– Religious Vilification Laws in Australia: Philosophical Underpinnings and Constitutional Implications

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"So if this bill passes you may for a time retain your institution of juries and the forms of your free Constitution, but the substance is gone, the foundation is undermined; – your fall is certain and your destruction inevitable. As a tree that is injured at the root and the bark taken off, the branches may live for a while, some sort of blossom may still remain; but it will soon wither, decay, and perish: so take away the freedom of speech or of writing and the foundation of all your freedom is gone. You will then fall, and be degraded and despised by all the world for your weakness and your folly, in not taking care of that which conducted you to all your fame, your greatness, you opulence, and prosperity… Let us put a stop to the madness of this bill; for if you pass it, you will take away the foundation of the liberty of the people of England, and then farewell to any happiness in this country!"

Charles James Fox, House of Commons, London, November 25, 1795.[1]

Abstract

This article explains the weakness of the argument that religious vilification laws promote harmony and tolerance among religious groups. Rather, they are based on a form of post-modern moral relativism which denies the existence of truth and could be used as a weapon by certain individuals to silence any criticism of their beliefs. These laws have become an invitation to people with extreme views to avoid debate by claiming that they, rather than their beliefs, have been attacked. The author then explains why there is no a priori reason why religious speech could not at the same time be characterised as political communication for the purposes of the implied freedom in the Australian Constitution. Rather, the text and structure of the Constitution gives full rise to the proposition that there is an implied freedom to discuss religious matters, particularly when these matters involve serious public and/or governmental interest. This freedom is a right of the citizen that works as a form of constitutional immunity from public and/or political restrictions that are not adapted to the ultimate goal of preserving freedom of speech, which is an essential element of every (democratic) system of representative government.

Introduction

Religious vilifications laws are designed to promote greater tolerance and harmony among religious groups. And yet these laws are conceptually unsound, producing results that are often antithetical to

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[1] Charles James Fox, 'The Spirit of Freedom'. Speech delivered at the House of Commons on November 25, 1795, *in* Brian MacArthur (ed.), The *Penguin Books of Historic Speeches* (London: Penguin Books, 1995), 149.

the tolerance its advocates claim or hope for. Aiming at promoting 'cultural diversity', these laws have actually become a permanent vehicle used by religious extremists to increase intolerance and inter-religious tension in society. After critically analysing the post-modern philosophical underpinnings of religious vilification laws, this article explains why it is reasonable to assume that there might be under the Australian Constitution an implied right of freedom of speech concerning religious matters, which is in turn derived from the implied freedom of communication founded upon the constitutionally prescribed system of representative government.

The Victorian Racial and Religious Tolerance Act (2001)

Of greatest concern in Australia has been the enactment of anti-incitement laws on the grounds of religious vilification. Although the country has no federal legislation explicitly created for the purpose of religious vilification, three Australian states have passed such laws, namely Queensland[2], Tasmania[3] and Victoria. Since these laws are sufficiently similar that the considerations about them are substantially the same, the Victorian Racial and Religious Tolerance Act 2001 (Vic) (hereafter RRTA) will be taken as a representative. The Victorian Act was passed in June 2000, and became law on 1 January 2001. Section 8(1) of the Act provides:

> A person must not, on the ground of the religious belief or activity of another person or class of persons, engage in conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons.

The RRTA states that motives are irrelevant[4], and that religious belief need only be the substantial ground for the conduct.[5] The Act further states that it is also irrelevant whether the statement is true or false.[6] Section 8 states 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

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[2] Queensland has passed legislation introducing religion vilification laws in 2001. This Act is called the Anti-Discrimination Amendment Act 2001 (Qld). In a very similar provision 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 (Qld) s124A(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

[3] Like Queensland and Victoria, Tasmania also has legislation containing provisions against religious vilification. Section 19 of the Anti-Discrimination Act 1998 (Tas) outlines that one must not publically act in a way which would incite 'hatred towards, serious contempt for, or severe ridicule of a person of persons on the basis of their religious beliefs or affiliations'.

[4] Section 9(1)

[5] Section 9(2)

[6] Section 10

scientific interest.[7] Further, if the accused can establish that they reasonably believed that the conduct would be seen or heard only by them, then they will not be held to have contravened section 8.

Neither South Australia nor Western Australia has religious vilification laws. The Labor government of South Australia once proposed an amendment to its racial vilification laws to extend the scope to include that of religious vilification, but this was rejected after much public objection.[8] In Western Australia, the government officially dropped in 2004 the idea of religious vilification legislation on the grounds that it was 'too hard to devise laws that could be fair and workable'.[9] Likewise, New South Wales does not have religious vilification laws[10], and a proposed Bill was decisively voted down in Parliament on 1 March 2006.

In a speech to the NSW Parliament, the then Labor Premier Bob Carr described these laws as 'regrettable' and 'highly counterproductive'. He argued that they were 'too easy to abuse' and 'questionable to say the least'.[11] 'Determining what is or is not a religious belief is difficult', the Premier stated: 'It is subjective. It is a personal question. These laws can undermine the very freedom they seek to protect – freedom of thought, conscience and belief'.

To support his point, Premier Carr also referred in his speech to the case in Victoria of the paedophile and self-proclaimed wiccan Robin Fletcher, who claimed he was vilified by a Christian teaching course. A prisoner, Mr Fletcher made a complaint under the Victorian vilification law after attending a Salvation Army Christian course in prison, claiming the course 'posed a danger to his safety' and that it discriminated against him based on his beliefs as a wiccan. Judge Morris summarily dismissed the case and made observations about the need for the law to prevent this sort of 'preposterous' litigation.[12] Since that case, the Victorian government has inserted a section into its vilification law that allows an exception to the law where so called 'vilification' is for conveying or teaching a religion or proselytizing.[13]

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[7] Section 11
[8] Simon Rice, 'Do Australians have equal protection against hate speech?' [2005] Democratic Audit of Australia 2.
[9] Steve Edwards, 'Do We Really Need Religious Vilification Laws?' (2005) 21 (1) *Policy* 30, 32.
[10] To be more precise, New South Wales provides some protection from religious vilification. In 1994, an amendment to the Anti-Discrimination Act 1977 (NSW) included the term 'ethno-religious' to the definition of the term 'race. (Anti-Discrimination Act 1977 (NSW), s4).
[11] Farrah Tomazin, 'Victoria's Vilification Act Easy to Abuse: Carr', *The Age*, Melbourne/Vic, June 23, 2005, 3.
[12] *Fletcher v Salvation Army Australia* [2005] VCAT 1523
[13] Racial and Religious Tolerance Act 2001 (Vic) s11(2)

Race vs Religious Issues

The Victorian RRTA applies to religious issues the same formulations applied to race. And yet, if people cannot choose the colour of their skin, religion is, to some degree at least, a matter of personal choice and not an immutable characteristic. In contrast to racial issues, where one finds no questions of 'true' or 'false', religious beliefs involve ultimate claims to truth and error. As Ivan Hare points out, 'religions inevitably make competing and often incompatible claims about the nature of the true god, the origins of the universe, the path to enlightenment and how to live a good life and so on. These sorts of claims are not mirrored in racial discourse'.[14] Therefore, one must assume that the laws of a democratic society 'should be less ready to protect people from vilification based on the voluntary life choices of its citizens compared to an unchangeable attribute of their birth'.[15]

Inversion of the Onus of the Proof

The RRTA allows anyone to file a complaint of religious vilification. Instead of staying with the person who claims to be offended, the burden of proof rests with the person who has been charged. This is a major breach of the rule-of-law tradition that one is innocent until proven guilty. Those who are charged under the Victorian Act, however, are required to prove why they have not committed vilification, or why they would qualify for any exemptions. In so doing, they must bear all the expenses with lawyers and legal costs. In the meantime, those who bring the charges get the full backing of the state, often with all costs born by the taxpayer.[16] Of course the risk of being dragged into a court will deter many people from arguing the merits of someone's religious beliefs and convictions. This self-imposed censorship of ideas will inevitably cause the 'chilling effect' of limiting freedom of speech because of 'the fear of litigation and its risk of financial ruin, jail, collegial ostracism, or embarrassment'.[17]

[14] Ivan Hare, 'Crosses, Crescents and Sacred Cows: Criminalising Incitement to Religious Hatred [2006] Public Law 521, 531.
[15] Rex Tauati Ahdar, 'Religious Vilification: Confused Policy, Unsound Principle and Unfortunate Law' (2007) 26 *The University of Queensland Law Journal* 293, 301.
[16] Bill Muehlenberg, *The Problems with Vilification Legislation.* On Line Opinion, September 7, 2005, at http://www.onlineopinion.com.au/view.asp?article=3792
[17] 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.

Motive and Truth are Irrelevant

The RRTA considers that the truth of a statement cannot be relied upon as a defence against the charge of vilification.[18] In addition, section 10 states that in determining whether a person has committed religious vilification, 'it is irrelevant whether or not the person has made an assumption about the race or religious belief or activity of another person or class of persons that was incorrect at the time that the contravention is alleged to have taken place'. In other words, a person's motive for engaging in such conduct is not relevant for the purposes of the legislation, unless it falls within the exceptions of 'good faith' art, academic, religion, science, or public interest.[19] According to Joel Harrison, such provision reveals 'a desire to impose the civility (fictional or otherwise) of academia onto the public sphere'.[20] And of course, if stating the truth is irrelevant for the purposes of religious vilification, then section 8 'might be contravened by conduct which has the effect of inciting religious hatred even where the inciter had no intention to do so'.[21]

The Case of the Two Pastors

Although religious vilification laws are designed to penalise the insulting of persons based on their beliefs, in practice they might lead to more inter-religious strife and social conflict.[22] Perhaps the most compelling argument against such vilification laws is the *Catch the Fire Ministries* case in Victoria. This decision, the first major litigation on the subject in Australia, bears out all the concerns that vilification laws on religious grounds can be used as a weapon by radical groups to silence any form of criticism based on their beliefs.

In 2002, three Muslims were instigated by a Muslim employee who works for the Victorian government at the 'Equal Opportunity Commission', to attend a seminar held by evangelical

[18] Section 9 of the Racial and Religious Vilification Act 2001 (Vic) explains that:
(1) In determining whether a person has contravened section 7 or 8, the person's motive in engaging in any conduct is irrelevant.
(2) In determining whether a person has contravened section 7 or 8, it is irrelevant whether or not the race or religious belief or activity or another person or class of person is the only or dominant ground for the conduct, so long as it is a substantial ground.

[19] Ibid., s11.

[20] Joel Harrison, 'Truth, Civility, and Religious Battlegrounds: The Context Between Religious Vilification Laws and Freedom of Expression' (2006) 12 *Auckland University Law Review* 71, 86.

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

[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, 72.

Christians on the subject of Islam. Importantly, this was a seminar only for Christians and the three Muslims had not disclosed their identity.[23] But as Harrison points out, 'in what is truly disquieting, the attendees were encouraged to attend at the behest of May Halou who was both a member of the Executive of the ICV [Islamic Council of Victoria] *and* employed by the Equal Opportunity Commission, the Act's primary administrative body'.[24] None of those Muslims attended the entire seminar, 'but pursuant to a deliberate plan each had sat in at different times to ensure that the complete event was covered'.[25] Each said that they were 'very upset' at what they heard,[26] although it is fair to argue that they would not be there to be 'offended' if the law had not been enacted.[27]

In December 2004, Judge Michael Higgins, presiding at the Victorian Civil and Administrative Tribunal (VCAT), found the speaker and organiser of that seminar, Pastors Daniel Scot and Danny Nalliah, guilty of inciting religious hatred against Victorian Muslims. In reality, the evidence of vilification against those pastors was not based on whether the attendees felt hatred or contempt toward Muslims, but whether the three particular Muslim attendees (who did not reveal their faith and were technically not invited) felt offended by the comments about the Koran during the course of the seminar, even though they confessed under cross-examination that their knowledge of the Book was 'slight'.[28]

One significant aspect of the decision is that Judge Higgins found that all the seven witnesses for the complainants could be relied upon, and yet, in one way or another, rejected all the five witnesses for the respondents and refused their requests to call two expert witnesses.[29] The judge then relied solely on the expert witnesses for the complainants to reveal his personal views on what he believes to be the 'best interpretation' of the Koran and the 'true nature' of Islam. One wishes not to question the moral integrity of Judge Higgins, but it may be important to consider that he was appointed by the same Labor government that enacted the legislation at the insistence of the Muslim community. Furthermore, as Robert Spencer correctly reminds,

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[23] So, even material designed for one particular religious group may need to be censored for fear of attracting unwelcome complaint.
[24] Joel Harrison, 'Truth, Civility, and Religious Battlegrounds: The Context Between Religious Vilification Laws and Freedom of Expression' (2006) 12 Auckland University Law Review 71, 77.
[25] Rex Tauati Ahdar, 'Religious Vilification: Confused Policy, Unsound Principle and Unfortunate Law' (2007) 26 *The University of Queensland Law Journal* 293, 293. ICV v CTFM Inc. [2004] VCAT 2510 [76], available at http://www.austlii.edu.au/au/cases/vic/VCAT/2004/2510.html
[26] *ICV v CTFM Inc.* [2004] VCAT 2510 [77]
[27] Andrew Bolt, 'Playing with Fire', Herald Sun, Melbourne, December 22, 2004.
[28] Roslyn Phillips, 'Shock Ruling on Religious Vilification', *Festival of Light Australia*, December 17, 1004.
[29] Durie, Mark, 'Catch the Fire and Daniel Scot's (In)Credible Testimony', *On Line Opinion*, February 18, 2005, at http://www.onlineopinion.com.au/view.asp?article=3050

