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A FUNDAMENTAL FREEDOM

When Winston Churchill and F.D. Roosevelt met on the Atlantic in 1941 to define the Allied war aims in the Second World War, they included amongst the four fundamental freedoms a right to “worship God in one’s own way anywhere in the world”. By giving primacy to freedom of religion as one of the most fundamental of human rights, the Allies were addressing the oppression which the leaders of Nazi Germany were inflicting upon Jews, Jehovah’s Witnesses, and other religious minorities. But they were also reflecting the history of western civilisation.

As a result of the bloody conflicts among princes and peoples over religious beliefs in Western Europe, a recognition of freedom of religion and of conscience became what was possibly the oldest of the internationally recognised human rights¹. It was a term of the Peace of Westphalia, signed in 1648 to bring to an end the Thirty Year War in Central Europe. Long after 1648, people of different religions and denominations continued to suffer legal and social disadvantages.

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¹ W.D. Durham Jr. “Freedom of Religion: The United States Model” (1994) 42 *The American Journal of Comparative Law*, 617 at 618.

Roman Catholics, for example, were denied the right to vote in Great Britain until legislation finally swept away such laws early in the nineteenth century².

The victory of the Allies in Europe revealed, in its full enormity, the genocide that the Nazis had inflicted on various communities, but principally on the European Jews. It was therefore unsurprising that, on the creation of the United Nations Organisation in 1945, moves were quickly taken to enshrine fundamental human rights as part of the new world legal order. The *Universal Declaration of Human Rights* (UDHR) of 1948 included in art.18 a statement that:

“Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”

When the *International Covenant on Civil and Political Rights* (ICCPR) was adopted in 1966, article 18 repeated the foregoing promise. It added, in sub-article (2) a provision forbidding coercion “which would impair [a person’s] freedom to have or adopt a religion or belief of his choice”. Sub-article (3) recognised limitations “prescribed by law” which were “necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others”. Sub-article (4) promised respect by the state “for the liberty of parents and ... legal guardians to ensure the religious and moral education of their children in conformity with their own convictions”. In these ways, the broad statement in the

² A reference to the *Roman Catholic Suffrage Acts*. Cf. *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 173 [6]. The *Roman Catholic Relief Act* 1829 (GB); 10 Geo IV c 7 followed the removal of religious disabilities of Protestant non-conformists in England: *Toleration Act* 1828; 9 IV Geo c 17. See T.F. Plunkett, *A Concise History of the Common Law* (Butterworth, London, 1948), 669.

Four Freedoms of 1941 and in the UDHR of 1948 was modified, elaborated and qualified.

The presence of a fundamental right to freedom of religion and conscience, in a document declaring other fundamental rights, necessitated a balancing exercise by which freedom of religion and of conscience would be accorded by nation states in a way harmonious with other fundamental rights with which they might sometimes be competition. Such rights could include freedom of expression (art.19, UDHR); freedom of peaceful assembly and association (art.20); the right to work without discrimination (art.23); the right to rest days (art.24); the rights of motherhood and childhood (art.25) and to education (art.26).

In the international legal order, the reconciliation of the foregoing rights, when they are in conflict with each other, is substantially the task of institutions that have been created since 1945. These include the Human Rights Commission (now Council) of the United Nations; the Human Rights Committee established under the ICCPR; other treaty bodies, and special rapporteurs of the Council and special representatives of the Secretary-General who report to the world community on such conflicts and their resolution. On a regional basis, trans-national courts and other bodies have been created for Europe, the Americas and Africa to decide cases and to resolve conflict said to arise between the universal right to freedom of religion and of conscience and other rights and freedoms.

This contribution offers a reflection on some of the recent controversies that have arisen out of the clash of freedoms that can occur when assertions of freedom of religion are said to conflict with other freedoms.

In most countries, such issues are resolved by municipal courts (ultimately final national appellate and constitutional courts) and by advisory bodies (such as human rights commissions and tribunals). Commonly, such issues are decided by reference to constitutional principles, for it is not unusual today for a national constitution to contain its own particular provisions limiting interference with freedom of religion and sometimes defining the ambit of that freedom in ways that will influence its suggested disharmony with other freedoms.

The prediction that religion in contemporary society would wither away because of its increasing irrelevance to the secular affairs of the state, has not been borne out so far by the experience of the twenty-first century³. Whereas in the 1990s, many political leaders thought that religious disputes were “echoes of earlier, less enlightened times”⁴, more recent events have suggested that this prognostication may have been unduly optimistic. Not only have instances of international terrorism and conflict presented clashes between religious assertions and secular demands. It has become much more common, and not only in the United States of America, for western political leaders to announce publicly their religious beliefs in a way that did not happen in recent generations.

In the context of Australia, the historian, John Warhurst, has noted⁵:

“More than any other federal government, the senior members of the Howard government have been active, in word and deed, in emphasising its religious credentials and beliefs and in

³ Carolyn Evans in “Introduction”, Peter Cane, Carolyn Evans and Zoë Robinson, *Law and Religion in Theory and Historical Context*, (Cambridge UP, 2008), 1.

