

THE POSTMODERN UNDERPINNINGS OF RELIGIOUS VILIFICATION LAWS: IMPLICATIONS FOR DEMOCRACY AND FREEDOM OF SPEECH

AUGUSTO ZIMMERMANN*

Abstract

Religious vilification laws are supposedly designed to promote greater tolerance and harmony among religious groups. And yet, such vilification laws are conceptually unsound and their postmodern underpinnings produce results that are often antithetical to the level of tolerance their advocates hope or aspire for. Although these laws aim to develop a more tolerant 'multicultural' society, their postmodern underpinnings ultimately erode freedom of speech, a cardinal tenet of every truly democratic society. Indeed, such laws might become a permanent invitation for religious bigots and extremists to silence any criticism of their beliefs, by claiming that they, rather than their radical beliefs, have been attacked. Ironically, the more a religion warrants debate and discussion, the more protection such religion appears to receive from this sort of legislation.

I INTRODUCTION

Designed to promote religious tolerance by prohibiting the vilification of persons on the grounds of religious belief or activity, religious vilification

* Augusto Zimmermann LLB (Hon), LLM *cum laude*, PhD (Monash) is Senior Lecturer in Law, Murdoch University; Adjunct Law Professor, Universitas Kristen Maranatha (Indonesia); President, Western Australian Legal Theory Association (WALTA); Commissioner, Law Reform Commission of Western Australia. This article includes material previously published in Augusto Zimmermann, 'The Intolerance of Religious Tolerance Laws' (2013) 57 *Quadrant* 52.

laws of the sort of those enacted in Australia may not necessarily promote the level of tolerance its advocates hope or aspire for. On the contrary, laws such as the Victorian *Racial and Religious Tolerance Act 2001* (Vic) ('Victorian RRTA') may become a permanent invitation to individuals to avoid debate of their religious beliefs by claiming that they, rather than their beliefs, have been attacked. First, this article explains how the meaning of tolerance has suffered a remarkable transformation in our 'multicultural' societies. Second, this paper reveals the postmodern underpinnings of religious vilification laws enacted in Australia, in particular the Victorian RRTA. Finally, the article explains how the enactment of such anti-discrimination laws may have an undesirable effect on democracy and freedom of speech.

II TOLERANCE: OLD AND NEW

In the Oxford English Dictionary the verb 'to tolerate' means 'to endure, sustain (pain or hardship)'. One is tolerant if he or she, while perhaps holding strong convictions, insists that others must have the right to dissent and to argue their cases freely. This meaning of tolerance implies that truth can be known, although the best way to achieve truth is by means of a spirit of mutual understanding and open-mindedness; for whilst truth can be discovered, the wisest and least malignant course of action is a 'benign tolerance' grounded in intellectual modesty that recognises our own human limitations.¹

Since our Western traditions consider that truths can be known, freedom of speech is therefore approached as an important mechanism by which truth can be obtained and falsehood can be eliminated. Because of our

¹ Donald Carson, *The Intolerance of Tolerance* (William B Eedermans Publishing, 2012) 6.

human fallibility, and the fact that without freedom of speech an individual cannot really be free, ‘the great debate over toleration emphasised that conscience and expression were one’. God did not give any person the power to police the thoughts of another person. So, reasoned the advocates of tolerance, He did not mean for monarchs to force religious tolerance on their subjects’.²

This is the essence of the classical liberal argument for religious toleration. For instance, John Locke, one the greatest philosophers in the liberal tradition, argued for religious tolerance not because he doubted the existence of absolute truth, or because he had any sympathy to the beliefs that he thought should be tolerated.³ Rather, in *Letter Concerning Toleration* he advocated tolerance on the basis that positive laws are incapable of producing genuine religiosity in the minds of citizens who are subjected to them, so that even the opinions which ‘are false and absurd’ must be tolerated.⁴ Locke thus argued that each person is *individually* responsible for finding ‘the narrow way and the strait gate that leads to heaven’.⁵ Whilst he believed that there is ‘only one way to heaven’, Locke insisted that ‘a man cannot be forced to be saved’,⁶ and that ‘religious truth must be left to individual conscience and individual discernment’.⁷

² Chris Berg, *In Defence of Freedom of Speech: From Ancient Greece to Andrew Bolt* (Institute of Public Affairs and Mannkal Economic Education Foundation, 2012) 156.

³ John Locke, *A Letter Concerning Toleration* (John Horton and Susan Mendus, 1991) 42-3.

⁴ Ibid 41.

⁵ Ibid 19.

⁶ Ibid 32.

⁷ Jeremy Waldron, *Liberal Rights: Collected Papers 1981–1991* (Cambridge University Press, 1993) 98.

Given the cultural relativism of our present time, however, this classical meaning of tolerance is becoming obsolete and it is being replaced by a new approach that denies the attainment of the absolute truth. To be ‘tolerant’, therefore, no longer implies an attitude of intellectual modesty in which one learns through trial and error. On the contrary, the ‘new tolerance’ now operates under a postmodern assumption that ‘truth’ is always subjective and all beliefs must have equal validity. We have moved away from a culture of free expression of contrary opinions to the acceptance of all opinions. As such, it is morally wrong to claim that there might be only one possible truth.⁸ The new approach changes the meaning of tolerance from an attitude of permitting the articulation of beliefs that we may not necessarily agree with, to asserting that all beliefs and claims are equally valid. ‘Thus we slide from the old tolerance to the new’⁹ and, as result of such remarkable transformation, D A Carson states:

Intolerance is no longer a refusal to allow contrary opinions to say their piece in public, but must be understood to be any questioning or contradicting the view that all opinions are equal in value, that all worldviews have equal worth, that all stances are equally valid. To question such postmodern axioms is by definition intolerant. For such questioning there is no tolerance whatsoever, for it is classed as intolerance and must therefore be condemned. It has become the supreme vice.¹⁰

The ‘new tolerance’ appears to indicate that all values and beliefs are positions worthy of an equal respect. One may ask if this would apply for Nazism, Stalinism, cannibalism, etc. Whereas the ‘old tolerance’ declared objective standards of truth, the ‘new tolerance’ argues from a

⁸ Carson, above n 1, 11.

⁹ Ibid 3–4.

¹⁰ Ibid 12.

morally relativist perspective whereby no values and beliefs can be challenged. Thus the new meaning of ‘tolerance’ implies a psychological attitude that conveys not only a sense of identity or empathy, but also the tacit support or consent with almost every existing value and belief.¹¹ Indeed, desperate straits are no longer required for anyone to claim the emotional status of being a victim of ‘intolerance’, because all that is required is often ‘the vaguest notion of emotional distaste at what another has said, done, proposed, or presented’.¹²

In this sense, the old link between tolerance and judgment has been lost due to our cultural obsession with being non-judgemental.¹³ When the meaning of tolerance can be distorted to such an extent that it now signifies the impossibility of making judgement, such ‘tolerance’ has ceased to be a virtue to become, rather, ‘the superficial signifier of acceptance of affirmation of anyone and everyone’.¹⁴ Of course, real tolerance would demand an attitude of critical reflection and personal restraint. That being so, explains Frank Furedi quite correctly:

The most troubling consequence of the rhetorical transformation of this term has been its disassociation from discrimination and judgement. When tolerance acquires the status of a default response connoting approval, people are protected from troubling themselves with the challenge of engaging with moral dilemmas.¹⁵

¹¹ Frank Furedi, ‘On Tolerance’ (2012) 28 *Policy* 30, 32.

