

# THE INTOLERANCE OF TOLERANCE – THE POLITICISATION OF RELIGION IS RELIGIOUS TOLERANCE A STRATEGIC SOLUTION TO PERSECUTION?

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## ABSTRACT

*Although freedom of religion has been well established in case law in Australia such as in the case of the Scientology Case<sup>1</sup>, in Attorney-General v Grant<sup>2</sup>, in which Justice Gibbs made it explicitly clear in his judgment that: ‘... in this country the law recognises a complete freedom of conscience in matters of religion...’, this same religious freedom codified in the Australian Constitution<sup>3</sup> as a Constitutional guarantee of religious freedom in section 116, the politicisation of religion which has prevailed since Christ has thwarted these freedoms, more with the advent of exclusion zones, and the associated High Court decision in Clubb v Edwards; Preston v Avery<sup>4</sup>.*

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<sup>1</sup> *Church of the New Faith v Commissioner of Pay Roll Tax (Vic)* (1983) 154 CLR 120 at 134 per Mason ACJ and Brennan J (cited as the Scientology Case)

<sup>2</sup> *Attorney-General (NSW) v Grant* (1976) 135 CLR 587 at 600, per Gibbs J.

<sup>3</sup> *Attorney-General (Vic) (ex rel Black) v Commonwealth* (1981) 146 CLR 559 at 605 per Stephen J.

<sup>4</sup> *Clubb v Edwards; Preston v Avery* [2019] HCA 11 (10 April 2019) at 11 per Kiefel CJ, Bell J, Keane J.

## I. INTRODUCTION

Despite rhetoric that we live in the most tolerant time in history, with the most anti-discrimination laws and protection mechanism for individual rights, according to leading global studies, 215 million Christians alone face significant levels of persecution today<sup>5</sup>. Persecution amongst Christians is the highest recorded, but, of course, there are other minority groups facing similar challenges.

So, what should the 'persecuted' response be? Should the intolerance of tolerance be endured? Are these matters best addressed in the public square - with political and legal force, or are they private matters to be simply prayed about and endured?

As a refugee family, we fled religious and racial persecution from Communist Romania in the 1980's, and we were blessed enough to receive asylum from Australia under the Keating Government. I know first-hand and full well that Australia is indeed the lucky country, and my heart grieves when, as a society, we often take these freedoms for granted.

When a person is persecuted for their faith, should they retreat their faith from the public square, or should anti-discrimination laws and the tolerance of others extend to those expressing religious views? When considering the intolerant nature of those who persecute those expressing their religion, *is the real issue perhaps the politicisation of religion?*

These are some of the human rights, legal, religious and political matters I would like to explore here, from an academic, experiential perspective as a trained international human rights lawyer and ordained Pastor, and someone who advocates for minorities in the Austral-Asia region.

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<sup>5</sup> 'Open Doors World Watch List 2018', <<https://www.opendoors.org.au/persecuted-christians/world-watch-list/>>, last accessed 14 November 2019.

## II. DEFINITION OF TOLERANCE - ITS LEGAL DOCTRINE AND THE LEGAL REASONING AS A BALANCING OF IDEAS AND CONFLICTING PRIORITIES

*According to the Cambridge dictionary online, tolerance is defined as a willingness to accept behaviour and beliefs that are different from your own, although you might not agree with or approve of them.*<sup>6</sup>

We practice tolerance every day - we may tolerate listening to music someone else has chosen on the long journey in our car, and this positive form of tolerance allows us to get along in our communities. What would you do if that guest in your car on the long drive started playing something offensive? Would you tolerate it further, or would your values and standards drive you to say something, at the risk of losing the friendship, or even losing face?

Politically, the question then becomes: at what point might our tolerance of the way things are politically and socially affect our own beliefs and our freedoms? This negative form of tolerance can be harmful in community living, as people can no longer express their beliefs in freedom, but instead, this compromise leads to the threat of other freedoms.

Is there a difference between tolerating cultural norms to tolerating that which affects our religious beliefs? May I submit to you - that both are connected? Our religious beliefs are intrinsically connected to the social norms, and therefore the laws we accept, espouse and practice.

There are various minority groups who currently live under state-sanctioned intolerance, persecution and even threat to life because of their beliefs and its practices. As observers, to what extent should we go on being tolerant to these human right violations from a comfortable distance - despite the persecution, discrimination and threat to those in other nations such as China? For, surely, as much as another person's rights and freedoms are being compromised, ours are equally under threat - regardless of politics, geography or ideologies. Further to this, is there a risk of an international intolerance creep, and will we see persecution rising in the West in the near future?

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<sup>6</sup> 'Tolerance', *The Legal Dictionary* (online), <<https://legal-dictionary.thefreedictionary.com/tolerance>> last accessed 14 November 2019.

The *Doctrine of Tolerance* refers to a belief that everyone has a point of view and should be respected for it. It holds that all philosophies, all religions, all opinions, are equally valid in thought and practice, without one morally superior to others.<sup>7</sup>

But - are they?

### III. HISTORICAL TOLERANCE TO PERSECUTION – THE EARLY CHRISTIAN CHURCH TO TODAY

Let's look at the life and times of Christ as a historical example. During the time of Christ, we saw historically that it was the intolerance of the Religious Priests - bending the will of Pilate that led to the brutal crucifixion of Christ. Why? Because Jesus challenged the political, social and economic structures of his society: teaching all who would listen that *ALL* may bear the name of YHWH - reserved to that point only for the Jews.

Jesus was a legal and political revolutionary of his day - without being political.

The crucifixion of Christ was a highly politicised event, with the Religious High Priests and Lawyers of the Jewish world totally confronted by His teaching on the inclusivity of the Gentiles – which included women, children, the widowed, the disabled, leper's, the weak, the sick and the poor of society - challenging the very core identity of all Jews.

The life, death and resurrection of Christ was highly political - not by Christ's intent, but by necessity. For, when you address religion, you are addressing the economic, social, health, education, welfare and governance structures of communities and nations. Religion and politics cannot be separated– whether it's Christianity, or the religions of secularism and humanism. Our ideologies drive the way we govern, lead, make decisions and organize ourselves as a people group, and our ideologies are at the heart our 'religion' that so intrinsically affects our politics.

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<sup>7</sup> Ibid.

Did Jesus have a political mission? Essentially, the political mission of Jesus was to restore Kingdom principles of leadership and governance to a fractured world caught up in self worship and pleasure - sound familiar?

Jesus never intended to politicise the Church, but He did not shy away from the Church being an influence in political spheres. It was Constantine in the 4th Century that politicised the Church, triggered by what he referred to as a 'conversion' experience, with his efforts leading not only to the legalisation of Christianity and giving respite to persecuted Christians who had experienced severe forms of brutality since Pentecost - but Constantine also called the Council of Nicea in 325AD to settle theological differences - finally forming the tenants of the Christian faith which evangelicals still adhere to today.<sup>8</sup>

Constantine's efforts established the Church as more powerful than the King for a time in history. This was never the intent of Christ, for if it was, Jesus would have accomplished this through His work, but also that of His Apostles. But, Jesus did not come to establish His Kingdom here on earth, He came to disrupt the current systems of the world. We can all agree - the current man-made systems of this world are found wanting and need disrupting!