> There are some hints that the outcome of the case was virtually predetermined. When during the trial Scot began to read verses from the Koran that discriminate against women, a lawyer for the Islamic Council of Victoria, the organization that brought the suit, stopped him: reading the verses aloud, she said, would itself be religious vilification.[30]

In the course of court proceedings, and in response to Pastor Scot's assertion that 'the prophet said all you who believe fight those disbelievers who are in your neighbourhood'[31], judge Higgins relied on the expertise of Dr Abdul Kazi for the ICV to state that although the reference was correct, 'the word fighting/combating has been taken literally, rather than figuratively'.[32] When asked whether Muslims would be bound to treat the life of Mohammed as an example of the morality which they would then apply in their own personal lives, Dr Kazi replied: 'That is so in a general sense, but you do not follow it in every way'.[33] Judge Higgins happily accepted these 'liberal' interpretations, also relying on Dr Kazi's controversial claim that the term 'jihad' cannot be applied literally, and that any such orthodox interpretations of the Koran are 'illogical, unsustainable, and astounding'. Of course it is a great a pity that so many Islamic extremists think otherwise, so that for them the term 'jihad' is to be applied literally. Above all, whether it was done by purpose or not, Dr Kazi clearly misled Higgins and induced him to commit judicial error, because, as Ahdar and Aroney point out in *Shari'a in the West*, 'traditional Islamic jurisprudence has tended to be literalistic in its interpretation of the Qur'an and Sunna'.[34]

In relation to the assertion by Scot that Mohammed was a paedophile for marrying Aishah when he was at the age of fifty-four and she was only six and consummating the marriage when she was nine, the following was stated by Dr Kazi and paraphrased by Judge Higgins: 'One cannot use a set of cultural values and people living them at one time [and] make a value and moral judgement on a totally different people in a different cultural context'. Enabled to rely on such blatant moral relativism, Higgins went on to reveal a peculiar interest to enter the complex theological debate of what the Koran does and does not require of its followers.[35] This is not to argue that the views of Pastor Scot are necessarily better than that of Dr Kazi's, and endorsed by Judge Higgins; rather, the

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[30] Robert Spencer, 'Religious Vilification', *Human Events*, January 24, 2005, 18.
[31] Koran, Chapter 9, verse 23.
[32] *ICV v CTFM Inc.* [2004] VCAT 2510 [157]
[33] *ICV v CTFM Inc.* [2004] VCAT 2510 [31]
[34] Rex Ahdar and Nicholas Aroney, 'The Topography of Shari'a in the Western Political Landscape', in Rex Ahdar and Nicholas Aroney (eds.), *Shari'a in the West* (Oxford/UK: Oxford University Press, 2010), 19.
[35] Joel Harrison, 'Truth, Civility, and Religious Battlegrounds: The Context Between Religious Vilification Laws and Freedom of Expression' (2006) 12 *Auckland University Law Review* 71, 76.

question is whether a secular judge (or tribunal) with apparent no theological expertise should be engaging in and deciding on such complete theological issues.

In reality, the 'liberal' interpretation of Islam as provided by Judge Higgins is highly debatable. It is an interpretation that has been fiercely contested in some theological circles, even though it allowed him to decide that Scot and Nalliah were religious extremists for not agreeing with that. These two pastors thus presented an 'extremist view' of Islam that bears no relationship to 'mainstream' Australian Muslim beliefs.[36] The pastors therefore joined a class of extremists who have misused Islamic doctrine and thereby misrepresented the 'peaceful' nature of Islam. Hence, when questioned whether Scot believed the God of Islam to be the same as the God of Christianity, his reply that he rejects the proposition was regarded by Judge Higgins as a further evidence of his religious 'extremism'. And yet, according to the Rev Dr David Palmer, who is the Convener of the Victorian Presbyterian Church's *Church and Nation Committee*, the theological assumption that the Koran substantially agrees with core Christian beliefs would be 'news for most Muslims and Christians, if not downright offensive for both'.[37]

Curiously, the statement for the ICV by Professor Gary Bouma, that 'Charismatic Christianity is as offensive to [Australians] as it Wahhabist Islam'[38], was quoted approvingly by Judge Higgins. Ironically, in condemning the supposed 'objectionable' elements of Scot's speech, Judge Higgins appears to have incidentally partaken in 'disparaging an entire religious worldview to which many adhere, sending a message of authoritative public condemnation.'[39] Not content in vilifying an entire segment of the Christian community by calling them the extremist equivalent of Islamic Wahabbism,

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[36] ICV v CTFM *Inc.* [2004] VCAT 2510 [387]. Joel Harrison, 'Truth, Civility, and Religious Battlegrounds: The Context Between Religious Vilification Laws and Freedom of Expression' (2006) 12 Auckland University Law Review 71, 76.

[37] See: Zwartz, Barney; 'Law Curbs Free Speech, says Church', The Age, Melbourne, March 30, 2005. Rex M. Rogers, President of Cornerstone University and Grand Rapids Baptist Seminary, explains some crucial differences between Islam and Christianity: "Muslims presuppose that 'there is no God but Allah and Muhammad is his prophet'. They are monotheists, but their god has no partners (thus no Trinity), he does not beget (thus Jesus is not his Son), and he is responsible for good and evil. In the Islamic belief system, Allah is god of fate and fear. He is arbitrary and even capricious in his dealings with human beings. Muslims, therefore, cannot fully explain concepts like love, forgiveness, or peace, because the meaning of these concepts depends on the existence of a God who is both righteous and loving and who defines forgiveness in the work of his Son, Jesus". Rex M Rogers, *Christian Liberty: Living for God in a Changing Culture* (Grand Rapids/MI: Baker Books, 2003) 47.

[38] ICV v CTFM, [136].

[39] Joel Harrison, 'Truth, Civility, and Religious Battlegrounds: The Context Between Religious Vilification Laws and Freedom of Expression' (2006) 12 *Auckland University Law Review* 71, 92.

Judge Higgins went on to make the astounding statement that 'Islam agrees substantially with Christian beliefs save for particular events'.[40]

Of course such an assumption that Christianity and Islam are similar religions may be expected from a secular judge without any apparent theological training. But what is not acceptable is having a secular judge deciding on these very complex and sometimes controversial issues. For example, since he completely ignored 'the theological values attached to the concept of mercy in Islam',[41] Judge Higgins even claimed as 'illogical and unsustainable' Scot's opinion that mercy towards a thief under Islamic jurisprudence is to be shown only after the thief's hand has been cut off. Relying on his own secular worldview, Judge Higgins thought it was unreasonable to apply mercy only after the punishment, even though the Hadiths are clear that mercy is to be applied only after the thief's hand is amputated.

Perhaps one of the most interesting aspects of the case is that the speaker at the seminar that provoked the litigation, Pastor Daniel Scot, was born and raised in Pakistan. He had fled his native country to save his life when accused under Pakistan's blasphemy law. Even though both he and Pastor Nalliah had spent most of their lives in Muslim-majority countries (Pakistan and Saudi Arabia) before migrating to Australia, their reports were deemed unreliable by a secular Western judge who has never experienced what life is like in such countries. Finally, to add insult to injury, Judge Higgins even declared it a 'crime of vilification' to denounce the harsh persecution endured by millions of Christian minorities in such countries as a result of Islamic doctrine. Such an approach, writes Dr Mark Durie, 'constitutes a dangerous limitation on freedom of speech and the capacity of Christians to take up the cause of the persecuted church'.[42]

Judge Higgins announced the controversial decision on 22 June 2005. He ruled that the defendants had vilified Muslims by reading directly from the Koran, and that they would therefore, among other things, have to place a public statement expressing their apologies on their website as well as in four leading newspapers at the total cost of $70,000. These advertisements would reach 2.5 million people, rather than the less than 250 who attended the seminar. Naturally, the respondents appealed the decision, and two years later the Court of Appeal finally found the decision to have contained many significant errors of fact. Judge Higgins, for example, accused Pastor Scot of stating that 'Muslims are demons', when in fact Scot had merely pointed out that the Koran states that Allah had sent a group of

[40] ICV v CTFM, [376]
[41] Mark Durie, 'Catch the Fire and Daniel Scot's (In)Credible Testimony', *On Line Opinion*, February 18, 2005, at http://www.onlineopinion.com.au/view.asp?article=3050
[42] Mark Durie, *Notes on Victorian Racial and Religious Tolerance Act (2001)*

demons ('jinn'), who when they heard the Koran became Muslims. There were many other equally serious misrepresentations in his judgement.[43] As a result, the Court of Appeal found no other alternative but to remit the matter to the Tribunal to be heard before a different judge, as well as have the orders requiring a public apology set aside.[44]

After the decision by the Court of Appeal, the case involving the pastors was resolved through mediation between the parties and without the need for re-hearing, thereby ending a litigation process that lasted five years.[45] Regardless of its final outcome, it is worth considering that the defendants spent a significant amount of money in litigation, the costs running into several hundreds of thousands of dollars. And the excessive cost of litigation can of course easily result in the denial of justice. Since it may lie far beyond the financial capacity of most individuals and small organizations, defendants accused of vilification may be compelled to settle their cases with unfair concessions in the hope of avoiding costly litigation. This is in itself a form of punishment and a further denial of freedom of speech, meaning that the most vulnerable in this battleground are those who lack the resources and organisational clout to fund litigation.

Criminalisation of Truth-Telling

The ancient Greeks believed that the practice of freedom of speech (*parrhêsia*) was an essential right of free citizens and an essential virtue of democratic government. As Chris Berg points out, '[a] slave could not speak his mind but a free person could'.[46] Of course democratic speech has never been free in an absolute sense, and the Athenian citizens were prevented from making any false accusations.[47] Indeed no democracy has ever been able to survive without some restraint on false or slanderous speech. Rather than absolute free speech, the Greek word for 'free speech' stood for 'open and truthful speech' as opposed to deceptive or 'rhetorical' speech. Because the Athenians strongly believed that a frank, open and robust speech was essential to their democracy, those who 'deployed the art of rhetoric for ignoble ends' were said to constitute 'a threat to Athens' egalitarian democracy'.[48] As

[43] Ian CF Spry, 'Legal Notes: The Totalitarian Effects of Anti-Free Speech Legislation', (2008) National Observer 64, 65
[44] Rex Tauati Ahdar, 'Religious Vilification: Confused Policy, Unsound Principle and Unfortunate Law' (2007) 26 *The University of Queensland Law Journal* 293, 305.
[45] Rex Tauati Ahdar, 'Religious Vilification: Confused Policy, Unsound Principle and Unfortunate Law' (2007) 26 *The University of Queensland Law Journal* 293, 305.
[46] Chris Berg, *In Defence of Freedom of Speech: From Ancient Greece to Andrew Bolt* (Melbourne/Vic: IPA & Mannkal, 2012), 8.
[47] Berg, ibid., 9.
[48] Berg, ibid., 13.

Demosthenes pointed out, 'A man can do you no greater injustice than tell lies. For in a political system based on speeches, how can it be safely administered if the speeches are not true?'[49]

Whereas Western societies in the past defined religious freedom as dependent on our freedom to search for truth, now 'we put the emphasis upon creating a social, harmonious, and multicultural community'.[50] In the Catch the Fire case, however, the Tribunal reminded us in its ruling that the truth is not a defence under the RRTA, thus opening the way for 'vilification' to occur under the law even though statements may be true. Of course if a statement is true, it should be open to be stated freely in a truly democratic society. As with defamation cases, truth should be a complete defence against any charges of religious vilification. If it is illegal to speak the truth, then it can also be argued that such vilification laws not only hinder freedom of speech and expression, but that they deny the true value of democracy. Rather, such laws may punish truthful speech and reward the art of academic rhetoric, which may sometimes be deceptive.

In this sense, it is interesting to note that the Victorian Act gave artists and academics an immunity that was not extended to religious practitioners in the original draft. One could not severely offend someone if one did it for religious purposes, but one could, and still can, do it for artistic ones.[51] Such exemptions to vilification laws are problematic. Certain forms of communication, including academic and artistic, are granted full immunity to religious vilification. This creates elitist distinctions that privilege the eloquent speaker over others so that only certain forms of expression are restricted.[52] The then Roman Catholic Archbishop of Melbourne, George Pell, pointed out the strange anomaly and elitism of this provision:

> 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.[53]

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[49] Quoted from Berg, 13.
[50] Robert Forsyth, 'Dangerous Protections: How Some Ways of Protecting the Freedom of Religion May Actually Diminish Religious Freedom'. Lecture delivered at the third Action Lecture on Religion and Freedom, Centre for Independent Studies, September 24, 2001, 9.
[51] Robert Forsyth, 'Dangerous Protections: How Some Ways of Protecting the Freedom of Religion May Actually Diminish Religious Freedom'. Lecture delivered at the third Action Lecture on Religion and Freedom, Centre for Independent Studies, September 24, 2001, 11.
[52] Joel Harrison, 'Truth, Civility, and Religious Battlegrounds: The Context Between Religious Vilification Laws and Freedom of Expression' (2006) 12 *Auckland University Law Review* 71, 88.
[53] The Age, March 16, 2001. Quoted in Robert Forsyth, 'Dangerous Protections: How Some Ways of Protecting the Freedom of Religion May Actually Diminish Religious Freedom'. Lecture delivered at the third Action Lecture on Religion and Freedom, Centre for Independent Studies, September 24, 2001, 4.