¹² *Ibid* 31.

¹³ *Ibid*.

¹⁴ *Ibid*.

¹⁵ *Ibid* 32.

III THE IRRELEVANCE OF TRUTH

Three Australian states have introduced legislation aiming to support 'religious tolerance': Queensland,¹⁶ Tasmania,¹⁷ and Victoria. These laws are sufficiently similar so as to merit the discussion of one to encompass all. As such, the 2001 Victorian RRTA will be taken as representative.

The Victorian RRTA applies to religious beliefs the same formulations often applied to racial issues. Of course, religion, unlike race, is not an immutable genetic characteristic. One should expect the laws of democratic societies to be much less prepared to protect criticism based on voluntary life choices, compared to unchangeable attributes of an individual's birth.¹⁸ Of course, if people cannot choose the colour of their skin, religion is, to some degree at least, a matter of personal choice. In contrast to racial issues where one finds no ultimate questions of 'true' or

¹⁶ Queensland has passed legislation introducing religion vilification laws in 2001. This Act is called the *Anti-Discrimination Amendment Act 2001* (Qld). Similar to Victoria's law, Queensland outlines that a person must not publically act in a way of which would 'incite hatred towards, serious contempt for, or severe ridicule of a person or persons on the basis of their religion' (*Anti-Discrimination Amendment Act 2001* (Qld) s 124A(1)). The provision also provides the circumstances in which such an act could be legal: the act must be public, done reasonably and in good faith, for academic, artistic, scientific or research purposes; a publication of material that would be subject to the defence of absolute privilege in defamation case; or the publication of a fair report of a public act. Queensland also criminalises serious religious vilification. The section dealing with serious religious vilification is comparable to the Victorian section.

¹⁷ *Anti-Discrimination Act 1998* (Tas) s 19 outlines that one must not publically act in a way that would incite 'hatred towards, serious contempt for, or severe ridicule of a person or persons on the basis of their religious beliefs or affiliations'.

¹⁸ Rex Tauati Ahdar, 'Religious Vilification: Confused Policy, Unsound Principle and Unfortunate Law' (2007) 26 *University of Queensland Law Journal* 293, 301.

‘false’, religion involves ultimate claims to truth and error that are not mirrored in racial discourse.¹⁹

To determine who might have committed ‘religious vilification’, the Victorian RRTA states: ‘It is irrelevant whether or not the person who has made an assumption about the race or religious belief or activity of another person or class of persons, was incorrect at the time that the contravention is alleged to have taken place’.²⁰ Once a complaint is filed, those charged under the legislation must prove that they have not committed any such crime, or why they may qualify for any exemptions under the legislation.²¹ Naturally, this may cause a chilling effect on people who certainly must think twice before making any comment, because of ‘fear of litigation and its risk of financial ruin, jail, collegial ostracism, or embarrassment’.²²

The motivation causing ‘religious vilification’ is irrelevant for the purposes of the legislation.²³ Indeed, the Victorian RRTA informs that it is irrelevant whether the statement leading to ‘vilification’ is true. In other words, a person may be found guilty of vilification ‘by conduct which has the effect of inciting religious hatred even where the inciter

¹⁹ Ivan Hare, ‘Crosses, Crescents and Sacred Cows: Criminalising Incitement to Religious Hatred’ (2006) *Public Law* 521, 531.

²⁰ *Racial and Religious Tolerance Act 2001* (Vic) s 9(1) states: ‘In determining whether a person has contravened section 7 or 8, the person’s motive in engaging in any conduct is irrelevant.’

²¹ There is no contravention if the person is able to establish that the act was, in the circumstances, reasonable and in good faith for the purpose of genuine academic, artistic, religious or scientific interest: *Racial and Religious Tolerance Act 2001* (Vic) s 11. If the accused establishes that they reasonably believed that the conduct would be seen or heard only by them, they will not be held to have contravened s 8.

²² Joel Harrison, ‘Truth, Civility, and Religious Battlegrounds: The Context Between Religious Vilification Laws and Freedom of Expression’ (2006) 12 *Auckland University Law Review* 71, 79.

²³ *Racial and Religious Tolerance Act 2001* (Vic) ss 9(1), 10.

had no intention to do so'.²⁴ Such is the situation that unless the person falls within the exceptions of 'good faith,' art, academic, religion, science, or public interest, he or she is restricted in the manner in which they may express themselves. This creates an elitist distinction by which the more 'eloquent' forms of expression are protected, whilst all the others are restricted.²⁵ Such elitist exemption supports the conception of two-tiered speech by which only the so-called disinterested 'experts' or more 'qualified' individuals are able to pursue ideas freely, whereas the 'irrational masses' are restrained. Cardinal Pell criticises this strange anomaly:

Citizens rightly resent any attempt to limit their free speech more than the free speech of their 'betters'. It is quite unfair that the deliberate conduct of the artist or the politician is exempted but the clumsy contribution of the less educated is made criminal. If any serious movement for racial and religious persecution were to gain momentum, then no doubt it would have been led and nourished by certain misguided politicians, academics and artists.²⁶

The Victorian RRTA states that the truth may not be used as a legal defence against charges of religious vilification.²⁷ Why would this so be? After all, the truth has always amounted to a fundamental element of defence in defamation cases, and so it should. The answer seems to lie in the postmodern underpinnings of religious tolerance laws. According to postmodern theory, 'truth' is socially constructed and so it is possible to conclude that one is 'morally wrong' just for criticising someone else's

²⁴ Ahdar, above n 18, 301.

²⁵ Harrison, above n 22, 88.

²⁶ *The Age*, 16 March 2001, quoted in Robert Forsyth, 'Dangerous Protections: How Some Ways of Protecting the Freedom of Religion May Actually Diminish Religious Freedom', (Speech delivered at the Third Action Lecture on Religion and Freedom, Centre for Independent Studies, 24 September 2001) 9.