⁴ Madeleine Albright, *The Myth and the Almighty: Reflections on Power, God and World Affairs*, (Pan Macmillan, 2006), 9.

⁵ J. Warhurst, “Religion in 21st Century Australian National Politics”, Australian Senate, *Occasional Lecture Series*, 5 May 2006, 6.

emphasising the positive contribution of Christian values to Australian society.”

This change stood in sharp contrast to what Marian Maddox described as the “unobtrusive, establishment religiosity” of former leaders of the Liberal Party of Australia, such as Robert Menzies, Malcolm Fraser and Alexander Downer⁶.

The present leader of the Federal Opposition, Tony Abbott, has been one of the leading proponents of a more active role for Christian values in Australian politics and public policy. Speaking at Notre Dame University in Sydney in June 2007, when he was a minister in the Howard government, Mr. Abbott listed the practical ways in which, he said, the government had brought religion into play in its political decisions⁷:

“I believe the Howard government has done much which Christians should applaud. For instance, in our first term, we overturned the Northern Territory’s euthanasia Bill, which otherwise would have legally assisted suicide. Just recently, we opened a pregnancy support help line, which is explicitly designed to bring down the rate of abortion in this country. In our first term, we scrapped the former government’s policy which made it very difficult for new religious schools to open. In our first and second terms, we put policies into place which explicitly recognised the role of the stay-at-home mum, in a way which no government had been game to do for a long time. And at the end of our last term, we passed legislation against so-called gay marriage”.

The hope of some secularists that the election of an Australian Labor Party government led by Kevin Rudd, in November 2007, would restore

⁶ M. Maddox, “For God and Country: Religious Dynamics and Australian Federal Politics”, Australian Parliament, Department of the Parliamentary Library (Canberra, 2001), 11.

⁷ The Hon. Tony Abbott, *The Religion Report*, ABC Radio National, 6 June 2007, cited in G. Sobey, “Ticking the Faith Box: Re-interpreting the Place of Conservative Christianity in Australian Electoral Politics” (2009) 10 *Traffic* (Uni of Melb, 2009), 17 at 24.

the former condition of things has been only partly satisfied. As Damien Murphy put it, describing Mr. Rudd⁸:

“No politician has ever spoken so frankly or linked his beliefs to political policy. His open and sincere religiosity even provided an ethical public persona that enabled him to battle John Howard for the hearts and minds of Christians and eventually led the ALP out of the political wilderness”.

The Rudd government has continued a number of policies of the Howard government. It has maintained already promised super-funding to several religious schools; large subventions for school religious chaplains; continuation (with some modifications) of the Northern Territory Intervention; and maintenance of the opposition not only to same-sex marriages, but also to same-sex civil unions or partnerships as proposed by the Legislative Assembly of the Australian Capital Territory. On the other hand, the National Apology to the Aboriginal people, initiated by Mr. Rudd, was obviously informed by his spiritual convictions. Even the cadences of the language of the National Apology sound familiar to Australians raised in the Cramnerian words of the Anglican *Book of Common Prayer*.

Debates concerning religious freedom in Australia (and what, if anything, the Constitution has to say on the topic⁹) generally occur in a context of a legal system that maintains a fairly strict ‘separation between church and state’¹⁰, a social system that accepts diversity of religious persuasion; a population that now observes many religions and in which one of the fastest growing categories in the national census comprises

⁸ D. Murphy, “The Voluble and the Word: Amen to That”, *Sydney Morning Herald*, 6 October 2009, 7.

⁹ A.R. Blackshield, “Religion and Australian Constitutional Law” in Peter Radan, Denise Meyerson and Rosalind F. Croucher (eds), *Law and Religion*, (Routledge (London) 2005), 81.

¹⁰ But compare *Federal Commissioner of Taxation v Word Investments Ltd.* (2008) 236 CLR 240 at 252 [122]-[125].

respondents who identify with 'no religion'. The decline in church attendances amongst Christian denominations in Australia has been a marked feature of recent decades. Inter-denominational hostility as well as sectarianism has also waned. So as has Sabbath Day observance by most nominal Christians.

Nonetheless, politicians of all political persuasions continue to court religious leaders, to seek out faith-based groups and to accord to them a significance that appears less deserved if regard is had to their influence over the daily lives of adherents. In part, this may amount to nothing more than the tendency of modern Australian politicians, encouraged by sections of the media, to imitate the religiosity of their United States counterparts. But they do so in a society where religion has traditionally played a more limited role, as in Britain and its other settler dominions.

Against the background of the foregoing developments internationally, and in Australia, it is of interest to examine three controversies that have arisen in recent decades. They illustrate the clash of human rights values when particular perceptions of religious beliefs emerge to challenge competing human rights and the sensibilities of societies that are generally secular in outlook. In some cases, these conflicts have involved the courts. In other instances, they have been fought out in the political domain and sometimes, in other countries, on the battlefield.

GENOCIDE

It is a source of continued puzzlement as to how and why such a civilised country as Germany should have embraced the extreme anti-Semitism of Adolf Hitler and other leaders of the National Socialist Party, resulting in the Holocaust.