In the Catch the Fire case, the finding that a seminar on Islam was not a 'balanced discussion' was based on the assumption that Pastor Scot engaged in a 'unilateral uncontested dialogue'. Such an idea that one would have to provide a 'balanced' or 'uncontested' discussion to escape the accusation of 'vilification' is, quite frankly, rather absurd. According to Dr Ian Spry QC, Pastor Scot at that seminar had simply drawn attention to 'a number of disturbing statements in the Koran, as well as a number of other statements in the Koran of which he 'expressed approval'. Hence, as Spry pointed out,

> The seminar appears on balance to have been a reasonable presentation. There are undoubtedly profoundly disturbing statements within the Koran, and some of the extreme statements made by Moslems within Australia are even more disturbing. Needless to say, discussion of these matters should not be repressed.[54]

However, Garry Bouma, an expert witness for the ICV, thought that the seminar had been unbalanced. He wrote later in the Victorian newspaper *The Age* that the RRTA had the positive effect of enforcing 'the need for religious groups to behave honestly and honourably with each other', thus creating what he claims to constitute 'religious maturity'.[55] But in reality one could easily argue that what this kind of 'maturity' implies is the artificial creation of a debating club of pedantic academics who may sometimes adopt the art of obscure rhetoric in order to avoid a more open and robust debate on any particular issue.

Of course if the truth of a statement cannot be used as a defence, why should the truth itself be regarded as irrelevant for the purposes of vilification? The answer seems to lie on the fact that such laws are based on a post-modern assumption that truth is socially construed, and therefore irrelevant; that truth as such is entirely related to the particularities of an individual's culture, religion and social context. But if truth is relative to social context, then it is also 'morally wrong' to criticise someone else's values or beliefs no matter how obnoxious these values and beliefs might be.

Although it is not easy to define the term post-modernism, one may loosely define it as a label for a range of theoretical challenges to the objectivity of truth and knowledge. In Westerns societies, the idea of objective truth is traditionally related to the understanding about the relationship between the real world and statements that correspond to the real world. Post-modernists deny this tradition by claiming that there is no such thing as objective truth. For them, everything one knows is merely the subject of social context and, accordingly, cultural surroundings. This so being, religious vilification laws appears to be inspired by the work of post-modern scholars such as Stanley Fish, who claim that

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[54] Ian CF Spry, 'Legal Notes: The Totalitarian Effects of Anti-Free Speech Legislation', National Observer, Autumn 2008, 64, 65

[55] Gary Bouma, 'Why Costello is Wrong on Vilification Laws', The Age, Melbourne, June 1, 2004.

humanity has never been oriented toward 'the truth', and that 'there is no such thing as free speech'.[56] On the contrary, Fish argues, any claim to free speech is actually invalid because every speech serves an 'instrumental purpose' that allows its regulation by the government in the public sphere. 'When one speaks to another person', Fishes goes on to say,

> 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.[57]

Since the RRTA claims that the truth cannot be relied as a defence from the accusation of religious vilification, such law basically reflects the post-modern rejection or indifference to all matters of truth and objectivity. Such law is therefore grounded on the scepticism of truth, which in turn is deemed relative and contingent to group-thinking and social experience.[58] Accordingly, what one takes for the 'truth' is no more than his or her personal opinion and nothing else. In sum, what 'truth' means under the post-modern reading of reality is no more than a Christian perspective, a Muslim perspective, a Hindu perspective, and so forth. Each of these 'perspectives' must be conditioned and locked in the person's own sphere of 'religiosity', so that any claim to universal truth can be dismissed as naïve at best and deceptive at worst, as a mere attempt by one of these groups to 'impose' their own perspective upon the others.

Religious Vilification Laws: Blasphemy Laws by Stealth?

One reasonable concern regarding vilification law is that some religious bodies could exploit such anti-incitement mechanisms to secure immunity from appropriate public scrutiny of their beliefs and practices. This concern has been proven to be correct. Whatever the merits of the arguments presented by the respondents in the case of those two pastors, the regrettable episode illustrates the great potential for exploitation of any such legal mechanisms by extremist groups who are reluctant to endure public criticism of their beliefs. Of course, that case had many elements of a set-up, including the pre-arrangement by the Islamic Council of Victoria to send several anonymous informants to a

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[56] Stanley Fish, *There's No Such Thing as Free Speech* (New York/NY: Oxford University Press, 1994).
[57] Ibid., 104.
[58] Charles Rice thinks that such postmodern scepticism is absurd: '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 E. Rice, *50 Questions on the Natural Law: What it is and Why We Need It* (San Francisco/CA: Ignatius Press, 1999), 132.

seminar held privately in a Melbourne church, followed by the coordinated lodgement of a formal complaint with the VCAT.[59]

According to Ayaan Hirsi Alia, the reality is that Muslims who accept the idea that blasphemers deserve to suffer punishment 'are not a fringe group'. On the contrary, she comments that 'they represent the mainstream of contemporary Islam.'[60] Religious vilifications laws may therefore serve the purpose of creating a new form of blasphemy law, thus allowing religious extremists to make others keener to accept a range of religious restrictions to their freedoms in return for 'just being left alone'. This is particularly so when one takes into account that the RRTA was enacted at the insistence of the local Islamic community in Victoria.

In Islamic countries any comment or remark considered unfavourable of the official religion is a crime of apostasy and severely punished, often by death. Throughout the Muslim world, 'accusations of blasphemy or insulting Islam are used systematically in much of that world to send individuals to jail or to bring about intimidation through threats, beatings and killings'.[61] It is applied against such Muslims, because they are judged to be apostates, and against non-Muslims because they are considered to have lost the 'protection' afforded to them under the dhimma pact, or covenant protection. In traditional Islamic jurisprudence, any such transgressions, if performed by Muslims, are regarded as evidence of apostasy, a capital offense. Conversely, if the transgression is attributed to a non-Muslim living under Islamic rule, this is regarded as annulling their dhimmi condition, for which the death penalty is equally applied.[62] The offending 'dhimmi' must be treated as 'an object of war', which according to Sharia law means 'confiscation of property, enslavement (of wife and children), and death'.[63] As Michael Nazi-Ali points out, 'there is unanimity among the lawyers that anyone who

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[59] Another discomforting conclusion one can draw from the Victorian episode is that in the eyes of such a governmental body the rights of some religious people to engage in free speech may be be less important than others. This perceived desire to shelter particular groups from public examination should be of great concern to all Australians, including those of strong religious belief and those with none.

[60] Ayaan Hirsi Alia, 'The Painful Last Gasp of Islamist Hate', *The Weekend Australian*, September 22-23, 2012, 16.

[61] Paul Marshall, 'Blasphemy and Free Speech', Imprimis, Volume 41, Number 2, February 2012, 2. In these Islamic countries, writes Marshall, 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 religious authorities. Saudi Arabia represses Sunnis and Suffis. In Egypt, Shia leaders have been imprisoned and tortured'.

[62] Mark Durie, 'Sleeping into Sharia: Hate Speech and Islamic Blasphemy Strictures' (2012) 15 *International Trade and Business Law Review* 394, 396.

[63] Mark Durie, 'Sleeping into Sharia: Hate Speech and Islamic Blasphemy Strictures' (2012) 15 *International Trade and Business Law Review* 394, 396.

blasphemes against Muhammad is to be put to death, although *how* the execution is to be carried out varies from one person to another'.[64]

According to recent legal scholarship, the execution of apostates from Islam is sanctioned by all five dominant streams of Islamic law, 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*").[65] For adult women, death is proscribed by three of the five Islamic schools. The exceptions are Hanafi Islam, which allows for permanent imprisonment (until the woman recants), and Ja'fari Islam, which allows imprisonment and beating with rods (until death or recantation).[66] With the exception of Ja'fari Islam, the death penalty is also applied to child apostates under Sharia law, with the penalty typically delayed until attainment of maturity. Even more unsettling is the fact that under three of the five Islamic legal codes, apostasy need not be articulated verbally to incur mandatory punishment; even inward apostasy is punishable.[67] On the basis of the Islamic law, writes Charles Moore,

> 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 'jiyza', 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.[68]

In non-Muslim countries, radical Islamists have adopted other and far more subtle tactics to bring fear and intimidation upon their critics.[69] Accordingly, one of the greatest hypocrisy of religious vilification laws is embodied in the fact that their chief beneficiaries are meant to be a small but vocal group of religious extremists. Of course it is not entirely clear why such a group of people should merit any statutory protection from 'hate speech'. On the contrary, some of their most obnoxious

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[64] 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/UK: Oxford University Press, 2010), 79.
[65] Patrick Sookhedo, *Faith, Power and Territory: A Handbook of British Islam* (London: Isaac Publishing 2008), 24.
[66] Ibid.
[67] Ibid.
[68] Charles Moore, 'Is It only Mr. Bean who Resists this New Religious Intolerance?' Telegraph, 11 December 2004.
[69] Daniel Pipes, How Dare You Defame Islam, Commentary, November 1999, 41-45.

statements truly deserve our most complete revulsion.[70] And yet to express any such revulsion or even the slightest indignation for such statements may incur in the risk of being dragged into a court and accused of vilification under the existing laws. As Dr Ian Spry points out, '[t]here has been a tendency amongst left-liberal groups ... to champion the cause of Moslems in Australia and to dismiss concerns by others about aggressive statements by some Imams, the fact that Islamic terrorism exists in many parts of the world, and specific threats by terrorists that they will target Australia and Australians.'[71] Dr Spry then comments on the practical effects of religious vilification laws:

> Legislation of this kind operates in terrorem. After the ill-founded decision of Judge Higgins against Pastor Scot, many will be unprepared to make critical comments or give warmings about Islam and about Moslems in Australia or abroad, however well-based those comments or warnings would be. In particular, in a world where Moslem terrorists are active, and where threats are made by them against Australia, and where some Moslem leaders in Australia express sympathy with terrorists, the ability of Australia to defend themselves and their interests is seriously diminished.[72]

Of course, there is no good reason as to why the 'religious tenets' of radical Muslims should be accorded any respect or legal protection from spoken hostility, especially as the same protection does not seem to be afforded to others. However, as Robert Spencer points out, religious vilification laws 'actually make Muslims a protected class, beyond criticism, precisely at the moment when the Western republics need to examine the implications of having admitted into their countries people with greater allegiance to Islamic law than to the pluralist societies in which they have settled'.[73] 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 exchange them for fresh skins that they may taste the torment'. The passage concludes: 'Allah is ever Mighty, Wise'.[74]

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[70] For example, in January 2009, a Muslim cleric from Melbourne instructed his male married 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*, 22 January 2009. Statements such as these certainly deserve our revulsion and indignation.

[71] Ian CF Spry, 'Legal Notes: The Totalitarian Effects of Anti-Free Speech Legislation', National Observer, Autumn 2008, 64, 65

[72] Ian CF Spry, 'Legal Notes: The Totalitarian Effects of Anti-Free Speech Legislation', National Observer, Autumn 2008, 64, 65.

[73] Robert Spencer, 'Religious Vilification', Human Events, January 24, 2005, p18.

[74] Steve Edwards, 'The Trouble with Religious Hatred Laws', Policy, Vol.24, No.3, Spring 2008, 44.

These examples seem to suggest that basic individual rights and freedoms may be not adequately recognized by Islamic teaching.[75] And yet, in countries of European origin, changed immigration patterns have produced significant growth of the Islamic religion. While the great majority of these Muslims are peaceful, law-abiding citizens following a more moderate, non-literalist version of their religion, the potential for Islam to foster the growth of radical fundamentalist variants is of great concern to many Westerners. To quote Dr Patrick Sookdeo, an expert on the growth of Islam 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. [76]

In this sense, the future religious harmony of Australia seems intrinsically dependent on the cultivation of moderate, more acculturated forms of Islamic expression. This is why religious vilification laws can be so dangerously counter-productive. Apart from almost inevitably contradicting free speech by banning debate about religion, such laws may easily allow radical Muslims to demarcate the things that other people are allowed to say. And yet an important aspect of the religious freedom enjoyed in liberal democracies such as Australia, is that it involves the freedom to subject competing religious perspectives to critical analysis and public scrutiny. Accordingly, it is hoped that adherents of the Islamic faith understand that to practice their faith within Australian shores implies a willingness to withstand public scrutiny of the kind long endured by major Christian bodies in this country. However, because of the intrinsic nature of the Islamic religion, subjugation of the political process by an extreme form of Islamism is more likely and potentially detrimental to the basic rights of women as well as other democratic freedoms that are held dear by all Australians. Any such development would invariably pose a great threat to the country's democratic process.

Why Religions Are Not Equal in the Recognition of Basic Human Rights

What a person believes has a direct influence over what he or she becomes, and the same must be applied to his or her society. Culture is created as an expression of beliefs, and the values a society

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[75] This lack of freedom and the rule of law helps explain why, as David Pryce-Jones points out, 'No Arab university features on the list of the best 500 universities in the world. The number of books published in Arabic in the past thousand years is the equivalent of a year's publication in Spain. The total gross national product of the Arab world is the same as Finland's. Many of the young face chronic unemployment or the hardships of emigration.' – David Pryce-Jones, 'Islam Faces its Demons', *The Weekend Australian*, September 22-23, 2012, 15-16.

[76] Patrick Sookhedo, *Faith, Power and Territory: A Handbook of British Islam* (London: Isaac Publishing 2008), 2.

holds is dependent upon its people's religious views. For Rex M. Rogers, religious belief is the primary source of culture, because culture is basically 'religion externalised'.[77] Thus, T.S. Elliot famously described culture as a 'lived religion'.[78] Indeed, if law is the structural framework holding a society together, then every law must be based on a 'religious worldview' that inescapably influences the government, education, economics, and so forth.