The politicisation of religion under Constantine led to a blurring of the powers of the Crown and the Church and opened the door to the compromise and corruption of power in the Church like never before.<sup>9</sup> The Church had so much power, that the world started hating her.

Religion is in every way political - but it should never be politicised.

In its first three centuries, the Christian church endured persecution at the hands of the Roman authorities- having significant historical and theological consequences for the spread of Christianity.

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<sup>8</sup> 'First Council of Nicaea', *Encyclopaedia Britannica* (online), <<https://www.britannica.com/event/First-Council-of-Nicaea-325>>, last accessed on 14 November 2019.

<sup>9</sup> 'How the Church Dominated Life in the Middle Ages', *History Hit* (online), 11 November 2018, <<https://www.historyhit.com/how-the-church-dominated-life-in-the-middle-ages/>>

It has been calculated that between the first persecution under Nero in 64 to the Edict of Milan in 313, Christians experienced 129 years of persecution<sup>10</sup> and 120 years of toleration and peace.<sup>11</sup>

The Roman<sup>12</sup> persecutions were generally sporadic, localised, and dependent on the political climate and disposition of each Emperor. Imperial decrees against Christians were often directed against church property, the Scriptures, or clergy.

For the Romans, religion was first and foremost a social activity that promoted unity and loyalty to the State - a religious attitude the Romans called pietas, or piety. Cicero wrote that if piety in the Roman sense were to disappear, social unity and justice would perish along with it.<sup>13</sup>

Persecution sparked the spread of Christianity, prompted defences and explanations of Christianity, and, in its aftermath, raised fundamental questions about the nature of the Church.

So, how about today? Surely, there should be less persecution today than ever before in history? It has been estimated that more Christians have been martyred in the last 50 years than in the church's first 300 years. In a recent article, Justin D. Long emphasised the startling fact that more people have died for their faith in the twentieth century than in all of the previous centuries combined. *'During this century, we have documented cases in excess of 26 million martyrs. From AD 33 to 1900, we have documented 14 million martyrs.'*<sup>14</sup>

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<sup>10</sup> At least since the fifth century, it has been customary to count ten major persecutions in the early church, a number that nicely parallels the ten plagues of Egypt. These ten persecutions are: 1. Persecution under Nero (c. 64-68). Traditional martyrdoms of Peter and Paul. 2. Persecution under Domitian (r. 81-96). 3. Persecution under Trajan (112-117). Christianity is outlawed but Christians are not sought out. 4. Persecution under Marcus Aurelius (r. 161-180). Martyrdom of Polycarp. 5. Persecution under Septimus Severus (202-210). Martyrdom of Perpetua. 6. Persecution under Decius (250-251). Christians are actively sought out by requiring public sacrifice. Could buy certificates (libelli) instead of sacrificing. Martyrdoms of bishops of Rome, Jerusalem and Antioch. 7. Persecution under Valerian (257-59). Martyrdoms of Cyprian of Carthage and Sixtus II of Rome. 8. Persecution under Maximinus the Thracian (235-38). 9. Persecution under Aurelian (r. 270-275). 10. Severe persecution under Diocletian and Galerius (303-324).

<sup>11</sup> Mark Galli, *The Persecuting Emperors* (1999) 11 *Christian History*, 20.

<sup>12</sup> In order to understand the Roman distrust of Christianity, one must understand the Roman view of religion.

<sup>13</sup> Everett Ferguson, *Persecution in the Early Church: Did You Know?*, (1990) 11 (3) *Christian History* 27) <<https://www.christianitytoday.com/history/issues/issue-27/2700.html>>, last accessed 14 November 2019.

<sup>14</sup> Justin D. Long, *Modern Persecution*, *Christianity.com*, <<https://www.christianity.com/church/church-history/timeline/1901-2000/modern-persecution-11630665.html>>

Around 215 million Christians face significant levels of persecution in the world today, according to the latest *World Watch List from Open Doors*<sup>15</sup>.

During reporting for the 2018 *World Watch List*, 3,066 Christians were killed, 1,252 were abducted, 1,020 were raped or sexually harassed, and 793 churches were attacked. Researchers for the organisation estimate 1 in 12 Christians live where their faith is illegal, forbidden, or punished.

The ugly face of intolerance that uses crimes against humanity, genocide, murder and even government sanctioned persecution to feed its thirst, results in a Christian being put to death for their faith every five minutes somewhere in the world<sup>16</sup>.

Persecution takes many forms - even social isolation can have a profound impact on converts. Here is an example: when Bahai who is 22 years old and her mother came to faith, their community in India became aggressive. Bahai and other Christians refused to deny Jesus, and were violently thrown out of the village. Bahai went to Bible school to strengthen her faith so that one day she can return to her village with the gospel.<sup>17</sup>

*'Don't be afraid when persecution comes to you. It's part of the Christian life. It's a privilege to be persecuted.'* – Bahai says.

Behind the veil of intolerance for Christianity is a political agenda - one that would seek to silence faith, hope and love.

As a fundamental tenant of societies, religious freedom has been asserted, fought for and celebrated by men and women throughout history - often those same men and women who understand the grave price that is paid for these fundamental freedoms.

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<sup>15</sup> 'Open Doors World Watch List 2018', <<https://www.opendoors.org.au/persecuted-christians/world-watch-list/>>, last accessed 14 November 2019.

<sup>16</sup> Andrea Tokaji, *'Every Five Minutes, a Christian is put to death Somewhere in the World'*, *Eternity News*, 3 April 2019, <<https://www.eternitynews.com.au/opinion/every-five-minutes-a-christian-is-put-to-death-somewhere-in-the-world/>>

<sup>17</sup> *'Bahai's Story'*, *Open Doors*, <<https://www.opendoors.org.au/persecuted-christians/about-persecution/>>, last accessed 14 November 2019.

The freedoms of speech, freedoms of association, conscience and movement are associated freedoms to the freedom of religion, and are essential to uphold the common person's rights to engage in the political process, the media and in academia.

This, unfortunately is not the reality for millions of Christians persecuted for their faith daily in many countries around the world today - particularly for those who are affected by blasphemy laws: which punish converts out of Islam by death.

Take blasphemy laws in Pakistan for example: an estimated number of 1,274 people have been charged under the stringent blasphemy laws of Pakistan between 1986, from when they were included in the Constitution by General Zia ul Haq, until 2010.<sup>18</sup>

Pakistan's Penal Code Section dates back to pre-partition India when it was introduced in 1860. Section 295, better known as the *Blasphemy Law*, deals with religious offences and was meant to prevent religious violence. Prior to 1986, only 14 cases pertaining to blasphemy were reported.