²⁷ Berg, above n 2, 155.

beliefs, whatever such beliefs might be. Rather, it is the criticism itself that deserves criticism, because if one agrees with the postmodern premise that truth is always relative, then it is not difficult to assume that it is indeed quite 'intolerant' to criticise someone's values and beliefs. In sum, if truth is relative to each individual and social context then, according to postmodernist literary theorist Stanley Fish, there should be 'no such thing as free speech' which validates the criticism of another person's values and beliefs.²⁸ Of course, this might explain why in anti-discrimination laws the truth of a statement cannot be relied as a defence against charges of vilification. These laws are clearly sceptical of objective truth, religious or otherwise. This may also mean that these laws are not really taking religious statements seriously.²⁹ As law professor Carl Esbeck explains,

one who has never disagreed with others about religion is not ... commendably tolerant, but is treating religious difference as trivial,

²⁸ Postmodernist Stanley Fish comments:

When one speaks to another person, it is usually for an instrumental purpose: you are trying to get someone to do something, you are trying to urge an idea and, down the road, a course of action. There are reasons for which speech exists and it is in that sense that I say that there is no such thing as 'free speech', that is, speech that has its rationale nothing more than its own production:

Stanley Fish, *There's No Such Thing as Free Speech* (Oxford University Press, 1994) 104.

²⁹ Charles Rice argues on the absurdity of postmodern scepticism:

One who says we can never be certain of anything contradicts himself because he is certain of that proposition. If he says instead that he is not sure he can be sure of anything, he admits at least that he is sure he is not sure. Or some will say that all propositions are meaningless unless they can be empirically verified. But that statement itself cannot be empirically verified:

Charles Rice, *50 Questions on the Natural Law: What it is and Why We Need It* (Ignatius Press, 1999) 132.

as if religious beliefs do not matter. That is just a soft form of religious bigotry.³⁰

Naturally, atheists often would think that religion does not ultimately matter. Curiously, then, all the major postmodern philosophers have been Atheists: Foucault, Derrida,³¹ Lyotard, Bataille, Barthes, Baudrillard, Macherey, Deleuze, Guattari and Lacan³². Alister McGrath speaks of the intimate relationship between Postmodernism and atheism:

Many Postmodern writers are, after all, atheist (at least in the sense of not actively believing in God). The very idea of deconstruction seems to suggest that the idea of God ought to be eliminated from

³⁰ Carl Esbeck, 'The Application of RFRA to Override Employment Nondiscrimination Clauses Embedded in Federal Social Services Programs' (2008) 9(2) Engage 1, 9.

³¹ Yet at times Derrida himself was more cryptic about his Atheism. Speaking before a convention of the American Academy of Religion in 2002, Derrida commented: 'I rightly pass for an atheist'. However, when asked why he would not say more plainly 'I am an atheist', he replied, 'Maybe I'm not an atheist'. How can Derrida claim to be and not be an atheist? Both the existence and nonexistence of God requires a universal statement about reality, but Derrida is unwilling to make such an absolute claim. In this regard Derrida's theology is consistent with his Postmodern inclination for ambiguity. Likewise, Richard Rorty at one time admitted he was an atheist, but in a subsequent work, *The Future of Religion*, he says he now agrees with Gianni Vattimo that 'atheism (objective evidence for the nonexistence of God) is just as untenable as theism (objective evidence for the existence of God)'. Thus, Rorty insists that atheism, too, must be abandoned in favour of something he labels 'anti-clericalism'. Ecclesiastical institutions are dangerous, but not necessarily the local congregation of believers. 'Religion', he says, 'is unobjectionable as long as it privatized': David Noebel, *Understanding the Times: The Collision of Today's Competing Worldviews* (Summit Press, 2nd ed, 2006) 80.

³² 'Postmodernists agree with Nietzsche that "God" – which is to say, the supreme being of classical theism – has become unbelievable, as have the autonomous self and the meaning of history': Kevin Vanhoozer, *Postmodern Theology* (Cambridge University Press, 2005) 12. David Noebel comments 'a sympathetic critic defined Postmodernism as Marxism-lite dressed in a French tuxedo, sippin' French wine in a French café on the campus of the College International de Philosophie. A less sympathetic critic referred to Postmodernism as linguistic sophistry seeking to save Marxism's irrelevant posterior': David Noebel, *Understanding the Times: The Collision of Today's Competing Worldviews* (Summit Press, 2nd ed, 2006) 78.

Western culture as a power play on the part of churches and others with vested interests in its survival.³³

Postmodern philosophy states that what one takes for religious truth is no more than a Christian perspective, a Jewish perspective, a Muslim perspective, a Hindu perspective, and so forth. Each of these religious ‘perspectives’ are equally valid so that any claim to ‘truth’ should be dismissed as naïve at best, and deceptive at worse, in such case as an attempt to ‘impose’ one’s religious perspective upon others. Such premise which reduces religion to a private preference has been filtered down from academy to our ‘un-enlightened’ legislators, many of whom having embraced the postmodern premise that we must tolerate all religions because no one religion can be true. These legislators have therefore accepted the denial of religious truth, meaning that they perceive all religious claims as no more than personal *preferences*, rather than universal values or standards of truth.

IV MARXIST ROOTS OF POSTMODERN PHILOSOPHY

Although it is not easy to define the term postmodernism, one may loosely define it as a label for a broad range of theoretical challenges to the objectivity of truth and knowledge. In our Western philosophical tradition, the idea of truth is related to the relationship between the real world and statements corresponding to the real world. Postmodernists, however, argue that there is no such a thing as objective truth. For them, everything we know is subjective and so it is subject to particular contexts and surroundings. Moreover, Postmodernists also say that any claim to objective truth may actually legitimise instances of oppression and inequality, particularly against women and minority groups.

³³

Alister McGrath, *The Twilight of Atheism* (Doubleday, 2004) 227.

Although Marxism is a form of dialectical logic, and postmodern theory may be defined as reaction to all forms of dialectic, mainstream postmodernism emerged from a certain Marxist tradition of anti-Western philosophy. Marx himself was a moral relativist. He believed that human rights are not inalienable or universal, but conditional and socially determined. Postmodernists may not accept the Marxian dogma of dialectical logic, but postmodernism was birthed as a ‘wayward stepchild of Marxism, and in a sense a generation’s realisation that it is orphaned’.³⁴ Thus, Glen Ward comments that the vast majority of mainstream postmodernists have emerged from the Marxist tradition.³⁵

The Marxist link with postmodernism is particularly evident with respect to French Postmodernists. They invariably emerged from the Marxist tradition. For instance, Pierre Macherey has been described as ‘a Marxist critic ... concerned with how texts act to reproduce the values of capitalism’.³⁶ His postmodern theory rests on a ‘loosely Marxist framework’ that aspires to ‘bring Marx up to date’.³⁷

Similarly, Michel Foucault was a member of both the Maoist *Gauche Proletarienne* and the French Communist Party, but left the latter once he discovered the Marxist instance towards homosexuality.³⁸ In spite of his well-known aversion to some aspects of Marxist theory, Foucault did not abandon Marxist thought altogether. On the contrary, Foucault remained under ‘the profound influence of Marxist analyses of power relations and

³⁴ Lawrence Cahoon (ed), *From Modernism to Postmodernism: An Anthology* (Blackwell Publishers, 2nd ed, 2003) 4–5.