Anti-Semitism was not, of course, invented by Hitler or his confederates. They simply refined a deep undercurrent that existed in most European societies. Moreover, they channelled that undercurrent into a deadly force, propelled by a vast killing machine that utilised modern technology to give effect to its outrageous and inhuman designs.

The conception of a “Final Solution” to destroy physically millions of human beings because of their ethnic/religious/cultural identification as Jews can be traced to various economic, cultural and linguistic phenomena. The existence of pockets of Jewish communities, their adherence to distinctive dress and customs, their prohibitions on food commonly consumed by the rest of the population, their insistence of practices not normally performed on non-Jews, such as circumcision and their maintenance of strong economic, educational and linguistic links with each other, presented a ready-made target for animosity.

However, it must be acknowledged that this target was reinforced by practices observed within the Christian church in Europe by which Jews were identified as deicides, who were morally responsible for the death of Jesus whom Christians accepted as the Son of God. Jews denied the divinity of Jesus, and were viewed as complicit in his crucifixion. In the liturgy of the Roman Catholic Church, until quite recent times, a prayer was said at Easter for the conversion of the “perfidious Jews”. The failure to convert to Christianity, although the religious books of Judaism as the first of the Abrahamic religions afforded the foundations of the Christian Bible, was an ongoing affront to many Christians. Religious animosity towards the Jews therefore provided a powerful source of the anti-Semitism that the Nazis were able to tap and exploit in the German

and other European populations. Sadly, the Christian churches in Europe and their leaders (with a few notable exceptions) failed to condemn wholeheartedly and vigorously the monstrous rhetoric and diabolical murders that were unleashed against the Jews with growing vehemence in the years before and during the Second World War.

As is often the case, a religious text may be identified (and has been explained) as a foundation for the animosity of the Christian churches towards Jews. The text appears in chapter 27 of *St. Matthew's Gospel*. It arises in the context of the demand by an assembly of Jews in Jerusalem shortly before the crucifixion. The Roman governor of the province of Judea, Pontius Pilate, is described as resisting the insistence of the chief priests and elders of the Jewish people that Jesus be put to death on the ground that he had spoken blasphemy¹¹. The offence was explained by reference to Jesus's claim to divinity. His claim that he was King of the Jews was also offensive to the Jews and contrary to their laws¹². Pilate conceived the idea of securing the release of Jesus by offering instead to release a notable prisoner, Barabbas. The multitude would not be assuaged. They demanded that Jesus (who is called the Christ) should be crucified. The *Gospel* proceeds¹³:

“And the governor said, Why, what evil hath he done? But they cried out the more, saying, Let him be crucified.

When Pilate saw that he could prevail nothing, but that rather a tumult was made, he took water, and washed his hands before the multitude, saying, I am innocent of the blood of this just person: see ye to it.

Then answered all the people, and said, *His blood be on us, and on our children.*

¹¹ *St. Matthew's Gospel*, 27:65.

¹² *St. Matthew's Gospel*, 27:11.

¹³ *St. Matthew's Gospel*, 27:23-25.

Then released he Barabbas unto them: and when he had scourged Jesus, he delivered him to be crucified.”

This was the text that was said, in Christian belief, to invite the blood of Jesus on the Jews present, but also “on our children”. Jews therefore had the blood of the Saviour upon them from generation to generation.

As a young boy, I was raised in the Anglican tradition of Christianity. I was taught in Sunday School and later in church, the dramatic story of the crucifixion just recounted. I never heard the priest or any other person in authority preach about the perfidy of the Jews. My early exposure to Christian doctrine occurred in the years immediately following the Second World War. At my church in Strathfield, a suburb of Sydney, I recall a visit by Pastor Martin Niemöller. He was a survivor of the war, a minister of the Lutheran Church and one who had resisted the Nazi oppression. Famously, he declared that the sin of failing to resist had brought upon the German people a great suffering because, in the end, when all other good people were murdered, no-one was left to protect oneself.

It seems astonishing to contemporary observers that so many Christian people went along with the mass murder of the European Jews. Yet the textual foundation for anti-Semitism remained to assuage, in many, a sense of guilt. An inerrant Bible declared that the Jews had invited the blood of Jesus upon themselves “and [their] children”. Accordingly, they were “perfidious” and enemies to good Christians.

A moment’s reflection should have indicated the error of such reasoning. What authority could a rabble in a minor town of an unimportant Roman

province have to bring punishment on racial and cultural descendants nineteen centuries later? What authority could those present have anyway to visit enmity, suffering and death on their children? Even if they could invite such consequences for their own children, what authority could they possibly have had to visit such an enormity upon their children's children? How could there be such a blood debt, through nineteen centuries up to 1933 and its aftermath? How could any rational person accept such an interpretation of the text? In particular, how could any Christian believer do so in the context of a religion whose essence was love, forgiveness and reconciliation.

Long experience in the interpretation of important texts has taught me the tendency of the human mind to error that can arise from over-literalism. Formalism is also an error to which interpreters are prone. Taking words out of context is a serious danger in constitutional, statutory, contractual, testamentary and other challenges of construction. Only an ignorant literalist could read the foregoing passage in *St. Matthew's Gospel* as a foundation for stigmatising the entire Jewish race, and adherents to the Jewish religion, as "perfidious" and "deicides".