Because of its post-modern underpinnings, religious vilification laws uphold the incredible premise that all religions must be equal in value, and that no religion deserves to be criticised. In reality, different religions uphold different values and produce different kinds of society. Such differences, argues Mark Durie, 'extend to understandings of slavery, cast, marriage (e.g., monogamy, divorce, polygamy), the death penalty, euthanasia, the distribution of wealth, sexual politics, abortion, attitudes to truth, the nature of political representation, the whole legal system, and warfare. Treating religions as merely a matter of identity is a recipe for confusion'.[79]

In terms of our own Western values and traditions, Christianity played an enormously significant role in the origins and development of modern democracy, human rights, and the rule of law. Indeed, these values and traditions are inextricably connected to Christian principles and to deny these principles result in a diminished understanding of our own culture and the principles that underpin it. Under this Judaeo-Christian tradition, when people are said to be 'endowed by their Creator with certain unalienable rights', they are entitled not to a 'theocracy' but rather to the preservation of these basic rights and freedoms, no matter their ideological or religious convictions. Conversely, asked Thomas Jefferson rhetorically: 'How can the liberties of a nation be secure when we have removed their only secure basis, a conviction in the minds of the people that these liberties are a gift of God?' [80] Statements such as these had an undeniable impact on the development of Western democracy. According to Sanford Lakoff, Emeritus Professor of Political Theory at the University of California, San Diego,

> The Christian teaching with the greatest implications for democracy is the belief that because humanity is created in the image of God, all human beings are of equal worth in the sight of God. Along with the Greek Stoic belief in equality as a reflection of the universal capacity for reason, this belief shaped an emerging democratic consciousness, as Alexis de Tocqueville noted when he observed in the introduction to his study of democracy in America that Christianity, which has

[77] Rex. M. Rogers, *Christian Liberty: Living for God in a Changing Culture* (Grand Rapids/MI: Baker Books, 2003, p.48.
[78] T.S. Elliot, *Notes toward a Definition of Culture* (New York: Harcourt and Brace, 1949), 30.
[79] Durie, Mark; *Notes on the Victorian Racial and Religious Tolerance Act (2001).*
[80] Quoted from R.J. Rushdoony, *The Politics of Guilt and Pity*, Fairfax/VA: Thoburn Press, 1978, p. 135.

> declared all men equal in the sight of God, cannot hesitate to acknowledge all citizens equal before the law.[81]

Every year a non-governmental institution called *Freedom House* organizes a survey on the situation of democracy and human rights throughout the world. These surveys empirically support the assumption that majority-Protestant countries have the best levels of human rights' protection. By contrast, the denial of a broadest range of human rights comes precisely from Marxist-communist and Muslim-majority nations. The worst violators of human rights are Libya, Saudi Arabia, Sudan, Syria, Turkmenistan, and the one-party communist (atheistic) regimes of Cuba and North Korea. 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.

In *The Price of Freedom Denied*, Brian J. Grim and Roger Finke examine the face of resurgent religious fundamentalism and debate about the place of religion in the world. Perhaps the most controversial finding is that in countries where Islam or religions other than Christianity are the majority, 'religious persecution is reported in 100 percent of cases'.[82] As they have pointed out, 'Religious persecution is not only more prevalent in Muslim-majority countries, but it also generally occurs at a more severe level'.[83] There would be, according to this study, an unequal relationship between Muslims and non-believers, and between men and women. For example, a Christian caught practicing the faith in Saudi Arabia is likely to be beheaded in public; a half-million Christians have fled Iraq; and Islamists regularly attack and kill Christian Copts in Egypt and burn down their churches.[84] These instances of religious violence and persecution have been regarded as a natural result of orthodox Islamic teachings. Roger Scruton comments on the jurisprudential approach of Islam as compared to Christianity. According to him,

> Christians will agree [with the Muslims] that obedience to the secular law is impossible when that law conflicts with the laws of God. But there is a great difference between the Christian and the Islamic interpretation of what it means. For the Christian the law of God coincides with the moral principles laid down in the Ten Commandments, which were reduced by Christ to just two – namely, to love God entirely and to love your neighbour as yourself. These commandments do not replace the secular law but constrain it. They set limits to what the sovereign can command: but so long as the sovereign does not transgress those limits, the secular law retains absolute authority over the citizen.

On the other hand, says Scruton,

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[81] S Lakoff, *Democracy: History, Theory and Practice* (Boulder/CO: Westview Press, 1996), 90.
[82] Brian J. Grim and Roger Finke, *The Prince of Freedom Denied: Religious Persecution and Conflict in the Twenty-First Century* (Cambridge University Press, 2011), 21.
[83] Brian J. Grim and Roger Finke, *The Prince of Freedom Denied: Religious Persecution and Conflict in the Twenty-First Century* (Cambridge University Press, 2011), 169.
[84] David Pryce-Jones, 'Islam Faces its Demons', *The Weekend Australian*, September 22-23, 2012, 15-16.

> Islamic jurisprudence does not recognize secular, still less territorial, jurisdiction as a genuine source of law. It proposes a universal law that is the single path (shari'a) to salvation. And the shari'a is not understood as setting limits to what can be commanded, but rather as a fully comprehensive system of commands – which can serve a military just as well as a civilian function. Nor does Islam recognize the state as an independent object of loyalty. The obedience is owed first to God, and then, below him, to those situated at greater or lesser remove in the web of personal obligations. Nor is there any trace in Islamic law of the secular conception of government that Christianity inherited (via St. Paul) from Roman law'.[85]

And it is not only the minorities who will suffer under Islamic law. The treatment of women is particularly abhorrent. In most Muslim societies, calling women second-class citizens would probably elevate their current social status. Rules from the Koran dictate that female heirs get only half of the inheritance given to men, and that the testimony of women is worth half that of a man's. In Iran, the law allows families to marry off girls as young as nine years of age. And in Iran and Saudi Arabia, the police will beat any woman who dares remove her veil in public. According to John W Montgomery, who is a law professor at the University of Luton, because the Koran dictates that 'men are superior to women, owing to the qualities which Allah has elevated the former over the latter' (IV, 38), there is even an unsettled discussion in Islamic jurisprudence as to whether a woman can actually enter Paradise.[86]

And perhaps even more disturbingly is that fact that some Muslim nations have adopted genital mutilation and spread the practice from the Red Sea and Persian Gulf regions to North Africa and Southeast Asia, as well as other areas of Muslim inhabitation. The practice of genital mutilation, which involves amputating the clitoris and sometimes part or even the entire vulva from the genitalia of women, was affirmed by Mohammed himself.[87] The most common justification by Muslim jurists for the practice of female genital mutilation is based upon the Sunnah, in which a debated between Mohammed and a woman who was a 'circumciser' of female slaves is recounted. Mohammed asked her if she was still practising her profession. She said, 'yes, unless you forbid it'. Mohammed then replied: 'It is allowed. Come closer so that I can teach you: if you cut, do not overdo it, because it brings more radiance to the face and it is more pleasant for the husband'.[88] In Southeast Asia, the operations are not indigenous to Asia, but were imported with Islam. The practice is limited exclusively to the Muslim population in Indonesia and Malaysia as a Muslim rite, with no other

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[85] Roger Scruton, *The West and the Rest: Globalization and the Terrorist Threat* (Londo/UK: Continuum, 2002), 66

[86] John Warwick Montgomery, '*Law & Gospel: A Study Integrating Faith and Practice'* (Edmonton: Canadian Institute for Law, Theology and Public Policy, 1994), 44.

[87] Don Richardson, *Secrets of the Koran* (Ventura: Regal, 2003), 42.

[88] Sani A Alddeb Abu-Sahlieh, 'Jehovah, His Cousin Allah, and Sexual Mutilation', in George C Denniston and Marilyn F Milos (eds.), *Sexual Mutilations, A Human Tragedy* (New York/NY: Plenum Press, 1997), 47.

religious group involved.[89] In her *The Hoskan Report*, Fran Hoskan reproduces an extract from *Guidelines for Health Care According to Islamic Law*, an Indonesian book published in 1956. Part of the extract reads as follows:

> Therefore, circumcision among Muslim female children involves cutting the praeputium clitordis, sometimes the clitoris itself or the labia minora. The child lies flat on her back, lifts up her knees and straddles her legs widely ... After some words of prayers, the clitoris is cut with a pair of scissors or a small knife, as closely as possible along this boundary. It if it cut by a knife, a slice of Rhisom (turmeric) is placed as a base between the knife blade and the clitoris.[90]

About half of all Arab women are illiterate and in Islamic Africa many undergo genital mutilation. Besides, 'honour killings', the killing of a woman who has 'shamed' her family, is a common practice in the countries of the Middle East. However, instances of genital mutilation, 'honour killings', polygamy and forced marriages are reportedly occurring in Western countries among Muslims. For instance, although the Sharia permits polygamy and the Australian law prohibits it, some Australian Muslims have discovered that that latter permits *de facto* relationships regardless of whether one party is already legally married. This loophole has allowed for illegal polygamous marriages to take place among Australian Muslims.[91] As another example, Geraldine Brooks notes the results of a British empirical study on family violence in which the researchers found that women married to men of Muslim background were eight times more likely to be killed by their spouses than any other women in Britain. Brooks goes on to conclude:

> Presented with statistics on violence towards women, or facing the furore over the Rushdie fatwa ... Muslims ... ask us to blame a wide range of villains: colonial history, the bitterness of immigrant experience, Bedouin tradition, pre-Islamic African culture. Yet when the Koran sanctions wife beating and the execution of apostates, it can't be entirely exonerated for an epidemic of wife slayings and death sentences on authors. In the end, what they ... are proposing is as artificial an exercise as that proposed by the Marxists who used to argue that socialism in its pure form should not be maligned and rejected because of the deficiencies of 'actually existing socialism'. At some point, every religion, especially one that purports to encompass a complete way of life and system of government, has to be called to account for the kind of life it offers the people in the lands where it predominates. [92]

The Trouble with 'Multicultural Democracy'

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[89] Fran P Hosken, *The Hosken Report, Genitals and Sexual Mutilation of Females* (4rth ed., Massachusetts: Women's International News, 1993), 279.
[90] Fran P Hosken, *The Hosken Report, Genitals and Sexual Mutilation of Females* (4rth ed., Massachusetts: Women's International News, 1993), 279.
[91] Jamila Hussain, 'The Myths and Realities of Islam's Shariah Law', On Line Opinion, 2 March 2006, available at ..
[92] Geraldine Books, *Nine Parts of Desire: The Hidden World of Islamic Women* (London: Hamish Hamilton, 1995), 36.

As soon as the verdict against those pastors was announced by Judge Higgins, a spokeswoman for the Victorian Minister of Multicultural Affairs was found stating that the vilification law was 'working as it should and there's nothing to suggest that this is a bad law'.[93] If the government really thinks that its vilification law is working well, regardless of such outcomes, then one may reasonably assume that such results were not entirely unintended. Indeed, the government seems to actually believe that the law is serving its own political-ideological purposes. If so, what are the real purposes behind such vilification laws? Prior to the enactment of the Victorian Act, in a message printed in a Discussion Paper, the then Premier Steve Bracks said that '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'.[94] So, in reading the preamble of the RRTA, one finds the significant statement that such a law has been designed to advance a so-called 'multicultural democracy'.[95]

Of course, it is not difficult to see the internal tensions within these ideas of 'multiculturalism' and 'democracy', and that a truly liberal democracy should be seriously committed not so much to 'cultural diversity' but rather with the status of the individual citizen as a human being endowed with unalienable rights to life, liberty and property. Accordingly, securing the conditions of a multicultural society *and* preserving the basic rights of the citizen are potentially competing principles that may have to be traded off against each other in each particular case.

In his seminal work on how democracy effectively works, Robert Dahl, Emeritus Professor of Political Science at Yale University, identifies the underlying conditions in a country that would be favourable to the stability of democratic institutions. 'Where these conditions are weakly absent democracy is unlikely to exist, or if it does, its existence is likely to be precarious'.[96] Among conditions identified as 'essential for the stability of democracy, Dahl identifies 'weak sub-cultural pluralism' and 'democratic beliefs and political culture'. According to him, 'democratic political institutions are more likely to develop and endure in a country that is culturally fairly homogeneous and less likely in a country with sharply differentiated and conflicting subcultures'.[97] Conversely, 'cultural diversity', he continues, threatens to generate intractable social conflicts whereby democratic institutions would be simply impossible to be maintained. The following passage in Dahl's seminal *On Democracy* explains the potentially adverse consequences of state-sponsored 'multiculturalism':

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[93] Farrah Tomazin, 'Victoria's Vilification Act Easy to Abuse: Carr', *The Age*, Melbourne/Vic, June23, 2005, 3.
[94] Jenny Stokes, 'Religious Vilification Laws in Victoria – Background to the Law and Cases', Salt Shakers, Melbourne/Vic, May 2005.
[95] Racial and Religious Tolerance Act 2001 (Vic) s4(1)(a).
[96] Robert A. Dahl, *On Democracy* (New Haven: Yale University Press, 1998), 147.
[97] Robert A. Dahl, *On Democracy* (New Haven: Yale University Press, 1998, 150-1.

> Distinctive cultures are often formed around differences in language, religion, race, ethnic identity, and sometimes ideology. Members share a common identity and emotional ties; they sharply distinguish "us" from "them". They turn toward other members of their group for personal relationships: friends, companions, marriage partners, neighbors, guests. They often engage in ceremonies and rituals that, among other things, define their group boundaries. In all these ways and others, a culture may become virtually a "way of life" for its members, a country within a country; a nation within a nation. In this case society is, so to speak, vertically stratified.