The blasphemy laws include a death penalty for the defamation of the Holy Prophet Mohammed and life imprisonment for the desecration of the Holy Quran.

*According to sources, 51 people accused of blasphemy were murdered in Pakistan before their respective trials were over, however, the death sentence for blasphemy has never technically been implemented.*<sup>19</sup>

Or, take the example of my country of birth; Romania - where the ideology of socialism sought to literally kill the concept of God, Religion and Church: The Communist Party of the Soviet Union, in accordance with Marxist–Leninist interpretation of history, saw religion as a capitalist remnant that would inevitably disappear as its social base disappeared.<sup>20</sup>

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<sup>18</sup> *Timeline: Accused under the Blasphemy Law*, Pakistan Defence (online), 18 August 2013, <<https://defence.pk/pdf/threads/timeline-accused-under-the-blasphemy-law.489867/>>

<sup>19</sup> Ibid.

<sup>20</sup> Lavinia Stan and Lucian Turcescu. 'The Romanian Orthodox Church and Post-Communist Democratisation' (2000) 52 (8) *Europe-Asia Studies* 1467-1488.



Romania became a Communist Nation during WWII under the force of the USSR.<sup>21</sup>

The Romanian Anti-Religious Campaign initiated by the Socialist Republic of Romania, under the doctrine of Marxist–Leninist atheism, took a hostile stance against religion, and set its sights on the ultimate goal of an atheistic society, wherein religion would be recognised as the ideology of the bourgeoisie.<sup>22</sup>

Ironically, the intolerance of religion arose from atheism - a registered religion today<sup>23</sup>.

Under the Communism regime in Romania, more than 5,000 Orthodox Christian priests were imprisoned. The Orthodox archdiocese of Cluj contains biographies of 1,700 church personnel jailed.<sup>24</sup>

Of course, our modern-day example of Communist-Government sanctioned persecution in our region is China. Despite increased pressure of Christians in China, the church in this country of 1.4 billion people continues to grow.<sup>25</sup>

On the 2018 *World Watch List*, China ranks 43 of countries most difficult to follow Jesus, with nearly 100 million people identifying as Christians. Despite these difficulties, over the last four decades, the number of believers has grown by an average of 10% annually since 1979 in China.<sup>26</sup>

In these historical and current examples, the common denominator is an intolerant political ideology to religion that seeks to wipe out religious belief, thought, practice, association, freedoms of speech and movement - which in turn affects the political expression of each of these adherents, resulting in persecution, but also growth and often reform.

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<sup>21</sup> Romania was occupied by Soviet troops in 1944 and became a satellite of the Soviet Union in 1948. The country was under communist rule from 1948 until 1989, when the regime of Romanian leader Nicolae Ceausescu was overthrown. Free elections were held in 1990.

<sup>22</sup> Lucian Leustean, *Orthodoxy and the Cold War: Religion and Political Power in Romania, 1947-65* (Palgrave MacMillan, 2008), 92. The ultimate goal was to transform Romania into a communist atheist society.

<sup>23</sup> David Lose, 'Has Atheism Become a Religion?', *The Huffington Post* (online), 26 May 2011, <[https://www.huffpost.com/entry/atheism-religion\\_b\\_867217](https://www.huffpost.com/entry/atheism-religion_b_867217)>

<sup>24</sup> Jonathan Luxmoore, 'The Iron Curtain's Secrets', *The Tablet*, 23 January 1999, 106-7.

<sup>25</sup> Jacob Ennever, 'China: Pressure is Growing, But So Is The Church', *Open Doors*, 12 September 2018, <<https://www.opendoors.org.au/persecuted-christians/prayer-news/china-pressure-is-growing-but-so-is-the-church/>>

<sup>26</sup> World Watch List 2018, above n 14.

#### IV. THE LEGAL PROTECTIONS OF THE FREEDOM OF RELIGION IN AUSTRALIA

The global genocide of Christians continues, despite international Conventions and Charters professing freedom of religion and its associated freedoms for all persons<sup>27</sup>.

The preservation of religious liberty and equality should stand as a matter of fundamental concern to the Australian people - ultimately finding its expression in s 116 of the *Commonwealth Constitution*<sup>28</sup>, preserving religious freedom and religious equality.

The *Constitutional* guarantee of religious freedom in s 116 is clear, and contains a four-fold guarantee of religious freedom in the nature of a restriction on the exercise of Commonwealth legislative powers.

Our Constitution provides important safeguards for religious freedom for Australians by using four specific mechanisms applying to both legislative and executive action - prescribing the imposition of religious tests for officeholders, including for: (i) the imposition of religious observances; (ii) the establishment of one religion or church over all others; and (iii) the prescription of any religious worship.<sup>29</sup>

There are a number of important international treaties which protect religious freedom.

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<sup>27</sup> The primary sources of law underpinning the mandate of the Special Rapporteur on freedom of religion or belief are *Article 18 of the Universal Declaration of Human Rights*, *Article 18 of the International Covenant on Civil and Political Rights* and the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*. The work of the mandate is also guided by the relevant articles of the *International Covenant on Economic, Social and Cultural Rights*, the *International Convention on the Elimination of All Forms of Racial Discrimination*, the *Convention on the Rights of the Child*, the *Convention on the Elimination of All Forms of Discrimination against Women*, the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, the *Convention on the Prevention and Punishment of the Crime of Genocide* and the *Convention relating to the Status of Refugees*. The mandate is also guided by relevant resolutions of the Human Rights Council, the General Assembly and other organs of the United Nations, as well as relevant jurisprudence of the treaty bodies and provisions of international humanitarian law. The Special Rapporteur also takes into account relevant human rights instruments and jurisprudence at the regional level. International Standards on Freedom of Religion or Belief, OHCHR, at: <https://www.ohchr.org/EN/Issues/FreedomReligion/Pages/Standards.aspx>

<sup>28</sup> *Canterbury Municipal Council v Moslem Alawy Society Ltd* (1985) 1 NSWLR 525 at 544 per McHugh JA.

<sup>29</sup> *Attorney-General (Vic) (ex rel Black) v Commonwealth* (1981) 146 CLR 559 at 605 per Stephen J.

The most important international law reflecting the rights to freedom of religion which Australia has undertaken to be bound by, is the *International Covenant on Civil and Political Rights* (the ICCPR), Article 18 of which provides for a broad rights for religious freedom<sup>30</sup>.

The *International Covenant on Civil and Political Rights* has been in force for almost 40 years, and seeks to commit countries to respect, protect and fulfil the fundamental civil and political rights of individuals, including: the right to life; freedom of religion; freedom of expression; the right to peaceful assembly; freedom of association; and the right to non-discrimination and equal protection of the law.