Rather too late, in recent decades, this error has been acknowledged by Christian churches. The prayer against the "perfidious Jews" has been removed from the liturgy of the Roman Catholic Church. But in the history of the early church fathers, it was St. Augustine, in the fourth century, who wrote his *Sermons Against The Jews*. Those *Sermons* struggled with how a people, who had been chosen as special by God, could have continued to reject Jesus Christ. Regrettably, it was not until

the Second Vatican Council, a decade after the end of the Holocaust in Europe, that the Roman Catholic Church issued a definitive instruction¹⁴:

“True, the Jewish authorities and those who followed their lead pressed for the death of Christ (cf. John 19.6); still what happened in his passion cannot be charged against all Jews, without distinction, then alive, nor against the Jews of today. Although the church is the new people of God, the Jews should not be presented as rejected or accursed by God, as if this followed from the holy scriptures”.

Western anti-Semitism has proved hard to eradicate. Even intelligent and modern personalities, up to the present age, have continued to harbour deep antagonism against Jews¹⁵. The basic sin of the Christian churches lay in their earlier failure to nip such irrationality in the bud, and to expose the error of the literalistic reading of scripture that gave a supposed religious foundation to anti-Semitism. This is therefore the first lesson in the errors of literal interpretation of scripture. It teaches the need to preserve a secular role for the state against the excesses of erroneous interpretations of religious texts that turn violence against non-believers and otherwise inflict on them grave interference with their fundamental human rights.

In the case of the Jews, caught up in the Holocaust, these rights included the right to life, liberty and security of person (UDHR, art.3); and to be respected as “born free and equal in dignity and right ... endowed with reason and conscience ... [and obliged to] act to one another in a spirit of brotherhood”. (UDHR, art.1). And to do all this

¹⁴ Quoted in G. Sheraton, “Israel Still Looks Good, Warts and All” in *Australian Literary Supplement*, Vol.4, Issue 4 (May 2009), 12-13.

¹⁵ See e.g. Neil Baldwin, *Henry Ford and the Jews – The Mass Production of Hate* (BBS, New York, 2003), 108ff.

without distinctions of any kind “such as race ... religion ... national ... origin ... or other status” (UDHR, art.2).

SEXUALITY

One of the most serious debates in the contemporary world arises between adherents to religious beliefs and sexual minorities (principally homosexuals). These debates find reflection in the laws of many countries, including Australia. Those laws not only deny equality to individuals by reference to their sexuality (excluding them from standard civil rights open to other individuals, taxation relief, pension and other benefits). They also include laws which impose severe criminal punishments for adult, private sexual conduct, constituting a manifestation of the sexuality of the persons concerned.

Once again, the source of the social, cultural and legal antipathy is to be found in scriptural texts. In the case of homosexuals, the rule is chiefly found in a chapter of the Old Testament *Book of Leviticus* dealing with “divers laws and ordinances”. Thus, it appears in a series of rules laid down to deal with sexual conduct¹⁶:

“... And the man that committeth adultery with another man’s wife, even he that committeth adultery with his neighbour’s wife, the adulterer and the adultriss shall surely be put to death.

And the man that lieth with his father’s wife hath uncovered his father’s nakedness: both of them shall surely be put to death; their blood shall be upon them.”

There follow various other prohibitions including:

“If a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination: they shall surely be put to death; their blood shall be upon them.

¹⁶ *Leviticus* 20:11-13.

And if a man take a wife and her mother, it is wickedness: they shall be burnt with fire, both he and they; and there be no wickedness among you.

And if a man lie with a beast, he shall surely be put to death: and ye shall slay the beast.

The foregoing instructions appear in a context of God's laws, expressed to Moses, as to how the children of Israel should live. The rules are quite particular. Thus there is a requirement for circumcision of young male children¹⁷. And there are very clear rules for the purification of women¹⁸:

“And when the days of her purifying are fulfilled, for a son, or for a daughter, she shall bring a lamb of the first year for a burnt offering, and a young pigeon, or a turtle dove, for a sin offering, unto the door of the tabernacle of the congregation, unto the priest: Who shall offer it before the LORD, and make an atonement for her; and she shall be cleansed from the issue of her blood. This is the law for her that hath born a male or a female”.

Many of the rules laid down in Ancient Israel in this way have been overtaken by changing science, including by medical treatment¹⁹:

“He is a leprous man, he is unclean. The priest shall pronounce him utterly unclean; his plague is on his head.

And the leper in whom the plague is, his clothes shall be rent, and his head bare, and he shall put a covering upon his upper lip, and shall cry, unclean, unclean.

All days wherein the plague shall be in him, he shall be defiled; he is unclean: he shall dwell alone; without the camp shall his habitation be.”

¹⁷ *Leviticus* 12:3.

¹⁸ *Leviticus* 12:6.

¹⁹ *Leviticus*, 13:2-46.