³⁵ Glenn Ward, *Teaching Yourself Postmodernism* (McGraw-Hill, 2003) 78.

³⁶ Ibid 97.

³⁷ Ibid 78.

³⁸ Mark Lilla, *The Reckless Mind: Intellectuals in Politics* (New York Review of Books 2001) 150.

the role of economic inequality in determining social structures'.³⁹ Mark Lilla notes that Foucault felt a deep need to develop something 'more radical' than orthodox Marxism, so he turned to 'Nietzsche and Heidegger, but also avant-garde writers and Surrealists whose hostility to bourgeois life took a more aesthetic and psychological forms'.⁴⁰

Inspired by these particular philosophies, Foucault thought that Westerners were both a product *and* an agent of a diabolical capitalist system that is inherently oppressive and exploitative. Indeed, Foucault embraced a view of civil society that condemned Western citizens as irretrievably evil and corrupt, exploitative and oppressive, and, accordingly, a legitimate target of terrorism. His deep-seated hatred of Western democracies led him to strongly support both Maoism in communist China and the 1978 Islamic Revolution in Iran. As the protests against the Shah of Iran reached their zenith, Foucault visited Iran to lend his full support to the theocratic leader of the Iranian revolution Ayatollah Khomeini. After meeting with Khomeini as a special correspondent for *Corriere della Sera* and *Le Nouvel Observateur*,⁴¹ Foucault wrote numerous articles praising religious extremism and interpreting the Iranian Islamic Revolution as a turning point in world history which, according to him, signalled the end of Western hegemony that would 'set the entire region afire' and forever change the 'global strategic equilibrium'. As Bendle points out:

Foucault's assessment became rapturous, describing the revolution as a mystical manifestation of 'an absolute collective will' that has 'erupted into history', 'like God, like the soul'. He endorsed the

³⁹ Robert Eaglestone (ed), *Routledge Critical Things* (Routledge, 2003) 15.

⁴⁰ Lilla, above n 38, 142.

⁴¹ For a more comprehensive analysis, see Janet Afary and Kevin Anderson (eds), *Foucault and the Iranian Revolution: Gender and the Seductions of Islamism* (University of Chicago Press, 2005).

Islamist claim that democratic political systems are inherently corrupt, and that Iranian theocracy, with all its brutality, expressed the 'collective will' of the Iranian people in a pure and uncorrupted fashion that Western democracy could never match. This is a view of democracy shared by many [postmodern] academics.

Throughout his life Foucault was also fascinated with suicide and sadomasochistic sexuality. In Iran he was attracted to the ideal of revolutionary martyrdom and embraced its 'discourse of death'. He was mesmerised by the marching columns of black-clad men, rhythmically flagellating themselves in prolonged rituals of mass penitence, celebrating a 'political spirituality' that embraced death and would, he proclaimed with delight, overwhelm a decadent and materialist West.⁴²

Although a totalitarian theocracy, Foucault interpreted radical Islam as an essential factor of upheaval and not of passivity at the heart of Western democracies. According to Pascal Bruckner, Foucault and like-minded thinkers have a visceral hatred of both liberal democracy and free-market capitalism. Hence, they would be willing to promote a tactical alliance with radical Islamists against the more universalistic values of Western societies, in the hope that radical Islamism might become 'the spearhead of a new insurrection in the name of the oppressed'.⁴³ In the postmodern mind of such left-wing radicals, says Bruckner,

the hatred of the market is worth a few compromises regarding fundamental rights, and especially of the equality between men and women. The [Islamists], disguised as friends of tolerance, are dissimulating and using the Left to advance their interests under the mask of a progressive rhetoric. There is a twofold deception here:

⁴² Mervyn Bendle, '9/11 and the Intelligentsia, Ten Years On' (2011) 55 *Quadrant* 46, 47–8.

⁴³ Pascal Bruckner, *The Tyranny of Guilt: An Essay on Western Masochism* (Princeton University Press, 2012) 25.

one side supports the Islamic veil or polygamy in the name of the struggle against racism and neo-colonialism. The other side pretends to be attacking globalisation in order to impose its version of religious faith. Two currents of thought form temporary alliances against a common enemy: it is not hard to predict which one will crush the other once its objectives have been achieved. The Leftist intransigence that refuses any compromise with bourgeois society and cannot castigate too severely 'little white men' actively collaborates with the most reactionary elements in the Muslim religion. But if the far Left courts this totalitarian theocracy so assiduously, it is perhaps less a matter of opportunism than of a real affinity. The far Left has never gotten over communism and once again demonstrates that its true passion is not freedom but slavery in the name of 'justice'.⁴⁴

V SHARIA LAW BY STEALTH?

One common argument against vilification laws is that legislation of this kind can be exploited by some people in order to secure immunity from public scrutiny of their beliefs. This concern may be proven correct when one considers what took place in *Islamic Council of Victoria v Catch the Fire Ministries*⁴⁵ in Victoria, an episode which illustrates the full potential abuse of these laws by people who are reluctant to endure any criticism of their religious beliefs.⁴⁶ Of course, this perceived desire to

⁴⁴ Ibid 25–6.

⁴⁵ [2004] VCAT 2510.

⁴⁶ *Islamic Council of Victoria v Catch the Fire Ministries* [2004] VCAT 2510. The outcome of this controversial case bears out concerns that tolerance laws might be used to silence any strong criticism based on religious beliefs. In June 2002 three Victorian Muslims attended a Christian seminar on the topic of Islam. These attendees did not disclose their identity and were encouraged to attend this meeting by a member of the Executive of the Islamic Council of Victoria (ICV) and employed by the Victorian Equal Opportunity Commission, the Act's primary administrative body. Pursuant to a deliberate plan, each one sat in at different times in order to ensure that the complete event was covered. The case had clear elements of a 'set-up', including a pre-arrangement by the Islamic Council of Victoria to send anonymous informants

shelter any religious group from public scrutiny should be of great concern to every citizen, including those of no religious persuasion. After all, it is not really clear why free speech should be restricted by the inflated sensitivities of any religious group. And yet, anti-vilification laws appear to ultimately serve as a sort of Islamic blasphemy law by stealth; a suspicion that is deeply reinforced when one considers that the Victorian RRTA was enacted at the insistence of the influential Islamic Council of Victoria.