Although Australia is a signatory to the ICCPR, it is in the implementation of its provisions into our domestic laws that the principles of the ICCPR can take effect in our legal system - and therefore be applied and enforced<sup>31</sup>.

Religion is not covered as a protected attribute in the four current Federal Anti-Discrimination Acts. It is, however, the subject of several exemptions.

Freedom of religion is one right among many others and so, in practice, this right co-exists with a broad suite of other human rights, including in the *Human Rights and Equal Opportunity Commission Act 1986* (Cth), the *Racial Discrimination Act 1975* (Cth)<sup>32</sup> and

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<sup>30</sup> Article 18 of the *International Covenant on Civil and Political Rights* states: 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice. 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Furthermore, Article 2 of the *International Covenant on Civil and Political Rights* states that: 2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognised in the present Covenant.

<sup>31</sup> Even though in *Minister for Immigration v Ah Hin Teoh* (1995) 69 ALJR 423, Mason CJ and Deane J said that ratification of a Treaty is a "positive statement by the [Commonwealth] government to the world and the Australian people that the government and its agencies will act in accordance with the Treaty".

<sup>32</sup> The *Racial Discrimination Act 1975* (Cth) ('RDA') provides some limited protection against discrimination on the basis of religion. If a religious group can also be classified as an "ethnic" group, the RDA may cover direct and indirect discrimination and vilification under the racial hatred provisions of the Act. Even if a religious group cannot be classified in that way, the RDA arguably covers discrimination on the basis of religion in certain circumstances such as indirect race discrimination.

the *Workplace Relations Act 1996* (Cth) and by several States and Territories in anti-discrimination<sup>33</sup> and Commonwealth and State industrial relations legislation.

Both the State of Victoria (*Charter of Human Rights and Responsibilities Act 2006* Vic s 14) and the Australian Capital Territory (*Human Rights Act 2004* ACT s 14) have enacted general human rights instruments which contain explicit protections for religious freedom in these State-based human rights Charters, in addition to Section 116 of the Commonwealth Constitution<sup>34</sup> which narrowly protects freedom of religion constitutionally and legislatively by the Commonwealth.

The recent Ruddock Report<sup>35</sup> which came out of a Parliamentary Inquiry into Religious Freedom<sup>36</sup> has sparked attention and discussion over a possible Religious Freedom Commissioner<sup>37</sup> or a proposed Restoration of Freedoms Bill<sup>38</sup> in the place of religious freedom legislation.

While some LGBTIQ+ activists fear that such legal developments will encroach on their freedoms<sup>39</sup>, others believe that:

<sup>33</sup> The *Equal Opportunity Act 1995* (Vic), the *Anti-Discrimination Act 1991* (Qld), the *Equal Opportunity Act 1984* (WA), the *Discrimination Act 1991* (ACT), the *Anti-Discrimination Act 1996* (NT). The *Anti-Discrimination Act 1977* (NSW) prohibits discrimination on the ground of "race" which also includes ethno-religious background.

<sup>34</sup> Australian Constitution, s 116: "*The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth*".

<sup>35</sup> '*Religious Freedom Review: Report of the External Panel*', Prime Minister and Cabinet, 18 May 2018, <<https://www.ag.gov.au/RightsAndProtections/HumanRights/Documents/religious-freedom-review-expert-panel-report-2018.pdf>>

<sup>36</sup> On 22 November 2017, the then Prime Minister, the Hon Malcolm Turnbull, announced the appointment of an Expert Panel to examine whether Australian law adequately protects the human right to freedom of religion. On 18 May 2018, the Panel delivered its Report to the Prime Minister. The statement the Panel made after submitting its report is available. On 13 December 2018, the Panel's Report and the Government response were released and are available on the Attorney-General's website at: <https://pmc.gov.au/domestic-policy/religious-freedom-review>

<sup>37</sup> There is political talk of a Religious Discrimination Bill; a Religious Discrimination (Consequential Amendments Bill) which will amend other Commonwealth legislation to ensure consistency with the Religious Discrimination Bill; and a Human Rights Legislation Amendment (Freedom of Religion) Bill which includes the appointment of a Religious Freedom Commissioner.

<sup>38</sup> Augusto Zimmermann, '*We Need a Restoration of Freedoms Bill, Not Religious Freedom Legislation*', *The Spectator Australia* (online), 3 July 2019, <<https://www.spectator.com.au/2019/07/we-need-a-restoration-of-freedoms-bill-not-religious-freedom-legislation/>>

<sup>39</sup> Andrew M. Potts, '*Government Plans for Religious Freedom Commissioner at AHRC Leaked*', 19 July 2019, <<http://www.starobserver.com.au/news/government-plans-for-religious-freedom-commissioner-at-ahrc-leaked/184702>> Just.equal spokesperson Rodney Croome told the Star Observer he was concerned that religious groups were being given an inside track when it came to the government's plans for this legislation.

*“handing over the definition of religion to the Human Rights Commission is a terrible idea that risks further undermining our individual rights and freedoms. Wanting to be seen to do something, this government is just about to hand over a vast array of powers to a controversial body of unelected lawyers that have an appalling record of disregard for freedom of speech...”*<sup>40</sup>

In addition to these codified legislative State-based, Constitutional and international law definitions of religion, case law also assists us in defining what ‘*freedom of religion*’ is, if it has limitations, exemptions or privileges. We will look at some of these now.

## V. FREEDOM OF RELIGION DEFINED IN CASE LAW

The United States Courts have defined religion broadly as a system of belief which contain supernatural element and which go beyond theistic religions.<sup>41</sup>

Courts in England have taken a much narrower approach to defining religion, citing that the two essential attributes of religion are faith and worship which require faith in a god and worship of that god, limiting the concept of religion to theistic religions.<sup>42</sup>

The High Court of Australia in 1983 in the Scientology case<sup>43</sup> considered the expression of religious freedom, stating:

*“[F]reedom of religion, the paradigm freedom of conscience, is of the essence of a free society. The chief function in the law of a definition of religion, it is to mark out an area within which a person subject to the law is free to believe and to act in accordance with his belief without legal restraint. Such a definition affects the scope and operation of s116 of the Constitution and identifies the subject matter which other laws are presumed not to intend affect. Religion is thus a concept of fundamental importance to the law.”*<sup>44</sup>

We see here in his Honour’s judgment an indication in the last sentence quoted above an acknowledgement that religion is a concept that has fundamental importance to the law. I think we have forgotten this fact in our society, largely because people do not see themselves as religious, although everyone has a ‘religion’, or ideology, or belief system.

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<sup>40</sup> Augusto Zimmermann, ‘A Religious Freedom Commissioner: Not Just Worse Than Doing Nothing, But The Wrong Thing’, *The Spectator Australia* (online), 19 July, 2019, at: <https://www.spectator.com.au/2019/07/a-religious-freedom-commissioner-not-just-worse-than-doing-nothing-but-the-wrong-thing/>

<sup>41</sup> *Malnak v Yogi* 592 F(2d) 197 (1979) and *Torcaso v Watkins* 367 US 488 at 495.

