commission but for his conviction that the Church’s previous teaching on the natural law of marriage could not be changed.

In his 1972 lecture “Conscience in its Age”, Joseph Ratzinger (now Pope Benedict XVI) took as his starting point for reflection Hermann Rauschning’s Conversations with Hitler in which Hitler pledged to liberate man “from the filthy and degrading torments inflicted on himself by a chimera called conscience and morality, and from the claims of a freedom and personal autonomy that only very few can ever be up to”.

The future Pope Benedict said: “The destruction of the conscience is the real precondition for totalitarian obedience and totalitarian domination. Where conscience prevails there is a barrier against the domination of human orders and human whim, something sacred that must remain inviolable and that in an ultimate sovereignty evades control not only by oneself but by every external agency. Only the absoluteness of conscience is the complete antithesis to tyranny; only the recognition of its inviolability protects human beings from each other and from themselves; only its rule guarantees freedom.”

Ratzinger happily adopts Newman’s approach to authority and conscience noting that Newman embraced “a papacy not put in opposition to the primacy of conscience but based on it and guaranteeing it”.

For Pope Benedict XVI: “The true sense of the teaching authority of the pope consists in his being the advocate of the Christian memory. The pope does not impose from without. Rather he elucidates the Christian memory and defends it. For this reason the toast to conscience indeed must precede the toast to the pope because without conscience there would not be a papacy.”

_is there a Catholic position on any law or policy? Or is it just up to the individual?_

How do we get to the situation that Prime Minister John Howard can say, “There’s no such thing as a Catholic or Anglican view on anything; it depends on individuals”? More importantly, if the Prime Minister is wrong, when is it appropriate to speak of a Catholic or Anglican view on a moral or political issue?

A majority of John Howard’s senior Cabinet ministers are Anglicans or Catholics. They wear religious affiliation on their sleeves more readily than did the senior ministers of the Hawke and Keating governments. And yet they have pursued policies on asylum
seekers and the Iraq war contrary to the position adopted by most of their church leaders. The next moral issue on the political agenda is reform of the industrial relations system.

When John Howard committed Australian troops to the Coalition of the Willing in Iraq, most church leaders were very critical of his decision. However, he said that he found the views of Archbishops Peter Jensen and George Pell together with the detailed public explanation of the Anglican military bishop Tom Frame more helpful. Since then, Frame has formally and publicly retracted his support for the government position. Neither archbishop issued a formal retraction but in interviews they did clarify that they had not unequivocally supported Australia's involvement in the Iraq conflict. Their even-handed statements provided support for the Prime Minister who was attempting to deflect the more unambiguous church criticisms in Australia, the US the UK, and in the Vatican.

Since then, Archbishops Pell and Jensen have been the preferred Catholic and Anglican Church spokesmen for the government and its supporters. The cherry picking of bishops became easier for politicians and their supporters given the frequent public disagreements between Archbishop Jensen and Archbishop Peter Carnley when he was Primate of the Anglican Church.

The standing of Pell and Jensen with government members skyrocketed during the last federal election when they took the initiative and singled out Labor's education policy for adverse public moral assessment. Pell and Jensen were joined by their Melbourne colleagues while the bishops outside the big two cities were left out of the loop. The government was very happy to run with this timely moral assessment by senior church leaders.

Some in the government may even have thought that these two church leaders were sympathetic supporters of the Howard government. Thus the surprise when both these men, and not just the likes of Peter Carnley, came out and expressed some reservations about the government's proposed industrial relations changes. It was easy for the government to dispatch the new primate Phillip Aspinall to the sidelines dismissing him because he was not an expert in industrial relations. But such a cheap trick could not be played on Pell and Jensen whose expertise on war and education funding was not an issue for the government when in a corner.