It is obviously important to interpret the foregoing instructions in the context of a much earlier historical era. It was an era without knowledge concerning homosexuality, leprosy and much else. The modes of transmission of disease of leprosy were unknown, as were risks thereof. There were completely different attitudes to proportionality in punishment and to civic disapproval. The very long list of conduct attracting punishment (and even some offences attracting death by burning), makes it extremely difficult seriously to import the prohibition on homosexual relationships as a wrong, amounting to an “abomination”, in contemporary society.

Especially is this so because there have been large advances in contemporary knowledge about human sexuality. The scientific studies include the research in the 1940s and 1950s of Dr. Alfred Kinsey, at Indiana University in the United States, which revealed the incidence of homosexual conduct, including amongst a proportion of persons for whom it is their only mode of sexual expression²⁰.

The research of Dr. Kinsey eventually resulted, in Britain, to the repeal of criminal laws which had been enacted to impose severe criminal punishment for sodomy. This declared the crime “abominable”, after the language of *Leviticus*. Such laws survived into my own time as a young lawyer in Australia²¹. Consent was no defence. Moves to secure parliamentary repeal of such laws gathered pace in Britain following a

²⁰ A.C. Kinsey, W.B. Pomeroy and C.E. Martin, *Sexual Behaviour in the Human Male* (Philadelphia, Saunders, 1948); A.C. Kinsey, W.B. Pomeroy, C.E. Martin and P. Gebhard, *Sexual Behaviour in the Human Female* (Philadelphia, Saunders, 1953). See also Havelock Ellis, *Studies in the Psychology of Sex: Sexual Inversion* (3rd ed), (NY, Davis, 1915), 354.

²¹ *Crimes Act 1900* (NSW), s79, 80 (“unnatural offences”). Described in the sections as the “abominable crimes”. It was an adjective borrowed from the biblical text designed to silent questioning. Cf. W. Blackstone, *Commentaries on the Laws of England* (Oxford, Clarendon, 1865) Vol.4, 125-6 and see J. Bentham, *Theory of Legislation* (ed. C.K. Ogden) (NY, Harcourt Brace, 1931).

royal commission in 1957²². The repeal of these old laws in England²³ became the template for similar statutory reforms in Canada, Australia, New Zealand, and elsewhere.

The last State in Australia to adopt these reforms, Tasmania²⁴, only did so after a successful complaint to the United Nations Human Rights Committee, established under the ICCPR²⁵. On the basis of a determination by that Committee that the Tasmanian law breached the privacy and other guarantees of the ICCPR, federal legislation was enacted to override any inconsistent State laws²⁶. After the High Court of Australia upheld the entitlement of the complainants to mount a challenge to the unreformed law²⁷, the Tasmanian law was amended. The reform of the Australian laws, and similar criminal laws in other common law countries, has often been opposed by sections of the Christian church. To this day, it is opposition by religious people that has substantially impeded the reform by legislation of sodomy laws in other countries, inherited from British colonial times. Such laws still exist in 41 of 53 countries of the [British] Commonwealth of Nations²⁸. The Commonwealth of Nations has not been very effective in propounding the need to reform such laws²⁹. To the contrary, in some Commonwealth countries, notably Nigeria and more recently Uganda³⁰

²² *Homosexual Offences and Prostitution* (Command Paper 247, HMSO, 1957) (Wolfenden Report).

²³ *Sexual Offences Act 1967* (UK).

²⁴ *Criminal Code* (Tas), ss122(a) and (c) and 123.

²⁵ *Toonen v Australia* (1994) 1 *Int. Human Rights Reports*, 97 (No.3). Reproduced in H.J. Steiner and P. Alston, *International Human Rights in Context* (Clarendon, 1996), 545-548.

²⁶ *Human Rights (Sexual Conduct) Act 1994* (Cth), s68.

²⁷ *Croome v Tasmania* (1997) 191 CLR 119.

²⁸ Human Rights Watch, *This Alien Legacy: The Origins of "Sodomy" Laws and British Colonialism* (Washington DC, 2008).

²⁹ M.D. Kirby, "Lessons From the Wolfenden Report", (2008) 34 *Commonwealth Law Bulletin* 551; M.D. Kirby, "Legal Discrimination Against Homosexuals: A Blindspot of the Commonwealth of Nations" [2009] *EHRLR*, Issue 1, 21.

³⁰ *Anti-Homosexuality Bill 2009* (Uganda). Introduced by Parliament of Uganda, 14 October 2009, for debate 2010.

and Rwanda³¹, legislation has been enacted (or proposed) to increase the criminal penalties placed upon homosexuals for their adult, private, consenting conduct.

One ray of light on this dark landscape has been the strong stand taken by courts in a number of common law countries, in striking down as unconstitutional, the provisions of anti-sodomy laws targeted at sexual minorities. In the United States of America, which also inherited these laws from Britain in the original settlements, the Supreme Court invalidated such laws in *Lawrence v Texas*³². Similarly, a decade ago, the laws were invalidated by court decision in South Africa³³. Most recently, the High Court of Delhi, in India, held that the provisions of s377 of the *Indian Penal Code* were unconstitutional, so far as they purported to impose criminal punishments upon adult, consensual, private conduct³⁴. An appeal against this decision has been lodged in the Supreme Court, although the Union of India has indicated that it does not intend to challenge the conclusion.

