

# The role of the church in developing the law: response to commentators

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Three of the four commentators endorse our concerns about intervention by the Roman Catholic church as an *amicus curiae* in civil litigation, with few reservations. One commentary rejects our arguments in toto. We deal first with the three commentaries that support our arguments; secondly, with the reservations and qualifications in those commentaries, and thirdly, with the commentary that totally rejects our arguments.

Three commentaries endorse the three points of our general argument:

## 1. ARGUMENTS IN SUPPORT: HARRIS AND HOLM, COADY, AND BADAWI

### 1.1 Legitimate concern about the role of the churches' as *amicus curiae*

Harris and Holm, Coady, and Badawi believe that our concerns about church intervention in civil litigation are justified.<sup>1</sup> Coady says specifically that we “are right to be uneasy about the prospect of increased interventions by the churches in legal and constitutional matters”, especially because the intervention is initiated by church leaders and not by religious people in general. He cautions that the church should be wary about becoming involved in legal cases, for prudential reasons—the perception that the church is imposing its views on the wider community; and for principled reasons—that partial religious views ought not to be imposed on the general community; that claims to represent large parts of the population are questionable, and that they imply a religious rather than a legal motivation. He also says that there has been a significant decline in the church in the acceptance of using clerical power to dictate political views and the behaviour of church members, a view he develops in more detail in a recent article in *Eureka Street*.<sup>2</sup> The legitimate role of church leaders, in his view, is to offer teachings of religious principle to “members of their flock”, not to dictate to them—and even less to others—“correct social and political behaviour”, especially in “areas that are legitimately open to debate and decision amongst the laity”.

These comments do echo some of the causes of our concerns about intervention by the Roman Catholic church. Nevertheless, we have argued that the hierarchical structure of institutions alone should not be a barrier to accepting their submissions. In his *Eureka Street* article, Coady says of the Roman Catholic church: “virtually none of [the] certainties [that once characterised the typical Catholic] now have general acceptance”. He continues: “Papal authority in most moral matters is effectively a dead letter with the laity”; “the prohibition on contraception . . . is no longer seriously taught or preached and it is hardly obeyed by any of the laity”; “Marian devotion has dramatically declined in many parts of the

Catholic world”.<sup>3</sup> Coady is concerned that if the Roman Catholic church is permitted to present arguments on behalf of the church in litigation, it may be on the basis of what Coady calls the “stringent metaphysical dogmatism”<sup>4</sup> of its leaders and not on the informed or considered views of church members tempered by their experience of life.

We suggest, however, that it is not so much the inconsistency between the church's teachings and the views of the laity which makes church submissions unacceptable. Such inconsistency is an internal matter for the church, where the options seem to be either that the church alter its official doctrine and teachings, or members who no longer accept the certainties and authority of the church should consider their positions as members. Whatever the actual doctrinal position of an institution, it is the passing off of doctrine as legal argument which is of greater concern.

Harris and Holm also express concerns about the presentation of “doctrine” in court proceedings although their concern is directed to “faith-based principles”, whether religious or secular, rather than the intervention of the churches as such. Hence they would sanction church intervention when the church is willing to provide “evidence and argument” rather than assertion of a religious belief (a position not unlike our final conclusion).

Badawi also endorses limits on who can intervene in litigation, given that everyone can argue that they are affected in some way by legal decisions. He states that in some Islamic countries, intervention is permitted only with the public prosecutor's approval. Since *amicus* intervention also requires an application to the court for permission to intervene, such a restriction alone would not meet our concerns. We would like to see a more rigorous consideration of the criteria for admission to the court process in addition to a process for limiting admission.

### 1.2 Churches cannot logically be excluded while other third parties are heard

Harris and Holm share our view that religious and secular groups are entitled to make their case. This means that they should be “equally entitled to make their case”, as Harris and Holm correctly rephrase our argument. It does not mean that they are “equally well justified by evidence and argument” which, as they say, would be “both improbable and false” and

was certainly not our view. However, Harris and Holm—and also Coady—go beyond our argument that the church cannot be excluded on any principled analysis and argue that there should be wider access in general to the courts in order to promote democracy in the development of the law. Although we understand their reasons for this proposal, we share the reservations that Harris and Holm express about allowing intervention by anyone with “an interest”; it would be too time consuming and expensive, it would lengthen litigation considerably, and it could severely prejudice the interests of the parties to the litigation.

### 1.3 Judges should be cautious about “doctrine” presented as fact or legal argument

Coady endorses our concern that judges should be “cautious of involving the authority of the state in imposing partial religious views on the community” and in suggesting that the bishops’ intervention in the assisted reproductive technology (ART) case, although presented as legal argument, was “mandated by their religious position”. This accords with his ideas in his *Eureka Street* article and also with the arguments in our paper.

## 2. RESERVATIONS AND QUALIFICATIONS: HARRIS AND HOLM, COADY, AND BADAWI

Harris and Holm argue that the reason for concern about church interventions is not that they are “doctrine” or non-scientific, but rather that they are not supported by evidence or argument in their favour. On this basis, the church (and also secular groups) would be entitled to put evidence and argument, but not positions that they have only “doctrinal or metaphysical positions for espousing”. This distinction has some attractions, especially as we had such difficulty in stating our own position with regard to what is “doctrine” and properly excluded from court arguments.

We are less attracted by Harris and Holm’s suggestion that everyone should be let in, even by inviting submissions, rather than trying to think of a legitimate principle on which some parties should be excluded. All citizens have an interest, they say, especially in an issue where the state is a party to the litigation. And, for widespread intervention to be possible, there would have to be cheaper and more effective means of intervention than the *amicus* procedure. Even if there were such as system, however, it would still protract litigation and make it more costly.