Ayaan Hirsi Ali has opined that Islam is a totalitarian religion and that many Muslims believe that blasphemers deserve punishment.⁴⁷ Whether this is true or not, the fact is that across the Islamic world accusations of insulting ‘the prophet’ are systematically used to send people to jail and to justify death threats, beatings and assassination.⁴⁸ According to Dr

to a seminar held privately, followed by the coordinated lodgement of a formal complaint with the *Victorian Civil and Administrative Tribunal* (VCAT). In December 2004, pastors Daniel Scot and Danny Nalliah were found guilty of inciting religious hatred against Victorian Muslims. The evidence of vilification, however, was not based on whether the attendees felt hatred or contempt toward Muslims, but whether those Muslim attendees, who did not reveal their faith and were technically not invited, felt offended by the comments made during the course of the seminar. These pastors were condemned to post an apology on their website and in four leading newspapers to the Muslim community, at the cost of \$90,000. The advertisements would reach 2.5 million rather than the 250 individuals who attended the seminar. Of course, the respondents appealed the decision and two years later the Court of Appeal overruled the decision on the grounds of numerous errors of fact by the judge who decided on the matter. There was no re-hearing and the case was closed through mediation, meaning that a case that lasted five years and costed several hundreds of thousands of dollars to the defendants, reached its final conclusion without a clear winning side. See Augusto Zimmermann, ‘Why the Victorian Vilification Legislation Undermines Democratic Freedoms’ (2005) 1 *Original Law Review* 52, 53–5.

⁴⁷ Ayaan Hirsi Ali, ‘The Painful Last Gasp of Islamist Hate’, *The Weekend Australian* (Sydney), 22–23 September 2012, 16.

⁴⁸ Paul Marshall, ‘Blasphemy and Free Speech’ (2012) 41 *Imprimis* 1, 2. In these Islamic countries even Muslims themselves may be persecuted if they do not endorse the official interpretation of Islam: ‘Sunni, Shia and Sufi Muslims may be persecuted for differing from the version of Islam promulgated by locally hegemonic

Michael Nazir-Ali, ‘there is unanimity among the [Islamic] lawyers that anyone who blasphemes against Muhammad is to be put to death, although *how* the execution is to be carried out varies from one person to another’.⁴⁹ Hence, in *The Price of Freedom Denied*, Dr Brian J Grim and Dr Roger Finke comment that in Muslim-majority countries ‘religious persecution is reported in 100 per cent of cases’.⁵⁰ As they point out, ‘[r]eligious persecution is not only more prevalent in Muslim-majority countries, but it also generally occurs at a more severe level’.⁵¹

Recent scholarship on the subject shows that the execution of apostates is sanctioned by all the five dominant streams of Islamic jurisprudence, namely the *Hanafi* (Sunni), *Shafi’i* (Sunni), *Maliki* (Sunni), *Hanbali* (Sunni) and *Ja’fari* (Shi’a) legal codes, under which the State may impose the death penalty as a mandatory punishment (‘*hudud*’) against adult male converts from Islam (‘*irtidad*’).⁵² For adult women, death is proscribed by three of the five Islamic schools. The exceptions are *Hanafi* (which allows for permanent imprisonment until the woman recants), and *Ja’fari* (which allows imprisonment and beating with rods until death or recantation).⁵³ With the exception of *Ja’fari*, the death penalty is applied to child apostates under Sharia law, with the penalty typically delayed until attainment of maturity. Even more unsettling is the reality that, under three of the five Islamic legal codes, apostasy need

religious authorities. Saudi Arabia represses Sunnis and Suffis. In Egypt, Shia leaders have been imprisoned and tortured.’

⁴⁹ Michael Nazir-Ali, ‘Islamic Law, Fundamental Freedoms, and Social Cohesion: Retrospect and Prospect’ in Rex Ahdar and Nicholas Aroney (eds), *Shari’a in the West* (Oxford University Press, 2010) 79.

⁵⁰ Brian Grim and Roger Finke, *The Prince of Freedom Denied: Religious Persecution and Conflict in the Twenty-First Century* (Cambridge University Press, 2011) 21.

⁵¹ Ibid 169.

⁵² Patrick Sookhdeo, *Faith, Power and Territory: A Handbook of British Islam* (Isaac Publishing, 2008) 24.

⁵³ Ibid.

not be articulated verbally to incur mandatory punishment; even inward apostasy is punishable.⁵⁴

Naturally, radical Islamists living in a Western democracy will have to discover different mechanisms to punish those who might have ‘offended’ their religion. They will find in anti-vilification legislation such as the Victorian RRTA a suitable mechanism to strike fear and intimidation on the ‘enemies’ of their faith. Indeed, one of the greatest ironies of anti-vilification laws is that their chief beneficiaries are a small but vocal group of religious extremists, although it is not clear why such people should merit any statutory protection from ‘hate speech’.⁵⁵ Surely

⁵⁴

Ibid. In countries subject to Islamic Sharia Law:

Believers who reject or insult Islam have no rights. Apostasy is punishable by death. In Iran, Saudi Arabia and Sudan, death is the penalty for those who convert from Islam to Christianity. In Pakistan, the blasphemy law prescribes death for anyone who, even accidentally, defiles the name of Mohammed. In a religion which, unlike Christianity, has no idea of a god who himself suffers humiliation, all insult must be avenged if the honour of god is to be upheld. Under Islam, Christians and Jews, born into their religion, have slightly more rights than apostates. They are ‘dhimmis’, second-class citizens who must pay the ‘jizya’, a sort of poll tax, because of their beliefs. Their life is hard. In Saudi Arabia, they cannot worship in public at all, or be ministered to by clergy even in private. In Egypt, no Christian university is permitted. In Iran, Christians cannot say their liturgy in the national language. In almost all Muslim countries, they are there on sufferance and, increasingly, because of radical Islamism, not even on that:

Charles Moore, ‘Is It only Mr Bean who Resists this New Religious Intolerance?’, *Daily Telegraph* (online) 11 December 2004 <<http://www.telegraph.co.uk/comment/columnists/charlesmoore/3613495/Is-it-only-Mr-Bean-who-resists-this-new-religious-intolerance.html>>.

⁵⁵

Bruckner writes on the need to criticise Islam:

The process of questioning remains to be carried out by Islam, which is convinced that it is the last revealed religion and hence the only authentic one, with its book directly dictated by God to his Prophet. It considers itself not the heir of earlier faiths but rather a successor that invalidates them forever. The day when its highest authorities recognize the conquering, aggressive nature of their faith, when they ask to be pardoned for the holy wars waged in the name of the Qu’ran and for infamies committed against infidels, apostates, unbelievers, and women, when they apologise for the terrorist attacks that profane

some of their religious beliefs are rather repulsive and so they deserve our criticism.⁵⁶ Yet, because of legislation of this nature even the slightest indignation about their radical beliefs and statements may incur in a person being dragged into the secular court and charged with ‘religious vilification’.