When told by Barrie Cassidy on the ABC Insiders Program that Pell and Jensen were "worried about the impact (of the industrial relations changes) on family life", the Prime Minister claimed this was an exaggeration. It was not. Jensen had said, "This nation and its political leaders must be committed to ensuring optimum working conditions for the nation's workers; a living wage that will mean everyone has the ability to provide for themselves and their families the necessities of life; strong unions that will represent workers; and the preservation of leisure time for families to be together for rest and recreation and to maintain their relationships. " Cardinal Pell told the Sydney Morning Herald that he was awaiting the details of the reforms but expressed the point of principle that "civilised" conditions such as lunch breaks, annual leave, long service leave, superannuation, union access and family time should be preserved. He was "not sure we should encourage foolish people to barter these things away too quickly".

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Church leaders, like the rest of us, could be forgiven for not knowing the detail of the industrial reforms and their impact. Even Andrew Robb, the chairman of the government’s task force, speaking after the Prime Minister’s observation about the churches, had to admit that “we just simply don’t know” whether Mr Howard’s 1996 guarantee that no worker would be worse off under his workplace laws still applied.

Jensen and Pell rightly confined themselves to statements of principle - statements consistent with their church traditions and teaching on economic matters. Archbishop Jensen is a strong evangelical Anglican rightly reputed for basing his public utterances on the scriptures and the tradition of his Church. Cardinal Pell has been a strong supporter of the Catholic social teaching enunciated by Pope John Paul II whose encyclical Laborem Exercens dealt with human labour and the rights of workers.

Though there is always room for disagreement about how the principles are to be applied in practice, it is far too cavalier for government or their supporters to dismiss church leaders who have restricted themselves to statements of principle. There may be room to debate how families are best protected in a more globalised economy. But it is not good enough for government simply to cherry pick their church leaders, and then, when they find even their preferred church leaders expressing concerns based on the religious tradition, to dismiss their remarks on the basis that each individual will decide. Sure, each individual will make a decision in good conscience about how best to apply the relevant moral principles in the particular situation. But a Catholic or Anglican should receive some guidance from church authorities who confine themselves to expressions of principle true to the religious tradition. This should even be the case for a Catholic or Anglican cabinet minister in an Australian government which has control of both houses of Parliament.

Maybe Mr Howard was concerned about the effect that the archbishops’ remarks could have on some senators and members of the public not quite so convinced about the need to take the industrial reform package on trust. The Prime Minister was wrong on two counts. It was not an exaggeration to claim that the archbishops were worried about the impact on family life. They were and they still are. There is such a thing as a Catholic or Anglican view on the morality of war or the morality of government funding for education or on the morality of industrial relations changes impacting on families.

While the bishops confine themselves to statements of principle true to their faith traditions, they do express an Anglican or Catholic view. As for the application of the principles and the assessment of the detail of proposed laws or policy, there is much room for individual judgment made in good conscience.

**Articulating the Catholic position on law and policy while respecting the conscience of the individual, the constitutional role of the public official and the political complexity of the polis**

According to the biographer Anthony Howard, Cardinal Basil Hume’s greatest grief was “the marginalisation of the church” during his lifetime. Hume thought he was not a bad politician. When asked what he meant, he replied, “Well, you see, I think I know when to speak, and more importantly, I know when not to speak.”
In one of his last public addresses, he said: “It’s important always to be strict concerning principles and endlessly compassionate and understanding of persons. It does happen that a person or group may take up a position on some issue against the teaching of the Church. How should the pastor act? A first instinct may be to exclude from the community those who dissent. We must rather keep them within the community and work - sometimes very hard – to lead them to take up positions consistent with the Church’s teaching.”

Prior to my year’s study leave in the United States, I was much taken up with Australia’s policy on asylum seekers. After my first visit to the Woomera Detention Centre in 2002, I went to Canberra to meet with Minister Ruddock. One of my government contacts warned me that they were sick of the moral outrage from the churches and other advocacy groups. I was urged to keep cool. I kept cool until Easter that year. I then wrote to the minister:

My three hours in the detention centre on the evening of Good Friday convinced me that it was time to put the message to you very plainly despite its public unpopularity and despite your government’s immunity to moral outrage: “Minister, this is no place for kids.” When children end up in the sterile zone against the razor wire with tear gas and batons around them in Australia, it is time for all parties including the Commonwealth government to stop blaming others and to effect policy changes so that it can never happen again.