<sup>42</sup> *Re South Place Ethical Society; Barralet v Attorney-General* [1980] 1 WLR 156 at 1572, per Dillon J.

<sup>43</sup> *Church of the New Faith v Commissioner of Pay Roll Tax* (Vic) (1983) 154 CLR 120 at 134 per Mason ACJ and Brennan J (cited as the Scientology Case)

<sup>44</sup> *Ibid.*, at 130 per Mason CJ and Brennan J.

Their Honours in the Scientology case<sup>45</sup> could not reach consensus on the definition of religion, but rather provided several categories of definition that are arguably circular and not closed to the law, agreeing only that the legal trust of religion should not be confined to theistic religions. The three broad definitions offered by their Honours were:

1. *twofold: belief in a supernatural being or thing or principle; and the acceptance of cannons of conduct in order to give effect to that belief, although cannons of conduct which offend against the ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion.*<sup>46</sup>
2. *five tenants: that the legal definition of religion is satisfied when a particular system of ideas and practices satisfies: (a) the particular collection of ideas and practices or both, involving belief in the supernatural - the belief that reality extends beyond that which is capable of perception by the senses; (b) the ideas relate to man's nature and place in the universe and man's relation to supernatural things; (c) the ideas are accepted by adherents as requiring or encouraging them to observe particular standards or codes of conduct or to participate in specific practices having supernatural significance; (d) the adherents constitute an identifiable group or groups even though they are possibly loosely knit and verifying beliefs and practices; (e) the adherents themselves see the collection of ideas or practices (or both) as constituting a religion.*<sup>47</sup>
3. *Anybody which claims to be religious and to believe in a supernatural being or beings, whether physical and invisible, or a physical or invisible god or spirit, or an abstract god or entity is religious; anybody which claims to be religious and offers to find a meaning and purpose in life is religious.*<sup>48</sup>

Arguably, whenever the legislature prescribes what religion is, or requires the executive or judiciary to define what religion is, the definition will inevitably become narrow - tainted by political agenda: posing an ultimate threat to religious freedom.

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<sup>45</sup> *Ibid.*, at 134 per Mason CJ and Brennan J.

<sup>46</sup> *Ibid.*, at 136 per Mason CJ and Brennan J.

<sup>47</sup> *Ibid.* at 174 per Wilson J and Deane J.

<sup>48</sup> *Ibid.* at 151 per Murphy J.

In the *Scientology Case*<sup>49</sup>, Mason and Brennan JJ in their judgment defined the state's role in relation to religious belief as having no prophetic role under our laws, and went on to say that '*the state can neither declare supernatural truth, nor determine the parts through which the human mind must search in a quest for supernatural truth*'.

In Australia, it was established legal principle in case law that all persons had complete freedom of conscience in all matters of religion. In a NSW matter, Justice Gibbs in 1976 made it explicitly clear in his judgment that:

*"... in this country the law recognises a complete freedom of conscience in matters of religion. No one is compelled to adhere to, or to abjure, any particular religious opinions. Any member of a church is perfectly free to leave that church and join another which professes different beliefs and has a different mode of government. No court may prevent a citizen from abandoning religious beliefs, previously thought to be fundamental, and embracing a new and essentially different faith."*<sup>50</sup>

In fact, in 1943, the High Court held that the *National Security Act 1939 (Cth)* and its Regulations<sup>51</sup> were invalid due to their far-reaching provisions - going beyond their Constitutional powers in the *Jehovah's Witness* case<sup>52</sup>, where the High Court considered the question of whether the regulations were valid or contrary to s 116.

The High court unanimously held in the *Jehovah's Witness* case<sup>53</sup> that s 116 of the Constitution does not prevent the Commonwealth Parliament from making laws prohibiting the advocacy of doctrines or principles which, though advocated in pursuance of religious convictions, are prejudicial to the prosecution of a war in which the Commonwealth is engaged.

In this matter, limits of the constitutional guarantee established by s 116 were considered<sup>54</sup> during Australian war-time and its application to the *National Security (Subversive Associations) Regulations*, and whether it infringes upon section 116 of the Constitution by its application to the religious association known as Jehovah's Witnesses.

In his judgment in the *Jehovah Witnesses'* case, Latham CJ stated that:

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<sup>49</sup> Ibid. at 134 per Mason AC and Brennan J

<sup>50</sup> *Attorney-General (NSW) v Grant* (1976) 135 CLR 587 at 600, per Gibbs J.

<sup>51</sup> *National Security (Subversive Associations) Regulations 1940 (Cth)*.

<sup>52</sup> *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116.

<sup>53</sup> Ibid.

<sup>54</sup> Ibid.

*“[A]ccordingly no law can escape the application of s116 simply because it is a law which can be justified under ss 51 or 52, or under some other legislative power. All the legislative powers of the Commonwealth are subject to the condition which s116 [of the Constitution] imposes..... The prohibition in s116 operates not only to protect the freedom of religion, but also to protect the right of a man to have no religion. No Federal law can impose any religious observance. Defaults in the performance of religious duties are not to be corrected by Federal law - Deorum injuriae Diis curae. Section 116 proclaims not only the principle of toleration of all religions, but also the principle of toleration of absence of religion.”<sup>55</sup>*

All legislation is subject to the application of section 116 of the Australian Constitution, giving rise to the principle of the toleration of religion, as well as the principle of the toleration of the ‘absence’ of religion.

Latham CJ also stated that:

*“It is a well-established doctrine of constitutional law that it is for Parliament to choose the means by which its powers are to be carried into execution. In the absence of a relevant constitutional prohibition it is not a proper function of a court to limit the method of exercising a legislative power.”<sup>56</sup>*

The High Court, in the midst of World War II unanimously held that the *National Security Act 1939* (Cth) did not infringe against section 116, however, the High Court did hold that the Government had exceeded the scope of section 51(vi) of the *Constitution*<sup>57</sup>. Latham CJ held that the *Constitution* permitted the Court to ‘reconcile religious freedom with ordered government .... mak[ing] it possible to reconcile religious freedom with ordered government’.<sup>58</sup>

Essentially, the High Court held that freedom of religion should be upheld, and that national security legislation disproportionately encroached on the freedoms of the Jehovah’s Witnesses religion and the exercise of their faith - in public - to the possible security threat of the nation in war time.

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<sup>55</sup> (1943) 67 CLR 116 at 2.

<sup>56</sup> *Ibid.*, 12.

<sup>57</sup> *Commonwealth of the Australian Constitution Act Section 51* – “The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: (vi) the naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth ...”

<sup>58</sup> *Ibid.*, 10.