There is no good reason why the tenets of any religion should be accorded special protection from spoken hostility.⁵⁷ Laws such as the

the name of God – that will be a day of progress and will help dissipate the suspicion that many people legitimately harbour regarding this sacrificial monotheism. Criticising Islam, far from being reactionary, constitutes on the contrary the only progressive attitude at a time when millions of Muslims, reformers or liberals, aspire to practice their religion in peace without being subjected to the dictates of bearded doctrinaires. Banning barbarous customs such as lapidation, repudiation, polygamy, and clitoridectomy, subjecting the Qu’ran to hermeneutic reason, doing away with objectionable versions about Jews, Christians, and gains and appeals for the murder of apostates and infidels, daring to resume the Enlightenment movement that arose among Muslim elites at the end of the nineteenth century in the Middle East – that is the immense political, philosophical, and theological construction project that is opening up ... But with a suicidal blindness, our continent [ie Europe] kneels down before Allah’s madmen and gags and ignores the free-thinkers:

Bruckner, above n 43, 46–7.

⁵⁶ For example, in January 2009, a Muslim cleric from Melbourne instructed his married male followers to hit, and force sex upon their disobedient wives: ‘It’s OK to Hit Your Wife, says Melbourne Cleric Samir Abu Hamza’, *The Australian* (Sydney), 22 January 2009. Statements such as this clearly deserve our repulsion and indignation.

⁵⁷ As Steve Edwards points out:

This legal hypocrisy is compounded by that of the moral kind when one considers that religions and religious ‘holy texts’ themselves partake in some of the vilest hate speech towards nonbelievers, without providing a single morally defensible reason for their incitement. For instance, Sura 22:19-22 of the Koran claims, without providing any evidence, that non-Muslims will have ‘boiling water’ poured over their heads, melting their skin and innards, while being ‘punished’ and terrorised with ‘hooked rods of iron’. This horrific fate is not intended to be temporary: ‘Whenever, in their anguish, they would go forth from thence they are driven back therein and (it is said to them): *Taste the doom of burning*’. Sura 4:56 warns that ‘those who disbelieve our revelations’ shall suffer being ‘roasted’ alive. The punishment does not end there, for ‘as often as their skins are consumed, we shall

Victorian RRTA allow certain religious groups to become a protected class of citizens beyond any criticism, precisely at the moment when Western democracies need to examine the implications of having admitted into their societies people with greater allegiance to their religious law than to the laws of the societies in which they have settled. Of course, while the vast majority of Muslims are totally peaceful and law-abiding citizens, following a more moderate, non-literalist version of their religion, the potential for a more radicalised version of Islamism to foster the growth of fundamentalist variants should be of great concern to the every citizen. To quote Dr Patrick Sookhdeo, an expert on the growth of such religion as a cultural force within the British Isles:

Islam is unique among major world religions in its emphasis on state structures and governance, which are considered to be of as much importance as private belief and morality (if not more). Much of Islamic teaching is concerned with how to rule and organise society within an Islamic state and how that state should relate to other states.⁵⁸

The future of Australia's democracy and religious harmony depends on the cultivation of a more moderate, more acculturated forms of religious expression. Of course, attacking a place of worship should not be confused with a free examination of religious doctrine. For example, to speak of Islamophobia is often to avoid reasonable debate and maintain the crudest confusion between a specific belief system and the faithful who adhere to it. As the citizens of a liberal democracy we should have every right to reject and criticise any religious belief, and even to

exchange them for fresh skins that they may taste the torment'. The passage concludes: 'Allah is ever Mighty, Wise'.

Steve Edwards, 'Do We Really Need Religious Vilification Laws?' (2005)

²¹ *Policy* 30, 33.

⁵⁸ Sookhdeo, above n 52, 2.

consider it mendacious, retrograde and mindless. Or must we re-establish the crime of blasphemy as the Organization of the Islamic Conference demanded in 2006, when it introduced at the United Nations a notorious motion that would prohibit defaming religion and imposing strict limits on freedom of expression in the domain of religion?

We are seeing therefore the fabrication of a new crime of opinion analogous to the crime that used to be committed by ‘enemies of the people’ in the Soviet Union. This is why anti-vilification laws are so dangerously problematic and counter-productive. These laws may allow some individuals to demarcate the things that others are allowed to say. True religious freedom, however, implies the subjection of religious beliefs to competing perspectives as well as critical analysis and scrutiny. This must be done in the hope that the adherents of every religious belief understand that the practice of their faith within Australia implies a willingness to withstand public scrutiny of the kind long endured by the different Christian denominations. Because of the political nature of Islam, of course, such comprehension might be all the more important, because the subjugation of the political process by an extreme form of Islamic fundamentalism would be profoundly detrimental to our basic rights and freedoms.

VI TOLERANCE IN ‘MULTICULTURAL DEMOCRACY’

The Victorian RRTA takes no account of whether vilification is committed in that state; or, even, if anybody from that state has seen or heard the vilification.⁵⁹ Such law is not even concerned that violence has been incited by argument, but rather that people may be convinced or,

⁵⁹ Greg Taylor, ‘Casting the Net Too Widely: Racial Hatred on the Internet’ (2001) 25 *Criminal Law Journal* 260, 268.

alternatively, *feel* offended by the argument. In other words, for words to be considered religious vilification there is no actual need to demonstrate that anybody has been incited into action. Simply the expression of an opinion is sufficient to be religious vilification.

This fact appears to underline the importance of the debates prior to the draft of the United Nations' declarations and covenants whether there should be, when it comes to protection of freedom of expression, an exception only for 'incitement for violent' or, more broadly, an exception for 'incitement to hatred' as the Soviet Union and its totalitarian bloc of communist nations maintained. For while the idea of inciting to violence links the expression of thoughts to actions, the latter formulation links the expression of thoughts to no more than just thoughts. As Chris Berg points out, the drafting history of the protection of the freedom of expression in these declarations,

does not leave any doubt that the dominant force behind the attempt to adopt an obligation to resist freedom of speech under human rights law was the Soviet Union... When it came to draft the binding International Covenant on Civil and Political Rights, this was not the ascendant view. The Soviet Union proposed extending those restraints to 'incitement to hatred' ... Suddenly, states were responsible for the elimination of intolerance and discrimination.⁶⁰

The Australian drive to enact the principles of international discrimination law took place during the Labor government of Prime-Minister Gough Whitlam, who felt it could introduce 'multiculturalism' by adopting the 1966 United Nations' *Covenant on Civil and Political Rights*.⁶¹ The covenant was then embraced by Immigration Minister Al

⁶⁰ Berg, above n 2, 176.