Hence, he concludes:

> 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. [98]

What Dahl suggests is that some religious allegiances may be nonnegotiable, whereas democracy may actually require otherwise. A successful and stable democratic society 'cannot be radically multicultural but depends for its successful renewal across the generations on an undergirding culture that is held in common'.[99] This common culture, as John Gray points out, 'needs not encompass a shared religion and it certainly need not to presuppose ethnic homogeneity, but it does demand widespread acceptance of certain norms and conventions of behaviour and, in our times, it typically expressed a shared sense of nationality'.[100] By contrast, dividing people into enclaves of ethnicity will not necessarily advance the values of a truly open and democratic society. Of course, a basic precondition for authentic democracy is that citizens share common democratic values, and that they are fully able to communicate themselves in the common language of their fellow citizens, so as to enable themselves to be more properly engaged in the process of democratic deliberation. And yet, democracy in itself is a cultural value and so democratic values are linked to certain cultural traditions that are transmitted to citizens from generation to generation. As Jeffrie G Murphie points out, '[these] 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'.[101]

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[98] Robert A. Dahl, *On Democracy* (New Haven: Yale University Press, 1998), 150.
[99] John Gray, *Enlightenment's Wake* (London/UK: Routledge Classics, 2007), 36.
[100] John Gray, *Enlightenment's Wake* (London/UK: Routledge Classics, 2007), 36.
[101] Jeffrie G.Murphy, '*Constitutionalism, Moral Skepticism, and Religious Belief', in* Alan S. Rosenbaum (ed.) *Constitutionalism: The Philosophical Dimension* (New York/NY: Greenwood Press, 1988).

In his classic *Considerations on Representative Government* (1861), John Stuart Mill speculated that some peoples may be culturally unqualified to accept the moral implications of democratic government. He developed his argument according to the presupposition that the reality of democratic government is 'determined by social circumstances'.[102] Mill considered that these circumstances are malleable, and could therefore be changed for either better or worse. He also believed that people could be taught to behave in a democratic manner and according to the rule of law. And yet, Mill kept insisting that some patterns of cultural behaviour are essential in determining the realization of democracy. As he explained:

> 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 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.[103]

Mill was criticizing the unrealistic assumption that all cultures would agree with the values of democracy and basic rights, or that they would not create 'insurmountable obstacles' for the realization of such values. Indeed, Samuel Huntington once explained that if popular elections were held in most countries of the Middle East, chances are that these elections would bring people with extremist views into power. By appealing to their specific religious and cultural loyalties, such radicals would be more likely than not to deny a broadest range of basic rights for women and minority groups.[104] For example, the Muslim Brotherhood candidate who democratically won the presidential elections in Egypt went on to almost immediately purge the media and the judiciary while proposing to write a new constitution that will leave the country in the permanent possession of the Islamists. As pointed out by an Egyptian citizen a few days after the Brotherhood takeover: 'Arab Spring? What Spring? I see only an utter and complete rape of the nation that was the cradle of civilisation by an [Islamic] ideology that is the most detrimental factor at the base of misery, repression and loss that humanity has ever seen in all its history'.[105]

An idea that started out in the sixties and early seventies, multiculturalism initially had the reasonable goal of including minority groups in Western societies. Nowadays, it is difficult to talk candidly about such an idea, since the multicultural project seems to have become an aggressive ideology against

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[102] J.S. Mill, *Considerations on Representative Government* [1861] (Chicago/IL: William Benton, 1952), 31.
[103] Ibid., 29.
[104] Samuel Huntigton, 'Democracy for the Long Haul', in L. Diamond, Marc F. Plattner, Y. Chu, and H. Tien (eds.), *Consolidating the Third Wave Democracies* (Baltimore/London: The John Hopkins University Press, 1997), 7.
[105] David Pryce-Jones, 'Islam Faces its Demons', *The Weekend Australian*, September 22-23, 2012, 15-16.

Western values and traditions. Multiculturalism is no longer just a fair understanding of other cultures, but an ideological project for the dilution of Western values and traditions. According to Huntington, multiculturalism is basically an 'anti-Western ideology' opposed to 'Eurocentric concepts of democratic principles, culture, and identity.[106] As such, the multiculturalists who demand our total respect for *any* culture, they themselves tend to exhibit a blatant disrespect for our own values and traditions in the West.[107]

The prevailing model of multiculturalism seems to advance the postulation that Western countries such as Australia and the United States are composed of different ethnic and religious groups, each of them having its own distinctive culture. And yet, the white elite dominant in society would have suppressed these cultures and compelled or induced those belonging to them to accept the elite's Western culture and religion. Western societies should therefore no longer be endowed with a single pervasive national culture and language, but instead as 'multicultural societies' they should recognise the rights of minority groups and accept governmental encouragement, support, and funding for their distinct language, customs, and culture.

In this sense, the concept of multiculturalism stands for a form of anti-Western ideology that promotes cultural (and moral) relativism and refuses to admit that culture (at the extremes) produce either a democratic society or social oppression, for instance, against women and minorities. And yet, the concept has been exploited as a powerful weapon by a few social engineers who desire to replace traditional Western values by other, more recondite ones.[108] These social engineers aspire to dismember the traditional elements of Western civilisation, especially those with their deep Judeo-Christian underpinnings, to reconstruct them in accordance with new blueprints that could provide legal accommodation, for example, to such practices as child marriage and polygamy.[109]

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[106] Samuel Huntington, *Who Are We? America's Great Debate* (London: The Free Press,2004), 173.
[107] Hence, writes Ravi Zacharias, Christianity has become a "free game for ridicule and analysis by social critics, and is afforded no protection from hate and hostility by the so-called multicultural society". – Ravi Zacharias, *Deliver us from Evil: Restoring the Soul in a Desintegrating Culture* (Dallas/TX: Word Publishing, 1996), 244.
[108] Irving Kristol comments: "Multiculturalism is currently propagated on college campuses by a coalition of nationalist-racist blacks, radical feminists, gays and lesbians, and a handful of aspiring demagogues who claim to represent various ethnic minorities. This coalition's multiculturalism is an ideology whose educational program is subordinated to a political program, that is, above all, anti-American and Anti-Western. What these radicals blandly call multiculturalism is as much 'a war against the West' as Nazism and Stalinism ever were". Irving Kristol, 'The Tragedy of Multiculturalism', in *Neoconservatism: The Autobiography of an Idea* (Chicago/IL: Elephant Paperbacks, 1995), 53.
[109] Paul Johnson, 'Christianity: New Challenges', Australian Festival of Light, Adelaide/SA, February 1992, 11.

In addition, multicultural policies pose a major challenge to the idea of national identity, because they elevate racial, ethnic, gender, religious, and other sub-national identities over common national identity and equal rights for *all* citizens. As advocated by some elite elements and special-interest groups, multiculturalism favours a new form of cultural apartheid, or social fragmentation, whereby ethnic and/or religious differences are intensified and the social factors which have united the people and promoted immigrant assimilation are weakened. This is why multiculturalism has become such a major reason for the increased tendency of some immigrant groups to maintain their primary loyalty to their original cultural or religious identities rather than attempt to more fully embrace the cultural identity of their new nation.

Naturally, the multiculturalists who advocate 'cultural diversity' will claim that these immigrants would be the first to support state-promoted multicultural policies. However, it is possible to suggest that the main impetus for these policies do not come from the immigrants but rather from the local elite as well as the more powerful elements within the respective minority groups.[110] Apart from these few privileged individuals, common people will gain very little from the amorphous atmosphere of multiculturalism, 'save bewilderment and the loss of any sense of cultural identity'. Scruton thus reminds that the imposition of rules of cultural behaviour via the state sponsorship of multiculturalism has become a new form of 'social apartheid'. As he points out, 'all criticism of minority cultures is censured out of public debate, and new-comers quickly conclude that it is possible to reside in a… state as an antagonist and still enjoy all the rights and privileges that are the reward of citizenship'.[111] For Scruton, therefore, multiculturalism has caused entire Western nations to fragment into small enclaves of ethnicity. As a result of the enormous loss of national identity provoked by multicultural policies, he concludes: 'If people come from immigrant backgrounds that preserve the memory of a religious law, they will often revert to a religious experience of membership, and define themselves in opposition to the territorial jurisdiction by which they are ostensibly governed'.[112]

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[110] According to Tammy Bruce, 'Framing arguments about race as arguments about culture has the additional advantage for the Left of *removing the individual from the scene entirely*. Ironically, it also reinforces what is supposedly being resisted: the isolation of people because of their race. By defining society not as an entity made up of individual people but as a collection of cultures – as white culture, black culture, Hispanic culture – the Left effectively isolates us, whether we like it or not, into special-interest groups. The culture has the identity, eclipsing the individual. We're no longer individuals with unique minds and talents; we're defined instead by the color of our skin, by the country in which we were born, by the religion we practice.' – Tammy Bruce, *The New Thought Police* (New York/NY: Three Rivers, 2001), 166.

[111] Idem, at 63

[112] Scruton, Roger; *The West and the Rest: Globalization and the Terrorist Threat* (London/New York: Continuum, 2002) 68.

In Britain, for example, a study commissioned by *Policy Exchange* has found that multicultural policies have alienated entire generations of young Muslims. [113] It has made them increasingly more radical and anti-Western, and much more than their parents' generation.[114] This study also reveals that four out of ten young British Muslims desire to live under Sharia law, and that they support punishment by death for Muslims who convert to another religion. Furthermore, 13 per cent of these young British Muslims expressed a sincere admiration to terrorist organizations such as Hamas and Hezbollah, which are prepared to 'fight the West'. According to Dr Munira Mirza, the academic who conducted the survey, 'the emergence of a strong Muslim identity in Britain is, in part, a result of multicultural policies implemented since the 1980s which have emphasized difference at the expense of shared national identity and divided people along ethnic, religious and cultural lines'.[115]

Similarly, the media has recently reported a violent protest on the streets of Sydney by hundreds of hardcore Muslim militants who brutally attacked the police and were equipped with banners and posters with slogans such as 'Sharia will dominate the world' and 'Behead those who insult Islam'. These extremists may live in Australia but they are 'militant Muslims above all else, above all reason,

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[113] 'Multiculturalism drives young Muslims to shun British values', *Daily Mail*, January 29,2007, at http://www.dailymail.co.uk/news/article-432075/Multiculturalism-drives-young-Muslims-shun-British-values.html#

[114] Wolfgang Kasper agrees that multiculturalism has contributed for the radicalisation of the children and grand-children of some immigrants: *'The task of integrating immigrants does not stop with the first generation, in particular if they hail from non-Western origins. The first generation typically focuses on getting on within the existing system, but the second and third generations tend to challenge the existing regime. We have already observed a wave of multiculturalism and the politicisation of cultural change. Playing the multicultural card brought political advantage to the leaders who promoted the vision of multiculturalism, whether they were spokesmen for immigrant groups or politicians who sought migrant-group support in elections. Leaders with more traditional theories about government and social harmony have opposed the new multiculturalism'.* – Wolfgang Kasper, *The Merits of Western Civilisation: An Introduction* (IPA/Mannkal, 2011), 73.

[115] 'Multiculturalism drives young Muslims to shun British values', *Daily Mai*l, January 29, 2007. Further evidence part of the Muslim population in Britain have been radicalised and unwilling to accept the norms that rule a democratic society, occurred just after Ayatollah Khomeini on February 14, 1989, issued his fatwa condemning to death Salman Rushdie for writing *Satanic Verses* (1988). There were many British Muslims who were happily willing to carry out the death sentence against the writer. John Gray comments*: 'The evidence of the Rushdie affair is that a minority of fundamentalist Muslims are unwilling to accept the norms that govern civil society in Britain. Here a policy of toleration must be willing to be repressive – to arrest and charge those who have made death threats against the writer or those associated with him. Toleration does not mandate turning a blind eye on those who flout the practices of freedom of expression that are among the central defining elements of liberal society in Britain: it mandates their suppression... Difference of religious belief and of irreligion, of conceptions of the good and of ethnic inheritance may be many and significant, and yet the inhabitants of a country may yet be recognizably practitioners of a shared from of life. The kind of diversity that is incompatible with civil society in Britain is that which rejects the constitutive practices that give it its identity. Central among these are freedom of expression and its precondition the rule of law. Cultural traditions that repudiate these practices cannot be objects of toleration for liberal civil society in Britain or anywhere else'.* – John Gray, *Enlightenment's Wake* (London: Routledge, 2007), 37-8.

above all restraint, and above the law', as Dr Mervyn F Bendle points out.[116] The Sydney affair shows that a minority of Muslim extremists are unwilling to accept the norms that govern civil society in Australia. Here the government of a democratic society should be willing to arrest and charge all those who have made such threats against democracy and against all those who 'dare to insult Islam'. As John Gray correctly puts it, 'toleration does not mandate turning a blind eye on those who flout the practices of freedom of expression that are among the central defining elements of liberal society in [Australia]: it mandates their suppression'.[117]

Moderate Muslims, of course, by definition do not subscribe to the agenda of radical Islamism. In fact, some have argued that they are the principal victims of radical Islamists. If that is so, however, others have noted that they are quite a silent majority. According to Christopher Caldwell, 'condemnation of terrorism has never been frequent or full-throated enough to assure their fellow citizens. There was a collective test of loyalty. Muslims for the most part failed it'.[118] Likewise, Ahdar and Aroney point out that since September 11, 2001, 'governments eagerly awaiting firm denunciation by Muslim community spokesmen of *Al-Qaeda* terrorist attacks have been consistently disappointed'.[119] In their opinion, [t]he extent to which this silence represents tacit acquiescence and support for the radicals remains a moot point'.[120]