How times have changed. We now have laws against 'offending'<sup>59</sup> one another. Perhaps this is due to the rise in the politicisation of religion in recent times. Although religion affects every part of politics, it should never be politicised. An example of this tension arises in the recent 'exclusion zone'<sup>60</sup> laws, to which we have to ask: are exclusion zone laws a matter of freedom of religion, conscience and association, or are they a matter of 'political communication', as suggested in the recent *Clubb*<sup>61</sup> case by the High Court.

The facts of the case: On the 4<sup>th</sup> of August 2016, Mrs Clubb was seen by police to be standing at the eastern boundary of the East Melbourne Fertility Control Clinic standing about 5 meters from the entrance to the Clinic with pamphlets in her hand. At 10.30 am she approached a young couple entering the Clinic, spoke to them, and attempted to hand them a pamphlet. The young man declined the proffered pamphlet and moved, with the young woman, away from Mrs Clubb.<sup>62</sup>

In the court room, the evidence did not establish what was said between Mrs Clubb and the young couple, but the pamphlet that Mrs Clubb proffered offered counselling and assistance to enable pregnancy to proceed to birth.<sup>63</sup>

Mrs Clubb was charged in the Magistrates' Court of Victoria with the following offence:

*"[Mrs Clubb] at East Melbourne on the 4/8/16 did engage in prohibited behaviour namely communicating about abortions with persons accessing premises at which abortions are provided while within a safe access zone, **in a way that is reasonably likely to cause anxiety or distress.**"*<sup>64</sup> (emphasis added)

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<sup>59</sup> Section 18C of the *Racial Discrimination Act 1975* (Cth) states: "Offensive behaviour because of race, colour or national or ethnic origin. (1) It is unlawful for a person to do an act, otherwise than in private, if: (a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and (b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group". Note: Subsection (1) makes certain acts unlawful. Section 46P of the *Australian Human Rights Commission Act 1986* allows people to make complaints to the Australian Human Rights Commission about unlawful acts. However, an unlawful act is not necessarily a criminal offence. Section 26 says that this Act does not make it an offence to do an act that is unlawful because of this Part, unless Part IV expressly says that the act is an offence. (2) For the purposes of subsection (1), an act is taken not to be done in private if it: (a) causes words, sounds, images or writing to be communicated to the public; or (b) is done in a public place; or (c) is done in the sight or hearing of people who are in a public place. (3) In this section: "public place" includes any place to which the public have access as of right or by invitation, whether express or implied and whether or not a charge is made for admission to the place.

<sup>60</sup> *Public Health and Wellbeing Amendment (Safe Access Zones) Act 2015* (Vic).

<sup>61</sup> *Clubb v Edwards; Preston v Avery* [2019] HCA 11 (10 April 2019).

<sup>62</sup> *Ibid.*, at 11 per Kiefel CJ, Bell J, Keane J.

<sup>63</sup> *Ibid.*, 11 per Kiefel CJ, Bell J, Keane J.

<sup>64</sup> *Ibid.*, 10 per Kiefel CJ, Bell J, Keane J.

In deciding whether exclusion zones are Constitutional, the High Court held that the current laws in Victoria and Tasmania were valid, which essentially turned the compassionate religious acts of prayer, counselling and religious outreach in public into the category of '*political communication*' - arguably at the risk of compromising Australian's freedoms of religion, association, expression, speech and practice in public.

In the *Clubb* High Court ruling, religious expression, and its associated freedoms has been re-interpreted as '*political communication*' - dangerously redefining religion into a category it was never intended.

Given that the Court did not establish what Mrs Clubb said to the young couple, and that she merely handed a counselling flyer to them - in concern of their mental health and well-being, how were Mrs Clubb's actions different to, for example: Jehovah's Witnesses handing out a Watchtower magazines outside supermarkets or the Mormons doorknocking? Can one argue this act may cause '*anxiety or distress*'?

Mrs Clubb acted as a result of her religious convictions and beliefs of the sanctity of life.

What distinguishes '*communication*' of religious thought in public from '*political communication*' in public - and should they be measured differently?

In the related Federal Court decision of *Evans v NSW*<sup>65</sup>, where the Full Court in ruling on the invalidity of some regulations constraining religious comment during *World Youth Day*, the court held that where legislation was ambiguous it would be interpreted so as to favour the internationally recognised right of religious freedom to the maximum extent possible, referring at para [79] to the fact that:

“ [an] important freedom generally accepted in Australian society is freedom of religious belief and expression.”

This precedent was not adhered to in the High Court ruling in the *Clubb* case, although the High Court can pretty do whatever they like when it comes to judgements.

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<sup>65</sup> *Evans v NSW* [2008] FCAFC 130.

In Mrs Clubb's case, the argument that was made was that a counselling pamphlet was '*reasonably likely to cause anxiety or distress*'. This is a subjective test and is difficult to prove on the facts of the case, as in this particular case the evidence did not establish what was said between Mrs Clubb and the young couple<sup>66</sup>, and the nature of anxiety or distress had not been established, in accordance with the charge laid against Mrs Clubb.

It was argued that, although the evidence did not establish what Mrs Clubb actually said to the couple seeking access to the Clinic, it may be inferred that her conduct in proffering the pamphlet was directed solely at dissuading the young lady from having an abortion.

The question here is: did Mrs Clubb engage in political communication, or a religious form of communication?

The implied freedom of political communication is derived from the democratic structure of the Australian Constitution, under which Parliaments, both Commonwealth and State have a duty not to unduly restrict free speech on political issues.

The question the court asked was: did Mrs Clubb's behaviour actually constitute political communication? With respect to their Honours, was the High Court in fact asking the wrong question, and in the process politicising religion, which is disallowed by s116 of the Australian Constitution?

My concern remains: since when is the public expression of your religious conscience political communication?

With respect to their Honours, was not Mrs Clubb expressing her religious views that every life is precious and worth saving through association with the group she was with via exercising her freedoms of belief, speech and movement by extending an invitation to counselling to the young couple walking into the abortion clinic?<sup>67</sup>

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<sup>66</sup> Ibid., 11 per Kiefel CJ, Bell J, Keane J.

<sup>67</sup> Is this act worthy of a criminal record and a term of up to 12 months imprisonment? The offence-creating provision in Pt 9A is s 185D provides: "A person must not engage in prohibited behaviour within a safe access zone. Penalty: 120 penalty units or imprisonment for a term not exceeding 12 months."

I submit to the reader that given that most activists against abortion are expressing their religious convictions in the context of providing alternative services such as counselling and suggesting alternate options for the parents such as adoption, or they simply stand near clinics in silence while praying, all being the public expressions of belief, conscience, religion in the context of association and their freedom of movement.

Therefore, exclusion zone laws become a subtle erosion of the right of all citizens to express their freedom of belief in public, their freedom to associate with a likeminded group to do so, and the freedom to express their religion and convictions in the public square to others.