⁶¹ Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

Grassby in his first major statement on multiculturalism. Hence, when Whitlam introduced the *Racial Discrimination Act 1975* (Cth), which adopted the principles of the convention, ‘he made explicit reference to its harmony with the government’s multiculturalism policy’.⁶² This information is relevant because, before the RRTA was passed by the Victorian Parliament, then state Labor Premier Steve Bracks, in a message printed in a Discussion Paper, commented: ‘Victoria’s most multicultural state and the diversity of its people is a great asset. Respect for this cultural diversity is vitally important to our community’.⁶³ Hence the legislation’s preamble communicates that the ultimate purpose of such legislation is to advance so-called ‘multicultural democracy’.⁶⁴

An idea that started out in the late sixties and seventies, multiculturalism initially had the reasonable goal of including minorities in Western societies. Nowadays, however, it is hard to talk so candidly about such an idea, since multiculturalism has become not just the fair understanding of different cultures, but also a radical anti-Western ideological project that is opposed to ‘Eurocentric concepts of democratic principles, culture, and identity’.⁶⁵ ‘We cannot judge other cultures but we must condemn our own.’⁶⁶ Hence, instead of promoting the globalisation of liberal democracy and human rights, radical multiculturalists regard these values as ethnocentric products of Western history. In their place they propose a form of cultural pluralism that, although preserving a certain gloss of

⁶² Berg, above n 2, 177.

⁶³ Jenny Stokes, *Religious Vilification Laws in Victoria – Background to the Law and Cases* (May 2005) Salt Shakers, <http://www.saltshakers.org.au/images/stories/attachments/252_300343_ARTICLES_ON_VILIFICATION.pdf>.

⁶⁴ See also *Racial and Religious Tolerance Act 2001* (Vic) s 4(1)(a).

⁶⁵ Samuel Huntington, *Who Are We? America’s Great Debate* (The Free Press, 2004) 173.

⁶⁶ Keith Windschuttle, ‘September 11 and the End of Ideology’ in Imre Salusinszky and Gregory Melleuish (eds), *Blaming Ourselves: September 11 and the Agony of the Left* (Duffy & Snellgrove, 2002) 198.

tolerance and respect for all cultures, it stands as a form of moral relativism which refuses to admit that culture, at the extremes, may produce either a democratic society or social oppression, for example, against women and minority groups.⁶⁷ According to Roger Scruton,

The official view in most Western countries is that we are multicultural societies, and that cultures should be allowed complete freedom to develop in our territory, regardless of whether they conform to the root standards of behaviour that prevail here. As a result, the 'multicultural' idea has become a form of apartheid. All criticism of minority cultures is censured out of public debate, and newcomers quickly conclude that it is possible to reside in a European state as an antagonist and still enjoy all the rights and privileges that are the reward of citizenship.⁶⁸

Contrary to what the former Premier of Victoria appears to believe, an authentic democracy has never required the state-controlled promotion of cultural diversity. As a matter of fact, the leading scholar on the subject of democracy, Emeritus Professor of Political Science Robert Dahl from Yale University, explains that democracy is far more likely to be achieved and developed in societies that are 'culturally fairly homogeneous' than in those with 'sharply differentiated sub-cultures'.⁶⁹ According to Dahl, 'cultural diversity' may actually represent a serious threat to the realisation of democracy, because this might result in the cultivation of 'intractable social conflicts' whereby democratic

⁶⁷ For a broad analysis of how culture shapes values such as democracy, economic development and human rights, see Lawrence Harrison and Samuel Huntington (eds), *Culture Matters: How Values Shape Human Progress* (Basic Books, 2000).

⁶⁸ Roger Scruton, *The West and the Rest: Globalization and the Terrorist Threat* (Continuum, 2002) 63.

⁶⁹ Robert Dahl, *On Democracy* (Yale University Press, 1998) 150–1.

institutions cannot be maintained. The practical implications of the empirical fact are cogently explained by Professor Dahl:

Cultural conflicts can erupt into the political arena, and typically they do: over religion, language, and dress codes in schools, for example; ... or discriminatory practices by one group against another; or whether the government should support religion or religious institutions, and if so, which ones and in what ways; or practices by one group that another finds deeply offensive and wishes to prohibit, such as ... cow slaughter, or 'indecent' dress, or how and whether territorial and political boundaries should be adapted to fit group desires and demands. And so on. And on... Issues like these pose a special problem for democracy. Adherents of a particular culture often view their political demands as matters of principle, deep religious or quasi-religious conviction, cultural preservation, or group survival. As a consequence, they consider their demands too crucial to allow for compromise. They are nonnegotiable. Yet under a peaceful democratic process, settling political conflicts generally requires negotiation, conciliation, compromise.⁷⁰

Because certain cultural allegiances may be regarded by the members of any particular cultural group as being 'non-negotiable', no democratic society should be radically multicultural. Rather, a truly democratic society 'depends for its successful renewal across the generations on an undergirding culture that is held in common'.⁷¹ Democracy requires a 'common culture' that ideally encompasses common values and is based not only on 'good' legal-institutional framework but also on the widespread acceptance of substantive norms and conventions of behaviour that typically characterise a society based on unconditional

⁷⁰ Ibid 150.

⁷¹ John Gray, *Enlightenment's Wake* (Routledge Classics, 2007) 36.

respect to the basic rights of the individual and the fundamental rules of constitutional law.⁷²

In this sense, John Stuart Mill argued that democratic government is as much a socio-political achievement as it is a matter of legal-institutional design. Democracy, Mill asserted, rests not so much on institutional framework but on values that are transmitted to citizens from generation to generation. Unfortunately, Mill also observed, some societies are not culturally prepared to accept all the moral implications of living under a democratic rule of law. He believed that the realisation of democratic government is actually ‘determined by social circumstances’.⁷³ These circumstances Mill believed to be relatively malleable so they can be changed for better or for worse. Although Mill considered that people could be taught to behave democratically, he nonetheless kept on insisting that some patterns of cultural behaviour are absolutely essential in determining the proper realisation of democracy and the rule of law. As Mill pointed out:

The people for whom the form of government is intended must be willing to accept it; or at least not so unwilling as to oppose an

⁷² Bruckner offers this insightful, though rather polemical, criticism of multiculturalism:

[U]nder the cover of respecting cultural or religious differences (the basic credo of multiculturalism), individuals are locked into an ethnic or racial definition, cast back into the trap from which we were trying to free them. Their good progressive friends set blacks and Arabs, forever prisoners of their history, back into the context of their former domination and subject them to ethnic chauvinism. As during the colonial era, they are put under house arrest in their skins, in their origins. By a perverse dialectic, the prejudices that were to be eradicated are reinforced: we can no longer see others as equals but must see them as ... victims of perpetual oppression whose past ordeals interest us more than their present merits:

Bruckner, above n 43, 145.

⁷³ John Stuart Mill, *Considerations on Representative Government* (William Benton, 1952) 31.

insurmountable obstacle to its establishment ... A rude people ... may be unable to practice the forbearance which ... representative government demands: their passions may be too violent, or their personal pride too exacting, to forego private conflict, and leave to the laws the avenging of their real or supposed wrongs.⁷⁴

In the long run, values such as democracy and the rule of law depend on a firm element of public morality that incorporates a serious commitment to the protection of basic individual rights, as well as a commitment to principles and institutions of the rule of law. Samuel Huntington once commented that if popular elections were held in most countries of the Middle East, chances are that such electoral process would bring radicals into power who, by appealing to their religious and/or ethnic loyalties, would be very inclined to deny a broad range of human rights to women and religious minorities.⁷⁵ Of course, Professor Huntington's prediction of the rise of radicalism in the Middle East if elections were held has actually been fulfilled. The recent fall of authoritarian regimes throughout the greater Middle East has fuelled growing persecution of minority communities.