There is no point of discussion, however, that Islam is indeed 'an all-encompassing way of life in which the whole of reality falls under the sovereignty of Allah'. [121] According to classical Islamic jurisprudence, Islam does not allow for the privatisation of faith and leaving public governance in the hands of 'secular authorities'. That is incompatible with classical Islamic jurisprudence, at least if one takes at face value the opinion of leading Islamic scholars. For them, 'Shari'a is the "Whole Duty of Mankind", moral and pastoral theology and ethics, high spiritual aspiration, and detailed ritualistic and form observance; it encompasses all aspects of public and private law, hygiene, and even courtesy and

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[116] Mevyn F Bendle, 'Violent Islamism Erupts on the Streets of Sydney', *News Weekly*, Melbourne, September 29, 2012, at http://www.newsweekly.com.au/article.php?id=5334.
[117] John Gray, *Enlightenment's Wake: Politics and Culture at the Close of the Modern Age* (London: Routledge, 2007), 37.
[118] Christopher Caldwell, Reflections on the Revolution in Europe: Immigration, Islam and the West (New York/NY: Doubleday, 2009), 287.
[119] Rex Ahdar and Nicholas Aroney, 'The Topography of Shari'a in the Western Political Landscape', in Rex Ahdar and Nicholas Aroney (eds.), *Shari'a in the West* (Oxford/UK: Oxford University Press, 2010), 18.
[120] Rex Ahdar and Nicholas Aroney, 'The Topography of Shari'a in the Western Political Landscape', in Rex Ahdar and Nicholas Aroney (eds.), *Shari'a in the West* (Oxford/UK: Oxford University Press, 2010), 18.
[121] James W Skillen 'Shari'a and Pluralism', in Rex Ahdar and Nicholas Aroney (eds.), *Shari'a in the West* (Oxford/UK: Oxford University Press, 2010), 100.

good manners'.[122] Thus Tarik Ramadan, a well-known Muslim scholar, explains that the Sharia or Islamic law 'touches all the aspects of existence', from the intimately personal and spiritual, through to the management of interpersonal relations at the societal level.[123]

In classical Muslim jurisprudence, the *umma* or Islamic community can never be understood as a minority community within a modern state. Instead, the whole of humanity should follow the way of Islam in order to constitute the *Dar-ul-Islam* (the house of Islam) that will triumph over the *Dar-ul-Harb* (the house of conflict or war). Neither of these 'houses' is understood in terms of nationality or ethnic nations. Rather, the *Dar ul-Islam* is a universal community and all earthly governments, to have any legitimacy, will have to show 'their submission to Allah by contributing to the advance of Islam, typically by showing respect for the higher authority of Shari'a'.[124] This classical Islamic view of the world divided *into Dar-ul-Islam* and the *Dar-ul-Harb* implies that it is the obligation of Muslims to turn as much of the latter into the former. Of course, many Western Muslims are just willing to live their lives in peace. Besides, such an uncompromising position sometimes is not possible and so more radical Muslims may sometimes have to adopt different strategies, ranging from the *Hudna* (a temporary truce) to the recognition of certain territories being *Dar-ul-Sulh* (the abode of peace by agreement) or *Dar-ul-Ahb* (the abode of covenanted treaty). Even here, however, explains Nazir-Ali, 'it is still assumed ... that these territories and peoples are in tributary relationship to the Muslims':

> The theory remains that Muslims should either withdraw from the Dar-ur-Harb or, through jihad of one kind or another, seek to turn it into the Dar-ul-Islam... The classical consensus seems to be that Muslims should not remain in the Dar-ul-Harb. Where exceptions are made, it is demanded, for example, that they should be able to live as distinct and separate communities, and that they should be able to have their own law, their own judges, and even their own governors. Further, they must not contribute to the wealth and strength of a non-Muslim polity and should not serve in the military, especially against Muslims.[125]

One of the key questions facing 'multicultural' Western societies is how Muslims will adapt to living as minority communities in non-Muslim polities. Abdullah Saeed, who is Sultan of Oman Professor of Arab and Islamic Studies at the University of Melbourne, sees Muslim views on living in the West as comprising three different categories. First, there are those Muslims who think 'a Muslim cannot be bound by a national constitution that allows interest, alcohol, and [any] other behaviour which

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[122] A A An-Na'im, Islam and the Secular State: Negotiating the Future of Shari'a (Cambridge/MA: Harvard University Press, 2008), 11.
[123] T Ramadan, Islam, the West and Challenges of Modernity (Leicester/UK: Islamic Foundation, 2001), 33-34
[124] James W Skillen 'Shari'a and Pluralism', in Rex Ahdar and Nicholas Aroney (eds.), *Shari'a in the West* (Oxford/UK: Oxford University Press, 2010), 85.
[125] 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/UK: Oxford University Press, 2010), 85.

contradicts Islamic teachings'.[126] Secondly, there are those who are still 'undecided as to whether they want to be full members of Western societies'.[127] Finally, there are those Muslims who are happy to live in Western countries, because they see their legal systems as being 'Islamic' insofar as they can accept the Islamic notion of justice and morality, and allows them to exercise their basic religious duties.[128] Saeed thinks that most Muslims living in Australia fall into the third category, who believe the 'secular law' of Western societies can be tolerated in their daily lives, 'provided ... that the law of the land supports [Islamic] notions of justice ... and allows Muslims religious freedom to practice their fundamental beliefs'.[129]

Of course, there are numerous potential points of tension between placing religion as a pre-condition for a citizen's loyalty to the 'secular law'. Australia and other Western countries are basically facing two very serious threats. The first is extra-legal intimidation of a kind already endemic in the Islamic world and increasing in Europe. The national broadcaster, the ABC, regularly criticises and mocks Christianity and Christian leaders, but it will never have the courage to offend the 'moral sensibilities' of the minority Muslim community. It is because, among other things, they are scared of the Islamists who would not hesitate to kill those who dare to 'offend' Islam. The second threat, however, comes from the criminalisation of criticising Islam through the encroachment of *de facto* blasphemy laws. Indeed, religious vilifications laws are key weapons in the Islamists' arsenal, strategically employed to prevent their views from being subject to stronger criticism and open condemnation. Rather than encouraging Muslim fundamentalists in their efforts to legally stifle criticism and debate, Western authorities should firmly defend freedom of speech and expression.

Naturally, Muslim extremists will continue their push for more multicultural policies so as to continue advancing their radical and totalitarian agenda. As it currently stands, such policies demand us to accept other people's sentiments, requiring that we must accept the 'right' of everyone, including religious extremists, to live according to their radical beliefs and opinions that are different, sometimes even antithetical, to democratic rights and freedoms. Such multiculturalism suggests that we must live with the extremists and desist from interfering with them, because such a people do not fall in the line with our views about freedom of speech, women's rights, and individual liberty. Therefore, this so

[126] Abdullah Saeed, 'Reflections on the Establishment of Shari'a Courts in Australia', in Rex Ahdar and Nicholas Aroney (eds.), *Shari'a in the West* (Oxford/UK: Oxford University Press, 2010), 233.
[127] Abdullah Saeed, 'Reflections on the Establishment of Shari'a Courts in Australia', in Rex Ahdar and Nicholas Aroney (eds.), *Shari'a in the West* (Oxford/UK: Oxford University Press, 2010), 233.
[128] Abdullah Saeed, 'Reflections on the Establishment of Shari'a Courts in Australia', in Rex Ahdar and Nicholas Aroney (eds.), *Shari'a in the West* (Oxford/UK: Oxford University Press, 2010), 235.
[129] Abdullah Saeed, 'Reflections on the Establishment of Shari'a Courts in Australia', in Rex Ahdar and Nicholas Aroney (eds.), *Shari'a in the West* (Oxford/UK: Oxford University Press, 2010), 233.

called ‘celebration of diversity’ becomes, in actual effect, a mere affirmation of moral relativism as well as a manifestation of the incapacity of Western societies to judge religious extremists and their more fundamentalist views. So instead of serving as a way of promoting real tolerance and accommodating society to different cultural and/or religious views, these multicultural policies will result in a form of detached indifference to other people’s ideas and values, no matter how antagonistic they might be to our own values and traditions, and a way of not taking more seriously current threats which may undermine our basic rights and freedoms.

Arguably, when the meaning of ‘tolerance’ can be distorted to such a manner that it now seems to represent ‘a superficial signifier of acceptance of affirmation of anyone and everyone’, such ‘tolerance’ has actually become a vice rather than a virtue.[130] ‘In contemporary public discussion’, says Frank Furedi, ‘the connection between tolerance and judgement is in danger of being lost due to the current cultural obsession with being non-judgemental’.[131] Consequently, he adds, ‘[t]he reinterpretation of tolerance as a psychological attitude that conveys acceptance, empathy and respect means that it has lost its real meaning in public deliberations’.[132] And yet, as Furedi also reminds,

> The act of tolerance demands reflection, restraint and a respect for the right of other people to find their way to their own truth ... 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.[133]

The idea of multiculturalism, as propagated by the Western intellectual elite, is an anti-liberal concept which denies the supremacy of the individual over the collective. In prioritising cultural rights at the expanse of individual rights, multicultural policies tend to facilitate the oppression of women and other less powerful members of these different social groups. The abuse of rights on cultural or religious grounds is particularly visible when it comes to the treatment of women in most Muslim communities. Although the amputation of the clitoris, sometimes the entire vulva from the genitalia, is still practiced in some Muslim communities, some Western multiculturalists claim that the genital mutilation of little girls as young as 3 years old ‘have to be considered in context’. According to Leti Volpp, who is an American law professor, any criticism of clitoris mutilation amounts to a form of ‘cultural imperialism’ and a ‘version of racist ideology’ which ‘presents immigrant women as requiring liberation into the “progressive” social mores and customs of metropolitan West’.[134]

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[130] Frank Furedi, ‘On Tolerance’, *Policy*, Vol.28, No.2, Winter 2012, 31.
[131] Frank Furedi, ‘On Tolerance’, *Policy*, Vol.28, No.2, Winter 2012, 32.
[132] Frank Furedi, ‘On Tolerance’, *Policy*, Vol.28, No.2, Winter 2012, 32.
[133] Frank Furedi, ‘On Tolerance’, *Policy*, Vol.28, No.2, Winter 2012, 332.
[134] Leti Volpp, ‘Talking Culture: Gender, Race, Nation, and the Politics of Multiculturalism’ (1996) 96 *Columbia Law Review* 1573, 1577.

One will be forgiven for thinking that such arguments amount to a betrayal of non-Western women by a few Western female academics who have embraced the value of cultural relativism. Indeed, some women from particular minority cultures have often protested against the double standards that are normally applied by academics to justify their oppression.[135] As MDA Freeman observes,

> This debate inevitably throws up a conflict between women's interests and those of a racial or cultural group ... For Volpp prioritising women's rights embraces gender consciousness at the expense of race consciousness. But can it not be argued that allowing a cultural defence enables the rights of a group to prevail over the interests of female members of that group who are likely to have had little input into the formulation of its norms?[136]

There is however an ongoing demand for the government of Western societies to provide 'special rights' to certain minority groups on the grounds of multiculturalism. These groups would have their own 'societal cultures' that, according to Will Kymlicka, provide their 'members with meaningful ways to life across the full range of human activities, including social, educational, religious, recreational, and economic life, encompassing both public and private spheres'.[137] Because societal cultures play a pervasive role in the lives of its members, proponents of group rights claim that these groups must be accorded special rights or privileges or otherwise their minority status would be endangered by the dominant culture.[138]

There are numerous and rather serious problems with the concept of group rights as advocated by the multiculturalists and affirmative-action activists. Rights are not a single indivisible entity. They can and they do frequently conflict. Too much emphasis on group rights may therefore result in the reduction of basic rights to some individuals. Indeed, group rights that determine a person's rights on the basis of belonging to any ethnic, cultural or religious group, may easily reduce the freedom of the individual in that the rights of the individual stem directly from the particular group. Of course, since 'group' rights are targeted to specific racial, religious or ideological communities, if the individual does not actually belong to the group, his or her rights are automatically reduced or curtailed.[139] Furthermore, such an idea of special rights or affirmative action to special groups goes against the

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[135] See: N Rimmont, 'A Question of Culture: Cultural Approval of Violance against Women in the Asian-Pacific Community and the Cultural Defense' (1991) 43 *Stanford Law Review* 1311-26.
[136] M D A Freeman, *Lloyd's Introduction to Jurisprudence* (8th ed, London: Sweet & Maxwell, 2008), 1297
[137] W Kymlicka, *Multicultural Citizenship: A Liberal theory of Minority Rights* (Oxford: Clarendon Press, 1995), 89.
[138] See A Margalit and M Halbertal, 'Liberalism and the Right to Culture, (1994) 71 *Social Research* 529-548. To be fair, some multiculturalists do not claim that cultural groups should have special rights, but rather 'that such groups – even illiberal ones that violate their individual members' rights, requiring them to conform to group believes or norms – have the right to be "left alone" in a liberal society', which of course is another highly controversial postulation. C Kukathas, 'Are There any Cultural Rights?' (1992) 20 (1) *Political Theory* 105-139.
[139] Alvin Schmidt, *How Christianity changed the World* (Grand Rapids: Zondervan, 2004) at 259.

obvious fact that, with many of us currently living in Western pluralistic societies, our own ethnic inheritance is actually quite complex. In Western pluralistic societies, John Gray observes,