It doesn't actually matter what your position on abortion is; when Mrs Clubb was dragged off to prison and then to court, charged by the police for expressing her beliefs in public, your right to do the same was also under threat. Should we indeed tolerate such '*persecution*' of the expression of our faiths?

Dignity and respect for the other emerges out of empathy, compassion and understanding or 'tolerance', which is most powerfully expressed in the in the Christian understanding of *Imago Dei* - belief in the intrinsic value of all human persons as created in the image of a Divine Triune God who is love.

Maintenance of the Constitutionally prescribed system of government demands tolerance of political communication that is unwelcome and offensive<sup>68</sup>, expressed also in European human rights jurisprudential conceptions of margin of legislative respect or tolerance<sup>69</sup>, and applies to giving precedent to international human right norms of religious freedoms, including when these 'unwelcome and offensive' expressions subject to a margin of legislative respect or tolerance are practiced in public by personal conviction and belief.

Mrs Clubb's actions in handing out a counselling leaflet therefore can be seen as her public expression of her religious beliefs, permitted by her conscience and freedom of association,

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<sup>68</sup> *Clubb v Edwards; Preston v Avery* [2019] HCA 11, 190 per Gageler J.

<sup>69</sup> *Ibid*, 236 per Nettle J.

in line with international human rights principles and norms, to which Australia's legislative frameworks should extend a margin of respect and tolerance for.

The Court did not establish or give evidence as to what '*anxiety or distress*'<sup>70</sup> Mrs Clubb actually caused. This, therefore can be interpreted as an ill accusation of Mrs Clubb, a wrongful imprisonment and a wrong conviction under the *Public Health and Wellbeing Amendment (Safe Access Zones) Act 2015* (Vic)<sup>71</sup>, setting a harmful precedent in case law judgement.

No laws should have the power to encroach on freedoms of religion and associated freedoms of belief, conscience, association and movement.

On the evidence above, is this therefore the first signs of government-sanctioned persecution of Mrs Clubb by Australian legislation which has been poorly written, improperly enforced and badly interpreted? How much of this '*persecution*' should Mrs Clubb tolerate, and indeed, how much should we? For we have to ask: who is next? And of what kind of '*political communication*'?

## VI. THE INTOLERANCE OF TOLERANCE - THE TOLERANCE OF RELIGION IS CURRENTLY BEING REDEFINED IN A POSTMODERN HUMANISTIC FRAMEWORK

Let's go back to our definition of tolerance for a moment: tolerance is defined as a willingness to accept behaviour and beliefs that are different from your own, although you might not agree with or approve of them.<sup>72</sup> There is, of course, a whole philosophy of tolerance, which I would like to touch on.

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<sup>70</sup> *Ibid.*, 11 per Kiefel CJ, Bell J, Keane J.

<sup>71</sup> '*All the legislative powers of the Commonwealth are subject to the condition which s116 [of the Constitution] imposes..... The prohibition in s116 operates not only to protect the freedom of religion, but also to protect the right of a man to have no religion. No Federal law can impose any religious observance. Defaults in the performance of religious duties are not to be corrected by Federal law-Deorum injuria Diis curae. Section 116 proclaims not only the principle of toleration of all religions, but also the principle of toleration of absence of religion.*' *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 145 per Latham J.

<sup>72</sup> '*Tolerance*', *The Cambridge Dictionary* (online),

John Gray on tolerance states:

It is a mark of an illiberal regime that conflicts of value are viewed as signs of error. Yet liberal regimes which claim that one set of liberties – their own – is universally legitimate adopt precisely that view. They treat conflicts among liberties as symptoms of error, not dilemmas to which different solutions can be reasonable. Liberalism of this kind is a species of fundamentalism, not a remedy for it.<sup>73</sup>

Genuine tolerance and genuine diversity therefore must beware of counterfeits as they move towards the practice of *modus vivendi*.

This arrangement allowing people or groups of people who have different opinions or beliefs to work or live together is absolutely essential to harmonious community living, to the expressions of political communication and religious belief.

A "*pluralistic society*" is expressly recognised and "*secularity*" identified as providing: '*...a place for communication for different spiritual traditions and the nation*'.

Expressions of secular intolerance that are hostile to granting any kind of political or cultural relevance to religious faiths is intolerance which seeks to exclude the activity of its citizens.<sup>74</sup>

William Galston notes that '*...early liberal theorists worked to disentangle civil society from destructive religious quarrels. But they nevertheless assumed that civil society needed virtue and that publicly effective virtue rested on religion.*' Galston relates the discussion of "*public virtues*" to "*civic freedom*" and notes that '*...neither juridicalism nor fundamentalism can serve as an adequate basis for a liberal society.*'<sup>75</sup>

Conflicts of rights within community life are an inevitable result of, well ... living! It is in how we deal with these conflicts and tensions that we remain human, dignified and tolerant.

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<<https://dictionary.cambridge.org/dictionary/english/tolerance> >, last accessed 14 November 2019.

<sup>73</sup> John Gray, *Two Faces of Liberalism* (The New Press, 2000), 105.

<sup>74</sup> 'Compendium of the Social Doctrine of the Church', *Pontifical Council for Justice and Peace* (2004), para 417, <[http://www.vatican.va/roman\\_curia/pontifical\\_councils/justpeace/documents/rc\\_pc\\_justpeace\\_doc\\_20060526\\_compendio-dott-soc\\_en.html](http://www.vatican.va/roman_curia/pontifical_councils/justpeace/documents/rc_pc_justpeace_doc_20060526_compendio-dott-soc_en.html)>

<sup>75</sup> William Galston. *Liberal Purposes* (Cambridge University Press, 1991), 256-257. See, also: Iain T. Benson, '*An Associational Framework for the Reconciliation of Competing Rights Claims Involving the Freedom of Religion*', thesis submitted in fulfilment of the Requirements for the degree of Doctor of Philosophy at the Witwatersrand University, 12 September 2013, 46

Professor Iain Benson argues that:

*Conflicts of rights involving the freedom of religion should be approached on the basis of a close examination of the proper competence of law and religions .... in a post theocratic age that views constitutional laws as operating under and within the conditions of diversity and pluralism.*<sup>76</sup>

He goes on to note that ‘*appropriate tolerance need neither endorse relativism nor negative judgment but should reflect the conditions of living together with disagreement or ‘modus vivendi’ under the conditions of pluralism and civic virtues*’.<sup>77</sup>

The political intolerance of religious practice and expression in public leads to a liberal fundamentalism insofar as the application of the intolerance of the ‘*tolerant*’ that is assumed to exist by the other side.

Where law is respectful of diversity, then it can accord with pluralism by refusing to narrow the options that allow religious diversity. Where, on the other hand, the law dominates, then religious pluralism actually poses a threat to the control of religion by law.

As law is the codified expression of the will of the government by virtue of the will of the people, law is central to the outworking of its ideologies - connecting the will of the people with its intent and purpose.