Because it is based upon principles of equal treatment under the law and privacy rights expressed in the independence constitutions of most Commonwealth countries, the decision of the Indian court is important as a stimulus for possible decisions elsewhere in developing nations. The court's decision had reflected the need to separate the private beliefs of religious adherents from the imposition of criminal

³¹ Proposed law to insert art217 in *Rwanda Penal Code*, December 2009. Homosexuality has never been a criminal offence in Rwanda. Having been admitted to the Commonwealth of Nations at the last CHOGM meeting, a new law has been introduced to criminalise same-sex acts and defenders for the first time.

³² 539 US 558 (2003).

³³ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999(1) SA 6. See also *McCoskar v The State* [2005] FJHC 500 (Fiji Islands); *Commonwealth of Kentucky v Wasson* 842 SW 2d 487 (Ky 1992). *Contra Banana v The State* (2000) 4 LRC 629 (ZSC).

³⁴ *Naz Foundation v Union of India* [2009] 4 LRC 838.

punishments on others, whether adherents to the religion or not. Anti-sodomy laws exist in several countries outside the Commonwealth of Nations³⁵. However, such laws remain a predominant feature of countries deriving their legal system from Britain.

The Napoleonic codifiers removed such laws from the French criminal code in 1806. In consequence, those laws have not been common in most countries of the civilian legal tradition. They do not generally exist in the criminal codes of countries in the French, Netherlands, Spanish or German empires, or in other legal systems derived from Franco-German legal traditions. Thus, they have not been found in the modern law of Japan, China or Indonesia. The lastmentioned country, with the largest Islamic population in the world, inherited its criminal code from The Netherlands which, since 1811, has not penalised consensual, adult, private same-sex activities.

Apart from the personal oppression involved in the existence of such laws, they also impede effective responses to the HIV/AIDS epidemic, a point mentioned by the Delhi High Court³⁶. The demand by religious spokesmen for the maintenance of criminal punishments against sexual minorities is one of the least attractive features of the impact on the human rights of minorities of religious groups in the world today. Yet leaders of religious communities repeatedly assert their entitlement to discriminate against sexual minorities, based on God's supposed instruction.

³⁵ See e.g. *Iran, Islamic Penal Code*, Book 2, Part 2 (Punishment for sodomy).

³⁶ *Naz Foundation v Union of India* [2009] 4 LRC 838 at [61]-[66], [73] referring also to *Toonen v Australia* above.

This foundation for discrimination has more recently manifested itself in a struggle that is current, to secure an opening up of the civil status of marriage for same-sex partners in several jurisdictions. This is not the occasion to review those developments. Suffice it to say, that courts have upheld the entitlement to marriage of same-sex partners in Canada, South Africa and several states of the United States of America. On some occasions, court decisions to is the effect have been (narrowly) overridden by constitutional referenda (e.g. California and Maine).

In the United States District of Columbia, the Roman Catholic Archbishop of Washington recently announced the intention of his church to withdraw from the provision of funding for various charities if the Council of the District persisted with a law to recognise same-sex marriage in the District. Archbishop Donald Wuerl explained his church's position in an opinion published by *The Washington Post*³⁷:

“For the archdiocese and Catholic Charities, two core tenets of our faith are at the heart of our concerns: our understanding of the nature of marriage and our commitment to express Christ's love through service to others. Under the legislative language before the DC Council, the archdiocese would be forced to choose between these two principles. The archdiocese has long made clear that all people have equal dignity regardless of sexual orientation. But marriage is reserved for husband and wife because of the essential connection with the creation of children.”

Obviously, it is important to find a path through the clash between beliefs essential to the exercise of religious freedom and duties imposed by the general law. The imposition upon churches, temples and mosques (as

³⁷ D.W. Wuerl, “DC Same-sex Marriage Bill: Finding the Right Balance” *Washington Post*, 22 November 2009, C5.

distinct from public officials³⁸) of a duty to perform weddings between same-sex couples, contrary to their understandings of their religious beliefs, would be offensive and disproportionate. On the other hand, it is obviously open to the state to expand the availability of the civil status of marriage to same-sex couples³⁹. Depending upon the constitutional text, it would also be open to courts in many jurisdictions to uphold complaints that denial of access to that civil status is a breach of equality and privacy provisions in the constitution.

The differentiation between the civil status of marriage and the religious sanctification of weddings was recognised long ago in legal reforms to the law of marriage introduced in France. Reflecting the strong principle of *laïcité* observed in France, a religious ceremony, of a sacramental character, is differentiated in the law from the state's public occasion to recognise the civil status of marriage on the part of the entire community. The current position is explained by Patrick Weil⁴⁰:

“In France ... if [a person] wants to marry religiously, they are legally obliged to hold first a civil marriage in the city hall. The ceremony is held by the mayor who receives the engagement of the spouses and reads to them the four articles of the French civil code (art.212 through 215) that determines the rights and duties of spouses. The city hall is a common space that all French or foreign residents living in France have the right to come through, and the civil code is a common and superior legal rule that all French or foreign residents living in France have to respect if they want to marry in France. If they want to become civil servants or politicians, they would have to fulfil a higher degree of duty: not to express publicly their own faith or belief ... [L]iberal societies were built through the art of separation, which permits the emergence

³⁸ *Ladele v London Borough of Islington* [2009] EWCA Civ 1357 Court of Appeal (England and Wales), (upholding the duty of Borough registrars to perform civil partnership ceremonies despite religious objections).