> [multiculturalist] policies which result in the creation of group rights are inevitably infected with arbitrariness and consequent inequity, since the groups selected for privileging are arbitrary, as is the determination of who belongs to which group. The nemesis of such policies ... is a sort of reverse apartheid, in which people's opportunities and entitlements are decided by the morally arbitrary fact of ethnic origins rather than by their deserts or needs.[140]

The problem with so many Westerners today is that they have become moral relativists, who have in turn become too quick to assume that human rights and multiculturalism are both good things that can be easily reconciled.[141] And yet, some non-Western cultures are deeply suffused with practices and ideologies that do not support democracy and the rule of law, but that rather endorse and facilitate, for instance, the oppression of men over women and children. In such cultures, Susan Moller Okin comments, 'there are clear disparities in power between the sexes, such that the more powerful, male members are those who are generally in a position to determine and articulate the group's beliefs, practices and interests'.[142] In these cultural-religious conditions the concept of group rights will actually 'limit the capacities of women and girls of that culture to live with human dignity equal to that of men and boys, and to live as freely chosen lives as they can.'[143] There is indeed a strong likelihood of tension between the idea of equal rights between the genders and a form of radical multicultural ideology which is committed to use the legal system of democracies to provide more 'group rights' for minority cultures.[144] Unfortunately, as Freeman points out,

> the advocates of group rights tend to treat cultural groups as monoliths – to pay more attention to differences between and among groups than differences within them. Specifically, they accord little or no recognition to the fact that minority cultural groups like the societies in which they exist (though to a greater or lesser extent) are themselves gendered, with substantial difference in power and advantage between men and women.[145]

In Western societies, the overwhelming majority of cultural defences that are currently invoked in criminal cases involving members of cultural/religious minorities are connected with gender, in particular with male control over women and children.[146] In the United States, for example, cultural cases brought to the courts have involved instances of clitoris mutilation, child marriage, forced marriage, polygamy, and divorce systems biased against women. What follows are 'cultural defences'

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[140] John Gray, *Enlightenment's Wake* (London/UK: Routledge Classics, 2007), 35.
[141] S M Okin, 'Is Multiculturalism Bad for Women?', *in* J. Cohen, M. Howard and M. Nussbaum (eds.), *Is Multiculturalism Bad for Women,* 1999, 17-23. Quoted from Freeman, above n.35, 1400.
[142] Ibid., 1401.
[143] Ibid.
[144] Ibid., 1400.
[145] Ibid., 1401.
[146] Ibid., 1404.

that have successfully been used by the accused of violence against women and children in the American courts: (1) kidnap and rape by men who claim that their actions are part of their cultural practice; (2) wife-murder by immigrants from Asian and Middle Eastern countries whose wives have either committed adultery or treated their husbands inappropriately; (3) murder of children by Japanese or Chinese mothers who have also tried but failed to kill themselves, and who claim that the shame of their husbands' infidelity drove them to the culturally condoned practice of mother-child suicide'.[147] In all such cases expert testimony about the cultural background of the accused has resulted in dropped or reduced sentences.[148]

In all these cases involving 'cultural defence', women are not considered people of equal worth, but subordinated to men sexually, socially, and domestically.[149] These cultural defences distort not only the perception of the mainstream community about particular minority cultures, by drawing some excessive aspects of these cultures, but, and more importantly, they fail to protect women and children from serious instances of male and sometimes even maternal violence. Above all, these cultural defences stem from a multiculturalist disregard or failure to appreciate the fact that human rights can be seriously violated by some cultural and/or religious practices.[150] Of course, when it comes to protecting the basic rights of *all* human beings, no beliefs, practices, and interests should be considered irrelevant for the laws of a truly open and democratic society.

How the Present 'Culture of Offendedness' Threatens Freedom of Speech

Given the democratic imperative that all citizens should be allowed to speak openly and publicly about their convictions, religious or otherwise, the current notion of offendedness as defined by religious vilification laws is dangerously emotive. Those who now claim to be 'offended' are speaking of an emotional state on which they claim to have received a real or perceived insult to their belief system. In such a case, 'being offended does not necessarily involve any real harm but points instead to the fact that the mere presence of such an argument, image, or symbol evokes an emotional response of offendedness'.[151]

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[147] Ibid.
[148] Ibid., 1405.
[149] Ibid., 1403.
[150] A Gutmann, 'The Challenge of Multiculturalism in Political Ethics' (1993), 22 (3) *Philosophy and Public Affairs* 171-204.
[151] R. Albert Mohler Jr., *Culture Shift: Engaging Current Issues with Timeless Truth* (Colorado Springs/CO: Multnomah Books, 2008), 30-31.

Historically, however, being offended meant something quite different. The concept of offended implied in something much more than just being strongly challenged in our ideas and believes. Rather, being offended was to cause someone to be seriously brought down and to be crushed. Today, however, as Dr Albert Mohler Jr points out, 'desperate straits are no longer required in order for an individual or group to claim the emotional status of offendedness. All that is required is often the vaguest notion of emotional distaste at what another has said, done, proposed, or presented'. [152]

The government of every open and democratic society has a particular responsibility to protect free speech and to resist the present 'culture of offendedness'. Such culture, one might say, threatens to shut down all significant public discourse. Of course, the right of citizens to speak publicly about their innermost convictions imply that the adherents of other convictions must be equally free to present their arguments in an equally public manner. This is the basic cost of living in a democracy society; a point which has been made by Salman Rushdie, the British novelist who was put under an Islamic sentence of death because he had insulted Muslim sensibilities:

> The idea that any kind of free society can be constructed in which people will never be offended or insulted is absurd. So too is the notion that people should have the right to call on the law to defend them against being offended or insulted. A fundamental decision needs to be made: Do we want to live in a free society or not? Democracy is not a tea party where people sit around making polite conversation. In democracies people get extremely upset with each other. They argue vehemently against each other's positions.

Rushdie goes on to conclude:

> People have the fundamental right to take an argument to the point where somebody is offended by what they say. It is no trick to support the free speech of somebody you agree with or to whose opinion you are indifferent. The defense of free speech begins at the point where people say something you can't stand. If you can't defend their right to say it, then you don't believe in free speech. You only believe in free speech as long as it doesn't get up your nose.[153]

In a democratic society the law should not create a right for people not to feel offended. The construction of such a right means the end of free speech and the free exchange of ideas. And yet, religious vilification laws, as mentioned before, are designed to penalise strong disapproval of a person's beliefs.[154] Given the ongoing atmosphere of fear and intimidation that anti-discrimination laws have created, it is not uncommon to find discerning citizens who feel afraid of voicing any

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[152] R. Albert Mohler Jr., *Culture Shift: Engaging Current Issues with Timeless Truth* (Colorado Springs/CO: Multnomah Books, 2008), 31.

[153] Salman Rushdie, 'Defend the Right to Be Offended', OpenDemocracy, February 7, 2005, at http://www.opendemocracy.net/faith-europe_islam/article_2331.jsp

[154] Religious vilification laws can be used to fuel more home-grown religious radicalism. Indeed, the tactics of intimidating and thereby silencing writers and media outlets has been commonly adopted by Islamists in Western societies.

criticism of someone's beliefs.[155] In a democratic society, however, nobody should expect to be exempt from the possibility of strong criticism. As the European Court of Human Rights noted,

> Those who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or a minority, cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others by doctrines hostile to their faith.[156]

Naturally, it is understandable that a 'multicultural society' would prefer people to moderate their claims and avoid comments that might cause offence to some religionists. But to require the citizens to have their speech controlled by the law in the name of tolerance is certainly to go too far. After all, democracy involves the basic right of citizens to freely express opinions without any fear or threat of punishment. As properly understood, democracy presupposes a process of open deliberation about ideas that requires freedom of unqualified speech. This kind of freedom is crucial in the area of religious debate, which 'represents the idea that a responsible citizenry must decide these questions of faith and truth themselves. Speech is the means by which we may offer counterarguments to compete against characterisations that we detest, and it forms the means by which communities can create their identities, even if it is in opposition to, or at the expense of, one another'.[157]

Free speech is therefore the oxygen in which an authentic democracy breaths. As a basic tenet of democratic societies, freedom of speech involves a critical examination and assessment of belief systems in general. In an authentic democracy, citizens must feel entirely free to criticise any culture or religion. Although a citizen's opinion might be not the most politically correct, he or she still has the right to expose it without the risk of persecution, even if his or her opinion is found to be an erring one. Indeed, a democratic society provides that the right to the freedom to hold religious belief is not a right to freedom from one never being challenged about his or her religious beliefs and ethical values. Accordingly, any society that allows the government to enact laws that effectively clamp down on the citizen's basic right to free speech has already started moving from authentic democracy to a less overtly or more disguised form of 'elected dictatorship'.[158]

The Constitutional Invalidity of Religious Vilification Laws

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[155] Alvin J. Schmidt, *The Great Divide: The Failure of Islam and the Triumph of the West* (Boston/MA: Regina Orthodox Press, 2004), 247.
[156] Otto-Preminger Institut v Austria (1995) 19 EHRR 34 [47].
[157] Joel Harrison, 'Truth, Civility, and Religious Battlegrounds: The Context Between Religious Vilification Laws and Freedom of Expression' (2006) 12 Auckland University Law Review 71, 96.
[158] See: Muehlenberg, Bill; *The Problem with Vilification Legislation.* January 2005.

Besides Victoria, only two other Australian states have introduced religious vilification laws: Queensland and Tasmania. In Queensland, an amendment was passed to the Anti-Discrimination Act in 2001, which prohibits conduct that 'incites hatred towards, serious contempt for, or severe ridicule'.[159] This Act is divided into two parts and has a section on serious religious vilification that carries fine and a six month prison term.

A case in Queensland decided under is vilification law relates to an election brochure published during the federal election campaign, in 2011. Mr Andrew Lamb, who ran as an independent candidate, published a brochure comparing the Bible and the Qur'an. An injunction was applied by the Chairman of the Islamic Council of Queensland to the Anti-Discrimination Commission. The application was dismissed by President Sofronoff QC, who observed that '[o]ne result of acceding to the complainant's application to retrain further publication of the pamphlet would be to deny the voters of Moreton any further knowledge that Mr Lamb holds views of this character. Although his holding those views may persuade some to vote for him, it is equally likely that his may persuade others to deny him their vote'. Thus he concluded: 'In my view it is manifestly in the public interest that candidates' views on issues affecting the electorate be known'.[160]

Whereas the Australia Constitution does not contain a comprehensive declaration of rights, it does deal with some rights, and it has been found also to contain a few implied rights. Implied rights are those the High Court has declared to exist even though they are not explicitly mentioned in the Constitution. As such, some rights and freedoms are *implicit* in the basic law.[161] Among these rights, the High Court has determined that implied in the Constitution is a freedom of communication on political and public matters. Accordingly, the court has found an implied right to freedom of communication as a means of invalidating legislation on constitutional grounds.[162]

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[159] Queensland Anti-Discrimination Amendment Act 2011, at http://www.legislation.qld.gov.au/LEGISLTN/ACTS/2001/01AC035.pdf

[160] Dean v Lamb [2001] QADT 20 (8 November 2001), http://www.autslii.edu.au/au/cases/qld/QADT/2001/20.html

[161] Of course, legal protection is given to rights against discrimination by statute law at both Commonwealth and State levels. The Racial Discrimination Act 1975 (Cth), Sex Discrimination Act 1984 (Cth) and Disability Discrimination Act 1992 (Cth) prohibit discrimination on the stated grounds and offer a remedy where such discrimination occurs.

[162] *Nationwide News Pty Ltd v Wills* (1992) and *Australian Capital Television Pty Ltd v The Commonwealth* (1992).

In *Nationwide News*[163], the majority of the High Court (Brennan, Deane, Toohey and Gaudron JJ) relied on an implied freedom of communication to strike down a prohibition upon the making of statements calculated to bring the Industrial Relations Commission or any of its members into disrepute. The other Justices (Mason CJ, Dawson and McHugh JJ) struck down the law on other grounds. In providing rationale for his decision, Brennan J stated that democracy implies 'legal incidents' which are essential to its 'effective maintenance'. Thus he concluded:

> Once it is recognised that a representative democracy is constitutionally prescribed, *the freedom of discussion* which is essential to sustain it is as firmly entrenched in the Constitution as the system of government which the Constitution expressly ordains.[164]

Nationwide must be read in conjunction with *Australian Capital Television* (1992),[165] another landmark case in which the court further implied a freedom of communication in respect to political affairs as being derived from the system of representative democracy which the Constitution creates. The case involved a challenge to the validity of the *Political Broadcasts and Political Disclosures Act 1991* (Cth), which prohibited political advertisements on radio and television during election periods. The question before the court was whether the Act was invalid as a contravention of an implied guarantee of freedom of communication. The majority (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ) held that the Act contravened an implied guarantee of communication, at least in relation to public and political discussions. Brennan J fully acknowledged such an implication, but largely upheld the law by arguing that it was proportionate to the legitimate aim of reducing corruption in the political process. Only Dawson J rejected the concept.[166] Mason CJ, for instance, held that freedom of communication (and discussion) in relation to public and political affairs is an indispensable element in democratic society, arguing for the 'indivisibility' of freedom of communication as related to democratic issues:

> Freedom of communication in relation to public affairs and political discussion cannot be confined to communications between elected representatives and candidates for election on the one hand and the electorate on the other. The efficacy of representative government depends also upon free communication on such matters between all persons, groups and other bodies in the community… The concept of freedom to communicate with respect to public affairs and political discussion does not lend itself to subdivision … The consequence is that the implied freedom of communication extends to all matters of public affairs and political discussion, notwithstanding that a particular matter at a given time might appear to have a primary or immediate connection with the affairs of a State, a local authority or a Territory and little or no connection with Commonwealth affairs'.[167]

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[163] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1
[164] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 48-9 (Brennan, J)
[165] *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106
[166] Ibid., 187
[167] Ibid., 138-42

In *Theophanous* (1994)[168] the High Court found an implied right that allows a defence to defamatory statements about persons engaged in public activity. The defendant must show that the publication was reasonable. The implied right was said to create a substantive defence in defamation proceedings. The case involved a statement made that was defamatory to a member of federal Parliament and former chairman of the Parliamentary Committee on Migration. He sued for defamation the newspaper that made the statement because of a letter to the editor which attacked his immigration policies and accused him of bias arising from his own ethnic background. The Court held that it was a defence to the statement to demonstrate that the letter had not been published recklessly and that the defendant did not know the defamatory statement was false. In essence, the majority held that the implied freedom operates not only to invalidate federal statutes insofar as they unreasonably impair that freedom, but also to impose a similar limit on the law of defamation whether embodied in the common law or in the statute law of the states.