If religious citizens are to maintain a passion for law with justice, there is no substitute for being able to eyeball the victims as well as the government decision makers. Never presume that the public are less moral than you. But do take into account that they have plenty of other worries on their mind and they are easily influenced by the prevailing public and media mindset that can be changed over time.

In the end, the government did apologise to the mother of the seven year old boy whose bruises I had seen after he had been hit with a baton and tear gas. And finally government has decided that a detention centre is no place for kids. We have even been treated to the theatrical scene of Amanda Vanstone donning the gloves and goggles to begin the removal of razor wire at Villawood Detention Centre. Phillip Adams from A Just Australia has observed, “We’ve seen the campaign broaden from just the left and the churches, creating divisions in the government to achieve change. But there’s no guarantee that if another group of asylum seekers headed our way, we wouldn’t do it all again.”

It took 15 years of community agitation, including strong representations from the churches and a courageous stand by a mere handful of government backbenchers, to have government reverse the policy and law of mandatory detention for all asylum seekers who came to Australia without a visa. As recently as 11 February 2004, Andrew Bolt, reflecting on the ABC Lateline debate he had had with me after the baton assault on the child, told the Sydney Institute: “Why was it … that so many Australians did not accept the truth of what people like Frank (Brennan) were arguing – that the Howard government, contrary to what it claimed was in fact treating asylum seekers monstrously in our detention centres? Frank argued strongly that all we needed was more debate about asylum seekers, more leadership by politicians, and then Australians would swing around and see the shameful truth.” …… “(The debate) is manic. It’s
incessant….The public has heard as much of the argument about asylum seekers as it is ever going to listen to. We must now, surely, agree that the public has heard you, Frank, but simply disagrees in the main with you and your many supporters on this one.”

Because many citizens hung in, in season and out of season, the public and the government did come to see the “shameful truth” about children in detention. The government backbencher Bruce Baird echoed much of the community outrage at mandatory detention of children when he said: “I am sure that all members from both sides of this chamber would absolutely endorse this as fundamental. Let us never again see children in detention in this country. They should not be behind barbed wire or razor wire. It is an indictment that we have let it happen. Both sides of the House have been involved in that but we are changing this process through the bill. I really stress the importance of these changes.”

Unlike Messrs Howard and Ruddock, Mr Baird and his fellow Coalition members who agitated for the policy change had the opportunity to visit detention centres and look the children in the eye. Mr Baird told Parliament that these visits were the most confronting he had ever undertaken.

Conclusion

Religion once again has a place at the table of public discussion on law and policy. That place is subject to constitutional constraints. Members of parliament, judges, ministers and public servants have discrete functions to perform. Each of them, like every voter, has a conscience which must be accorded primacy. The place of religion is subject to political and social constraints which require religious citizens and religious authorities to exercise caution in distinguishing principle from strategy and tactics. Right judgment, prudence and political savvy all have their place.

That place is fraught by the public’s mistrust of church statements urging justice for the marginalised and oppressed rather than action and institutional instantiation of the ideal whether it be self determination for Aborigines or equal rights and due respect and dignified recognition of homosexuals.

That place is fraught by the politics of compromise, including the jealousies of stakeholders suspicious of what Paul Keating during the Wik debate called “the goody-goody brigade (who) display their Catholicism like a lamp”.

That place is fraught by the lack of expertise, specialist and confidential knowledge and the sensitivities of government at times of high security as with the public controversy over the Iraq war.

That place is fraught by the morality of politics where a democratically elected government thinks it must do evil to some in order to do good for the majority, and where government is influenced by utilitarian calculus, often embracing the Caiphas principle that it is better that one person suffer for the people. In recent times that one person has included the asylum seeking child held in long term detention so that a message might be sent to others not to breach our ordered migration barriers. That place is fraught by the emotion and rhetoric of politics especially at election time. That
place is fraught by the differing conceptions of morality and the common good. But we are fortunate to live in a society where we can mix law, religion and politics responsibly. I hope the Institute of Legal Studies at Australian Catholic University can make a modest contribution to the preservation and enhancement of this place.