The *Pew Research Center* has charted extensive government restrictions on non-Muslim religions in numerous 'democratic' countries of the Middle East, including Egypt, Afghanistan, Pakistan, Iraq, and the Palestinian territories.⁷⁶ In this context, because democracy may be

⁷⁴ Ibid 29.

⁷⁵ Samuel Huntington, 'Democracy for the Long Haul' in Larry Diamond, Marc Plattner, Yun-han Chu and Hung-mao Tien (eds), *Consolidating the Third Wave Democracies* (John Hopkins University Press, 1997) 7.

⁷⁶ Richard Russell, 'The Crushing of Middle Eastern Christianity', *The National Interest* (online), 10 May 2013 <<http://nationalinterest.org/commentary/the-crushing-middle-eastern-christianity-8457>>. Before the uprisings in Egypt, for example, ten per cent of the population identified with Christianity. But with a Muslim majority, the democratic elections are building a new government that is Muslim-dominated and determined to install strict Islamic law that forbids all

‘impracticable’ and even ‘an undesirable ideal’, ‘society will quickly relapse into a state of arbitrary tyranny’.⁷⁷

Indeed, surveys carried out by *Freedom House* on the situation of democracy and human rights throughout the world indicate that the denial of the broadest range of human rights comes from either Muslim-majority or Marxist-communist countries: ‘These worse-rated countries represent a narrow range of systems of cultures.’⁷⁸ According to *Freedom House*, the worst violators of human rights are North Korea, Turkmenistan, Uzbekistan, Equatorial Guinea, Eritrea, Saudi Arabia, Syria, Somalia and Tibet (under Chinese jurisdiction). Because of this, it is possible that the majority ideologies in these countries are not completely democratic, and it is important to openly discuss the reasons for this.

In short, real democracy has very little or nothing to do with state-sponsored ‘multiculturalism’. Nor is democracy simply a matter of good constitutional design, because democracy can actually be achieved in a

Christian activities. And yet, a survey by Pew Research Center has found that about 60 per cent of Egyptians actually want the country’s laws to ‘strictly’ follow the teachings of the Koran: Bloomberg, ‘Egyptians Back Sharia Law, End of Israel Treaty, Poll Shows’, *Arabian Business.Com* (online), 26 April 2011, <<http://www.arabianbusiness.com/egyptians-back-sharia-law-end-of-israel-treaty-poll-shows-396178.html>>. As for a ‘democratic’ country such as Iraq, the local Christian community has been severely discriminated against by Iraq’s Shia majority, largely in control of the elected government. Since the 2003 American and British military invasion ousted Saddam Hussein, the ongoing violence against the Christian community has led to a mass exodus of Christians. In the time of Hussein there were between 1.2 and 1.4 million Christians in the country. Today, after the American-led ‘coalition of the willing’ imposed ‘democracy’ on Iraq, it is estimated that fewer than 500 000 remain: Rupert Shortt, ‘In the Middle East, the Arab Spring Has Given Way to a Christian Winter’, *The Guardian* (online), 2 January 2013 <<http://www.guardian.co.uk/commentisfree/belief/2013/jan/02/middle-east-arab-spring-christian-winter>>.

⁷⁷ Friedrich Hayek, *Constitution of Liberty* (University of Chicago Press, 1960) 206.

⁷⁸ Arch Puddington, *Freedom in the World 2012: The Arab Uprisings and their Global Repercussions* (2012) Freedom House <http://www.freedomhouse.org/sites/default/files/FIW%202012%20Booklet_0.pdf>

variety of legal-institutional ways. Indeed, democracy ultimately is the result of an ‘interconnected cluster of values’ that are shared by members of a particular society from generation to generation.⁷⁹ As it has been properly said, ‘[democratic] values come to us trailing their historical past; and when we attempt to cut all [cultural] links to that past we risk cutting the life lines on which those values essentially depend’.⁸⁰ Of course, this also implies that the realisation of democracy is as much a socio-cultural as it is a legal-institutional achievement, since democracy ultimately depends on the intrinsic values and traditions of a particular society.⁸¹

VII CONCLUSION

One of the alleged goals of religious tolerance laws is to advance ‘multicultural democracy’. Although resting on ‘scepticism of truth’, so that universalistic claims about religion must be privatised as personal preferences, such laws may actually generate inter-religious strife by creating an environment of fear and intimidation on those who merely

⁷⁹ Martin Krygier, ‘Rule of Law’ in Neil Smelser and Paul Baltes (eds), *International Encyclopedia of the Social & Behavioral Sciences* (Elsevier, 2001) 134–4.

⁸⁰ Jeffrie Murphy, ‘Constitutionalism, Moral Scepticism, and Religious Belief’ in Alan Rosenbaum (ed) *Constitutionalism: The Philosophical Dimension* (Greenwood Press, 1988) 249.

⁸¹ Every year a non-governmental institution called *Freedom House* organises a survey on the situation of democracy and human rights throughout the world. The survey shows that the denial of the broadest range of human rights comes, mainly, from Marxist-communist and Muslim-majority nations. According to Freedom House, ‘these worse-rated countries represent a narrow range of systems of cultures’. The worst violators of human rights are North Korea, Turkmenistan, Uzbekistan, Equatorial Guinea, Eritrea, Saudi Arabia, Syria, Somalia and Tibet (under Chinese jurisdiction). If so, it is quite fair to suggest that there must exist something about communism and Islam that is clearly not democratic and to openly discuss the reasons for this: Arch Puddington, *Freedom in the World 2012: The Arab Uprisings and their Global Repercussions* (2012) Freedom House <http://www.freedomhouse.org/sites/default/files/FIW%202012%20Booklet_0.pdf> 5.

wish to express their opinions more openly. Not surprisingly, many citizens are now reluctant to join public conversation, seemingly to fear not only what other citizens might do to them but also what their own government might do. This leads to the self-censoring of ideas, ultimately making the secular government and its courts, according to Joel Harrison,

complicit in a process of legal silencing undertaken by rival minority groups, engaging with them in debates of truth and falsehood, good and evil. The court decides essentially theological questions in the process of finding incitement to hatred against persons.⁸²

In a world where terrorism has become common, and where radicalised Muslims have expressed sympathy with terrorists, the ability of Western democracies to defend their own interests is weakened by laws that make citizens unprepared to criticise or give warnings about the nature of religious beliefs, however well-based these warnings might be. This is the singular tragedy of ‘multicultural societies’ that allow legislation underpinned by postmodern philosophy to reduce free speech on some of the most fundamental issues of public morality.

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Harrison, above n 18, 72.