Stephens v West Australian Newspapers Ltd (1994) involves a similar right to freedom of political communication. The *West Australian* newspaper claimed that six members of the state Legislative Council had wasted taxpayers' money by taking an overseas trip to investigate matters that could have been investigated in Western Australia. The trip was described as 'a junket of mammoth proportions'. The six Legislative Councillors sued the newspaper for defamation, and the defendants pleaded a defence based on the implied freedom of political communication. The defamation was therefore related to state politicians and connected with a state issue, not a federal one. However, the majority (Mason CJ, Deane, Toohey and Gaudron JJ) held that the implied constitutional right to freedom of political communication extends to the discussion of state affairs. This is important because it reveals that such implied right is something that the states also need to respect.

In *Lange v Australian Broadcasting Corp* (1997)[169], the High Court resolved that the right to freedom of political communication encompasses 'information, opinions, and arguments concerning government and political matters that affect the people of Australia'.[170] The court reinstated its initial position that that the Constitution conceives a system of representative government that implies a 'freedom of communication on matters of government and politics'.[171] The case involved some comments made by a television program about the plaintiff, a former Prime Minister of New Zealand,

[168] *Theophanous v Herald &Weekly Times Ltd* (1994) 182 CLR 104
[169] *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520
[170] Nicholas Aroney, 'The Constitutional (In)validity of Religious Vilification Laws: Implications for their Interpretation' (2006) 34 Federal Law Review 288, 295.
[171] Ibid. 558-59.

who brought an action for defamation against the Australian Broadcasting Corporation (ABC). The High Court held that the freedom of communication in relation to political and public affairs prevents the Commonwealth, States and Territories from introducing legislation which restricts communication on political matters, and in a manner that is inconsistent with the existing system of representative government.

Finally, in *Coleman* (2004) the majority of the court considered that a law cannot, consistently with the implied freedom of political communication, prohibit speech of an insulting nature without significant qualifications. Standing in the majority, McHugh J held that insofar as the insulting words are used in the course of political discussion, 'an unqualified prohibition on their use cannot be justified as compatible with the implied freedom'.[172] His Honour also observed that 'insults are a legitimate part of the political discussion protected by the Constitution'.[173] Similarly, Gummow and Hayne JJ reminded that 'insult and invective have been employed in political communication since the time of Demosthenes'.[174] Justice Kirby concurred, arguing that Australia's politics has regularly included 'insult and emotion, calumny and invective', and that the implied freedom must allow for this.[175]

As seen above, the implied freedom has been found to protect insults, abuse, and ridicule made in the process of the political communication. Such a means of communication are therefore a legitimate part of the political discussion recognised by the High Court.[176] And yet, it is also possible to say that debates relating to the role of religion in political discussion in general will often 'be robust, exaggerated, angry, mixing fact and comment and commonly appealing to prejudice, fear and self interest'.[177] According to Nicholas Aroney, the natural implication is that no law can actually prohibit religious speech that involves insults, abuse and/or ridicule, to the extent where such a speech is political in character. Of course, religious speech may be also political speech and when they are intertwined, Aroney concludes, 'the decision in Coleman suggests that, absent qualifications of the kind relied upon by the majority, law which prohibit religious vilification will infringe the implied freedom of political communication'.[178]

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[172] Coleman (2004) 220 CLR 1, 54.
[173] Coleman (2004) 220 CLR 1, 54.
[174] Ibid, 78,
[175] Ibid, 91.
[176] Coleman v Power (2004) 220 CLR 1, 54.
[177] Roberts v Bass (2002) CLR 1, 62-63.
[178] Nicholas Aroney, 'The Constitutional (In)validity of Religious Vilification Laws: Implications for their Interpretation' (2006) 34 Federal Law Review 288, 313.

On the other hand, Aroney also comments that, if properly construed, religious vilification laws could apply in 'only very limited circumstances and for this reason are likely to be upheld as consistent with the implied freedom of political communication'. He points out to the interpretation by Judge Morris, the President of the Victorian Civil and Administrative Tribunal, who ruled that the RRTA 'does not stop a person from engaging in conduct that involves contempt for, or severe ridicule of, a religious belief or activity, provide this does not incite hatred against, serious contempt for, or revulsion or severe ridicule of another person or a class of persons on the grounds of such belief or activity'.[179] Hence, Aroney concludes:

> To the extent that religious vilification laws are interpreted with principles such as these in mind, they are likely to leave sufficient room for freedom of religious discussion that happens to be relevantly political. The implied freedom of political communication means that the prohibitions imposed by religious vilification laws need to be interpreted narrowly, and the exceptions construed widely, in order to leave room for political communication. At the same time, however, to the extent that religious vilification laws are not (or cannot) interpreted in this way, there is good reason to think that they are unconstitutional.[180]

Judge Morris must indeed be congratulated on his ability to recognise that at issue is the right of citizens living in a democratic society to cite statements of truth without the risk of being persecuted and sued by others, and no matter how undesirable these facts might be to a given person or minority group. One cannot help but wonder whether those who drafted the Victorian vilification legislation were actually of the same mind as him, or whether other judges, given the pervasive social pressures of political correctness and multiculturalism, would actually have courage to do the same.

In *Deen v Lamb*, Mr Lamb, an individual who was standing for local Parliament was found to be protected by the implied right to political communication when he printed a brochure comparing the Bible with the Qur'an.[181] In *ICV v CTFM*, however, two pastors were found guilty of vilification for also comparing the Bible with the Koran, for quoting from the Koran, and for expressing their concerns regarding the Islamisation of Australia's society, as well as the danger of Islamic ideology 'infiltrating' the Parliament and other institutions of power. Although these arguments are focused on religiously informed political speech, the Victorian Court of Appeal held that section 8 of the RRTA was constitutionally valid and hence not violating the implied right to political communication. Such ruling is rather questionable because the arguments of those pastors clearly touched on matters of political relevance, such as the ideology of one's elected officials, immigration policies, prayer in schools, and the religious underpinnings of our country's legal system.

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[179] Fletcher [2005] VCAT 1523 (Unreported, Morris P, 1 August 2005) [7].
[180] Nicholas Aroney, 'The Constitutional (In)validity of Religious Vilification Laws: Implications for their Interpretation' (2006) 34 Federal Law Review 288, 318.
[181] Dean v Lamb [2001] QADT 20 (8 November 2001)

The High Court has never faced with the opportunity to address the constitutional validity of religious vilification laws. Moreover, the question has received quite little scholarly attention.[182] Of course, the scope of the implied right to political communication has been found to protect speech that is not in its nature political, so long as the 'content, emphasis or content' is sufficiently political and the limitations upon would burden the implied freedom itself.[183] As such, the matter is basically whether the implied freedom of political communication can also give rise to an implied freedom of communication on religious grounds. I believe it clearly does. According to the Rev Dr Robert Forsyth, 'religion is rarely simply a matter of private and personal issues alone. It involves communities and institutions and thus the need to give shape to the distinctive identity of those communities and institutions.'[184] Indeed, as Adrienne Stone observes, religious speech is in its nature intertwined with 'political opinions, perspectives, philosophies and practices'.[185] But if religion and political matters are often intertwined, any logical derivation to the limitation imposed on freedom of religious speech amounts to a violation of the implied freedom of political communication found in the Constitution, which means that the validity of religious vilification laws can reasonably be contested on the grounds of restricting the right of political communication that has been framed from a religious perspective.

According to Darryn Jensen, 'civilised communities institutes practices to minimise – and ideally to eliminate – any disadvantage that individuals suffer by reason of their race or other attributes that they cannot change.'[186] Nonetheless, as he also points out, the objects of the Victorian Act are of a different kind. They appeal not to inherent conditions that are biologically immutable, but rather to religious-political ideals, which in turn become a criterion of reasonableness as an examination of what is politically acceptable. 'Since the political ideals themselves are subject to different interpretations', Jensen says, 'the battlelines of interpretation [of religious vilification laws] are ultimately political battlelines'.[187]

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[182] The only exception is Professor Nicholas Aroney from Queensland Law School.
[183] Theophanous (1992) 182 CLR 104, 124.
[184] Robert Forsyth, 'Dangerous Protections: How Some Ways of Protecting the Freedom of Religion May Actually Diminish Religious Freedom'. Lecture delivered at the third Action Lecture on Religion and Freedom, Centre for Indepdent Studies, September 24, 2001, 4.
[185] Adrianne Stone, 'Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication' (2001)25 Melbourne University Law Review 374, 386-387.
[186] Darryn Jensen, 'The Battlelines of Interpretation in Racial Vilification Laws', Policy, Vol.27, No.2, Winter 2011, 14, 18.
[187] Darryn Jensen, 'The Battlelines of Interpretation in Racial Vilification Laws', Policy, Vol.27, No.2, Winter 2011, 14, 18.

Of course free speech is important, because an informed public engaged in 'critical reasoning' is necessary for representative democracy to flourish. Such critical reasoning takes place through political discourse in the public sphere, which in turn affects the way the citizens choose their political representatives. This political process is necessarily wide, reflecting the freedom to receive all information that may affect a citizen's choices in the process of decision making. It seems reasonable then to consider that political communication may be easily embedded in a strong religious perspective. In such a context, political speech that is informed by a religious worldview should not be limited or restricted by the law, because the right to freedom of political communication should not be applied only to political statements based only on non-religious ideas, but also to political statements based on religious ideas, even if such statements are deeply annoying or offensive to some, as so many political statements based on non-religious ideas are. As Aroney points out,

> political discussion often involves disagreement about, and the defence or alternatively the criticism of, fundamental political perspectives, philosophies, and practices; and religion, religious beliefs and religious practices (as well as irreligious beliefs) not infrequently inform, or are tied up with, political perspectives, philosophies and practices... And if political speech can at times involve what we might call political abuse (serious contempt, revulsion, sever ridicule and even hatred on political grounds), and if the line between religion and politics is itself a matter of political debate, it is doubtful... that speech that vilifies on the basis of religion cannot, by definition, at the same time constitute speech that vilifies in a way that is politically relevant. And, if so, it follows that a law that prohibits religious vilification can, in at least some of its applications, constitute a relevant burden on freedom of political communication ...[188]

Although it is quite doubtful the High Court will ever consider religious vilifications laws to be invalid on constitutional grounds, the fact is that these laws obviously target communications which are very closely associated or mixed up with communications concerning government and political matters.[189] I have no doubt that these laws interfere with the type of political discourse that is sometimes based on particular religious perspectives or worldviews, thereby unduly imposing on citizens an unreasonable hindrance to political speech that is motivated by religion and/or a religious perspective.

Conclusion

One of the alleged objectives of religious vilification laws is to promote a more 'harmonious' and 'tolerant' society. But rather than promoting real tolerance among the different religious groups, vilification laws have emphasized separateness and promoted victimhood among these groups. They have incited inter-religious strife and community tension by criminalizing truth-telling and restricting

[188] Nicholas Aroney, 'The Constitutional (In)validity of Religious Vilification Laws: Implications for their Interpretation' (2006) 34 Federal Law Review 288. 306

[189] Nicholas Aroney, 'The Constitutional (In)validity of Religious Vilification Laws: Implications for their Interpretation' (2006) 34 Federal Law Review 288, 306.

freedom of speech, which is a cardinal precept of every open and democratic society. Ultimately, vilification laws make the government and its secular courts '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'.[190]

In general terms, laws that make it a crime to voice comments deemed 'offensive' to a religious group create undue fear and intimidation on people who wish to freely express their ideas and opinions.[191] Such laws constitute a frontal attack on freedom of speech and expression, and this is why so many people in Australia seem quite reluctant to join public moral conversation, seeming to fear what others and even their own government might do in return. This is the tragedy of a so-called 'multicultural' society which has embraced moral relativism and allowed the state to enact legislation that effectively prevents its citizens to speak more freely and openly about fundamental issues of public morality.

As explained in this article, there is no apparent reason as to why speech about religious matters should not simultaneously be characterised as political communication for the purposes of the right to freedom of political communication implied in the Australian Constitution. Accordingly, religious vilification laws such as the Victorian *Racial and Religious Tolerance Act* unreasonably compromise the constitutional right to freedom of political communication, which is a basic right of the citizen as derived from our system of government and implied in the Australian Constitution.

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[190] Joel Harrison, 'Truth, Civility, and Religious Battlegrounds: The Context Between Religious Vilification Laws and Freedom of Expression' (2006) 12 Auckland University Law Review 71, 72.
[191] Alvin J. Schmidt, *The Great Divide: The Failure of Islam and the Triumph of the West* (Boston/MA: Regina Orthodox Press, 2004), 247.