³⁹ R. Wintemute and Mads Andenaes, (Eds), *Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law* (Hart, Oxford, 2001) following *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (C.C.).

⁴⁰ P. Weil, “Why the French Laïcité is Liberal”, 30 *Cardozo L Rev* 2699 at 2713 (2009).

and guarantee of liberties and independence from political power. In each sphere, religious, economic, academic and private, “institutions are responsive to their own internal logic even while they are also responsive to systemic determination; the liberal achievement has been to protect a number of important institutions and practices from political power, to limit the reach of the government”⁴¹.

A complication in most common law countries with respect to marriage has come about as a result, in part, of the historical establishment of the Church of England. From this special status and other historical causes, flowed the widespread practice of performing “marriages” in churches. However, the status of marriage, as such, is defined by the [secular] law of each nation. To it are attached rights and duties, including some privileges and entitlements denied to those who are not married.

In Australia, a somewhat unstable compromise has so far been reached of denying a facility of marriage (or even of civil union or partnership) to same-sex couples, but seeking to repair the taxation, pension, social security and other financial inequalities of the law⁴². Those inequalities persisted in Australia until the election of the Rudd government. They were reinforced by the passage of the prohibition on the recognition of same-sex marriages in Australia, to which Mr. Abbott referred in the quotation cited above⁴³. Reform of the fiscal and financial disadvantages had been declared to be “not a priority” of the Howard government. Yet when the reforms were introduced into the Parliament by the Rudd government, they encountered very little opposition from either side of politics.

⁴¹ Michael Walzer, “Literalism and the Art of Separation”, 12 *Political Theory* 315 at 321 (1984).

⁴² *Same-Sex Relationships (Equal Treatment in Commonwealth Laws) Act 2008* (Cth).

⁴³ *Marriage Amendment Act 2004* (Cth) inserting s88EA in *the Marriage Act 1961* (Cth).

The instability of the current legal position facing homosexuals in Australia and elsewhere is thus a reflection of the instability inherent in the doctrinal position of many Christian churches in their treatment of the rights of members of sexual minorities. This instability rests on a variation upon the theme of ‘love the sinner; hate the sin’. It exhibits love to the ‘sinner’ by the repair of fiscal and financial disadvantages. But, it denies recognition of the equality and dignity of that person’s human relationships, evidencing, at the least, a distaste for such relationships and therefore an assertion that society is entitled to treat them as undeserving of equality, respect and legal protection.

So long as it was believed that members of sexual minorities (homosexuals, bisexuals, transsexuals, intersex and other queer people) were deliberately choosing their sexual conduct as an affront to society, the foregoing approach might have been understandable, or at least arguable. Once, however, it was accepted that there is a scientific phenomenon of “sexual orientation” (whether of genetic, hormonal, environmental or of other origin), and that individuals do not choose and cannot easily or at all change, the denial to those affected of equal rights of citizenship is unsustainable as a matter of principle.

To suggest that persons of homosexual orientation should, or could, get married to an opposite-sex partner, contrary to their sexual orientation, is revealed as absurd, indeed unnatural to them. In such circumstances to describe conduct which is normal for them as “abominable”, “unnatural” or “outside God’s love” is irrational, unscientific and decidedly unpersuasive. To demand of such persons a life of celibacy, which they do not otherwise choose, is also unsustainable – even oppressive. It imposes upon them stresses of deception and denial that are unhealthy

both for their physical and mental condition. To assert that this is demanded by a church dedicated to “Christ’s love through service to others” is particularly unconvincing. Even offensive.

Once it is accepted, as Archbishop Wuerl states that “all people have equal dignity regardless of sexual orientation”⁴⁴, the access of all people to equal legal rights appears undeniable. At least this is so in a society that is not a theocracy. To deny equal legal rights in the case of marriage because of the suggested essential connection of that institution to “the creation of children” is likewise unconvincing. Many marriages of elderly, infertile, injured or disabled opposite-sex partners cannot produce children. Yet their marriages are fully legitimate, respected and lawful. Moreover, in the current state of reproduction technology, the possibility of the creation of children outside the binary union of a man and a woman is entirely feasible and increasingly and successfully availed of.

In contemporary western democratic countries, the foregoing considerations promise an ongoing dialogue between Christian churches and other religious and secular society. It is a dialogue that can only have one ultimate outcome. In the face of the science of sexuality, which is now increasingly well-known and universally available, the religious demand to exclude members of sexual minorities from equal rights of citizenship, including civil partnership, civil unions and marriage if so desired, is likely to be seen increasingly for what it is: prejudiced legal discrimination. In any proportional balance between the right to freedom of religion for some (UDHR, art.18) and equality in dignity and rights of others, without irrelevant discrimination, it appears likely that an

⁴⁴ D.W. Wuerl, above n37, *loc cit.*

accommodation favourable to the entitlements of members of sexual minorities will be sustained in the end. Especially so because of the further promise in the UDHR to all “men and women of full age, without any limitation due to ... religion” to have “the right to marry and to found a family” (UDHR, art.16) (ICCPR art.23.2).