Coady says, on the other hand, that access to the courts by religious bodies may be a good thing since this puts their actions on public display, which is better than covert activity. He also questions our assertion that the religious perspective will already have been considered. We concede that there may be some merit in open presentation of the church’s arguments—so that they are revealed for proper analysis and discussion. It is also true that the practical experience of the Roman Catholic church, in contrast to its teachings, may not have been considered in court deliberations. For this reason, the church should be permitted to argue this part of its message.

## 3. REJECTION OF OUR ARGUMENTS: GORMALLY

Only Gormally’s commentary entirely rejects our arguments.<sup>5</sup> In our view, it is open to a number of criticisms, especially in its presentation of what he calls the “existing statute [law]” defended by the bishops in the abortion case, *CES v Superclinics*. Gormally’s description of the New South Wales Crimes Act as “[a] statute which provided that abortion was a criminal offence” is incorrect. The criminal offence created by section 83 of the *Crimes Act 1900 (NSW)* is not abortion. It is *unlawful* abortion.<sup>6</sup> Because the word “unlawfully” appears in the act, it is clear that the law states that it is sometimes *lawful* to

undertake an abortion. The circumstances in which it is lawful were defined by Justice Menhennitt in *R v Davidson* and later cases (the necessity<sup>7</sup> and proportionality principles). It is not true, as Gormally says, that the Roman Catholic church intervened in CES to *preserve* the existing law. It wanted the law to be more strict so that abortion would be a criminal offence regardless of the circumstances—on the basis of its doctrine as stated by Gormally that “it is always wrong intentionally to kill the innocent”. Such a position would not, in our view “develop” the law but it would certainly change it. The fact that the case was settled before the appeal to the High Court was heard was almost certainly due to the costs that the parties would incur when the appeal was complicated and extended by the inclusion of additional *amici*. There is no reason to infer, as Gormally does, that they settled because “they saw the possibility that the *Menhennitt* ruling would be discredited”. On the contrary, the trend in Australia, as Gormally notes in his reference to the law in South Australia and Western Australia, has been to more liberal laws on abortion, not more restrictive ones.

Gormally’s statements about the House of Lords’s decision in *Bland* are also misleading, in suggesting that the law lords held that it was “lawful to aim at a patient’s death” by the withdrawal of treatment from a patient in a long term persistent vegetative state for whom there was no hope of recovery. Bland died from his condition, not from non-treatment. And in the conjoined twins case, Gormally’s suggestion that the case highlighted “an undesirable restriction of parental rights in current English law” by limiting their right to direct that their children should be allowed to die seems remarkable, given Gormally’s other arguments. Would he take the same view if parents refused to allow their seriously ill child to be treated because of hostility to medical procedures?

In a wider context, we do not accept Gormally’s assertion that much church doctrine is rationally grounded, particularly in view of the examples Gormally gives—that lying—and killing the innocent—are always wrong. With regard to killing the innocent, the law recognises that reasonable self defence is a justification for homicide. Even the Roman Catholic church, as we understand its doctrine, sanctions a termination of pregnancy where the mother’s life is at risk. And the notion that abortion is the killing of an innocent “person” is one that has not always been part of the doctrine of the Roman Catholic church. Even today, there are different views within the church of the status of the fetus at various stages of its development.<sup>8</sup>

Gormally is right in saying that the church was the “moving party” in the High Court application to review Justice Sundberg’s decision in *McBain*. We did not suggest otherwise. Our concerns, however, are the same—why should the church be permitted to overturn a judicial decision reached in respect of a dispute between the parties to private litigation? Gormally’s point that the ProLife Alliance is a political party and not the church is a fair one but the broad argument that external parties should not be permitted to intervene in private litigation remains the same. No doubt Gormally would welcome intrusions by other political parties in litigation as little as we would!

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- 1 Harris J, Holm S. Commentary on Skene and Parker: the role of a church (or other ideologically based interest group) in developing the law—a plea for ethereal intervention. *Journal of Medical Ethics*

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- 2 **Coady T.** Catholic identity and the abortion debate. *Eureka Street* 2002;**12**:33–7. This is a “review essay” focused on Dombrowski DA, Deltete R. *A brief liberal Catholic defense of abortion*. Urbana: University of Illinois Press, 2000.
- 3 **See reference 2:** Coady T: 33. He concedes that the church’s rejection of abortion is still “rock solid”, despite the fact that “Catholic women have proportionately as many abortions as any other group in their communities: at 34.
- 4 **See reference 2:** 37.
- 5 **Gormally L.** Commentary on Skene and Parker: The role of the church in developing the law. *Journal of Medical Ethics* 2002;**28**:226–9.
- 6 **Crimes Act 1900 (NSW):** section 83: “Whosoever *unlawfully* administers to, or causes to be taken by, any woman, . . . any drug or noxious thing, or *unlawfully* uses any instrument or other means, with intent in any such case to procure her miscarriage, shall be liable to imprisonment for ten years” (emphasis added).
- 7 **See reference 5:** Gormally states that Menhennitt J’s decision was “erroneous in its reliance on the doctrine of necessity” without giving any authority for his assertion or suggesting any other meaning that might be given to the word “unlawfully” in the equivalent section in the *Victoria Crimes Act*.
- 8 **See reference 2:** Coady T: esp at 34: “The current Catholic orthodoxy on [abortion] is relatively new”. See also Ford NM. *When did I begin? Conception of the human individual in history, philosophy and science*. Cambridge and Melbourne: Cambridge University Press, 1988.



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