As Mattias Kumm has noted; law has shifted from interpretation to justification while recognising a “*general right to liberty*” and a “*general right to equality*” In this approach legal precedent no longer matters in the way it once did due to the use of the proportionality test, and justification is now the frame.<sup>78</sup>

Law should not be used to justify oppression or suppression, or the taking away of people’s rights, but to protect, uphold and codify the freedoms rights, safety and liberty of all persons.

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<sup>76</sup> Benson, above n 71, i.

<sup>77</sup> Ibid, 46.

<sup>78</sup> See: Mattias Kumm ‘The Idea of Socratic Contestation’ (2010) 4 *Law & Ethics of Human Rights* 142, 144.

Once laws take on the purpose of justification, they become a political tool of manipulation, propaganda and a vice of restriction in the hands of the government on the people.

In essence, law is the most successful social engineering tool, and often drives industries such as the media, education and economic frameworks - for either good, or bad ends.

The subordination of religion under the law therefore is dangerous - as is the subordination of law under religion. They therefore must be held in tandem as a fragile exercise of free democracy.<sup>79</sup>

It is important to separate the function of the law from the function of 'justice'.

Professor Benson suggests:

*Law can be about justice if it can recognise that it does not have the principal role of "creating a just society", but must stand back to let the arguments about justice be made by others better suited to its complexity and metaphysical richness.*<sup>80</sup>

Those who pursue justice wholeheartedly should therefore not restrict their voice on matters of law and public policy, but instead speak justice into the process of law-making.

If we are not engaged in public debates on important matters of law and its policies in the context of our political systems as is our right as citizens in a democratic nation, the void of opinions in the marketplace will be filled with the darkness as it is void of the light.

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<sup>79</sup> Professor Iain Benson suggests three main ways we may imagine and speak about law and religion: 1. We may think and speak about how law can dominate religion or be more powerful than religion – such is the story of secularism; this is law over religions. 2. We may think and speak about how law and religion can cooperate with religion; this is law on an equal footing with religion; this is law in harmonic co-existence with religions. 3. We may think and speak about law as subordinate to what religions say is the law; this is law under religions. – Benson, above n 71, 182.

<sup>80</sup> Ibid, 180.



## VII. WHAT ARE WE THEREFORE TO TOLERATE?

If speaking out leads to a criminal conviction such as in the case of Ms Clubb<sup>81</sup>, or indeed losing our jobs such as in the case of Israel Folau<sup>82</sup>, are we to be silenced from fear?

As people of faith, we need to put aside the promise of persecution, as we know it is coming, and even promised to us by Christ<sup>83</sup>: we need to tolerate not intolerance, but the process of dialogue: for it is our duty to speak the truth in love at all times, and in all places.

In this way I believe that we can reflect the ‘*political*’ strategy of Christ, who tolerated not the self-righteous, nor the silent: He spoke respect, love and peace into all situations – political and otherwise.

Professor Benson notes in his doctoral thesis that:

*[t]he struggle, therefore, is not between “church” and “state”, any longer, even if it once was, but between a wide variety of contested conceptions of meaning and faith, both religious and non-religious. Whether the “new sectarians” can learn co-existence and whether the religions can deepen their understandings remains to be seen. What will be needed is for the new movements – “secularist” or “pluralist” – to learn how to temper their enthusiasms and their dominant goals for the purpose of peaceful co-existence, not domination.*<sup>84</sup>

Our co-existence depends upon the true tolerance of one another: the law summed up by love<sup>85</sup>. Love speaks truth, even when it becomes intolerable.

Autonomy and diversity are competing theoretical conceptions within liberalism. The accommodation of diversity within a determinate but limited conception of liberal public

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<sup>81</sup> *Clubb v Edwards, Preston v Avery* [2019] HCA 11 (10 April 2019) at 11 per Kiefel CJ, Bell J, Keane J.

<sup>82</sup> “Israel Folau Declares Intent to Keep Playing Rugby”, *News Online*, 21 May 2019, <<https://www.news.com.au/sport/rugby/israel-folau-declares-intent-to-keep-playing-rugby/news-story/82b85b9e32776f3f1b84f5af56557678>>

<sup>83</sup> “Remember the word that I said to you, ‘A servant is not greater than his master.’ If they persecuted me, they will also persecute you. If they kept my word, they will keep yours also. But all these things they will do to you for my name’s sake, because they do not know Him who sent me”. – John 15:20-21. NKJV.

<sup>84</sup> Benson, above n 71, 184.

<sup>85</sup> Jesus declared, “‘Love the Lord your God with all your heart and with all your soul and with all your mind. This is the first and greatest commandment. And the second is like it: ‘Love your neighbour as yourself.’ All the Law and the Prophets hang on these two commandments.” Matthew 22:38-40.

purposes is a better foundation for liberal philosophy than is the promotion of rational reflection or personal autonomy – however attractive these concepts may be to important professions and social classes within liberal societies.<sup>86</sup>

What clearer example could we have of law “*rendering religion*” and failing to recognise it or respect it than the application of such broad language of “*discrimination*” without any attention to or respect for, as we have seen, the highly nuanced, historical and philosophically rich positions of the religions in relation to such issues as the dignity of the human person – from birth to death?

Societal tolerance to the expression of free thought, whether that is in religion, ideological beliefs, conscience and the associated freedoms of association and movement are fundamental rights and liberties to a free functioning society.

If our freedom of religion is compromised, so is our freedoms of movement, freedoms of association, freedom of conscience and leads to a violation of our freedom of expression and essentially a violation of our political freedoms, including our right to free political communication. These rights are inter-woven, but separate and distinct.

Freedom of religion has been well-established and well-defined in the Australian Constitution and in case law, but this freedom is becoming increasingly under threat by virtue of a political agenda of intolerance, and the re-definition of religious belief, conscience and thought as political communication.

If the freedoms of religion and its associated liberties are encroached upon legislatively, albeit restricted to a minority group, they will affect the equal rights of others. In kind, if the definition of the freedom of religion is re-defined and re-interpreted through case law precedent, it threatens not only the freedom itself, but its expression thereof.

It is important to remember that: religion is in every way political - but it should never be politicised, taking the example of Jesus who was a legal and political revolutionary of his day - without being political.

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<sup>86</sup> Galston, above n 71, 301.

The solution to these complex matters are complex themselves, and should be taken on a case-by case basis, for codified laws can never pre-suppose all outcomes, circumstances and unintended consequences.

One solution is that the spirit of the law should be remembered and upheld, applied with equity for all persons as definitions are interpreted, and re-interpreted in case law.

In an effort to wrestle deeply with these complex matters, it is important not to become an empty sounding gong. We should tolerate not that which seeks to oppress and suppress: but rather tolerate the process of debate and dialogue, by seeking the truth in love, in concert with Jesus' own '*political*' strategy and approach.