APOSTASY

A third difficulty presented to human rights discourse arises from the law of some countries (mostly Islamic) prohibiting persons who were born into, and/or raised as, adherents to a particular religion from changing that religion, either to another religion or to the abandonment of religion altogether. Such a step is known as apostasy. Together with blasphemy, it is treated as an impermissible renunciation of God deserving severe punishment. Such punishment is merited, in conventional theory, both to reflect the affront occasioned by such a disrespect to the Almighty; but also to discourage others from following such an impious path.

As with religious and social stigma directed at the Jews in Nazi Germany and at sexual minorities in many countries, the rules governing apostasy trace their origins to instructions stated in scripture and other holy texts. In the *Book of Deuteronomy*, the fifth book of the Old Testament, specific instructions are recorded about denying or renouncing the one true religion of Abraham⁴⁵:

“If there be found among you, within any of thy gates which the LORD thy God giveth thee, man or woman [that] ... hath gone and served other gods, and worshipped them, either the sun, or moon, or any of the host of heaven, which I have not commanded; ...

⁴⁵ *Deuteronomy* 17:2.

Then shalt thou bring forth that man or that woman, which have committed that wicked thing, unto thy gates ... and shalt stone them with stones, till they die.”

The text also insists on the same extreme punishment for those who promote other religions⁴⁶:

“If thy brother, the son of thy mother, or thy son, or thy daughter, or the wife of thy bosom or thy friend, which is as thine own soul, entice thee secretly, saying, Let us go and serve other gods, which thou hast not known, thou, nor thy fathers ...

Thou shalt not consent unto him, nor hearken unto him; neither shall thine eye pity him, neither shalt thou spare, neither shalt thou conceal him:

But thou shalt surely kill him; thine hand shall be first upon him to put him to death ...”

In Medieval England, apostasy was punished by the common law. In the 1250s, Henry de Bracton declared that apostates were to be burned to death⁴⁷. In one recorded case, a deacon was found to have “apostasised for the sake of a Jewess”⁴⁸. He was handed over by his bishop to the King’s officials to be committed to the flames. This was done without the help of parliamentary law. The English common law provided for the burning of heretics and that was enough⁴⁹.

When, in the 1770s, William Blackstone wrote his *Commentaries on the Laws of England*, he described an Act of Parliament that punished apostates as being addressed to persons “educated in or making a profession of the Christian religion” who had proceeded to deny it or to

⁴⁶ Deuteronomy 13:6-9.

⁴⁷ H. de Bracton, *De Legibus et Consuetudines Angliae* (Trans S.E. Thorne), (Cambridge, Mass., Harvard, 1968), Vol.II of *Pleas of the Crown*, 349.

⁴⁸ F.W. Maitland, “The Deacon and the Jewess or Apostasy at Common Law” (1886) 2 LQR 153.

⁴⁹ A.A. Bruce, “Christianity and the Law” (1907) 64 *Central Law Journal* 247 at 253; cf. W. Holdsworth, “The State and Religious Non-conformity: An Historical Retrospect” (1920) 26 LQR 339 at 345.

suggest that holy scriptures were other than the voice of divine authority. According to Blackstone, such a person was incapable of holding any office of trust in the kingdom and was liable to three years' imprisonment without bail⁵⁰. At least this represented an advance on burning at the stake.

Various other civil penalties were imposed on apostates, including an inability to make a valid will. This requirement meant that the property of apostates passed on intestacy only to next-of-kin who observed Christianity. Such laws have long since ceased to be enforced in England. They were never enforced in Australia or in countries whose legal systems derived from Britain. Because in many such countries other religions were practised, or even predominated, the enforcement of the law of apostasy might have caused intolerable problems for the colonial rulers.

To this day, however, apostasy is a specially serious offence in Islamic societies. The rise in recent decades of the Shariah law, even in societies that have generally observed the common law, has presented a conflict which reflects the contest between the asserted obligations of religious texts, when measured against constitutional norms that usually reflect the principles of universal human rights. The clearest recent case of this kind is the decision of the Federal Court of Malaysia in the Lina Joy appeal⁵¹. As I have described that case recently in another journal⁵², I will refrain from repeating its details.

⁵⁰ W. Blackstone, *Commentaries on the Laws of England* (1st ed, reprint) (London, Dawson's of Pall Mall, 1966) Vol.IV 44, referring to 9 & 10 Willc32.

⁵¹ *Joy v Federal Territory Islamic Council* [2009] 1 LRC 1; [2007] 3 CLJ 557.

⁵² M.D. Kirby, "Fundamental Human Rights and Religious Apostasy: The Malaysian Case of Lina Joy" (2008) 17 *Griffith Law Review* 151.

Suffice it to say that the Malaysian Constitution contains in art.3(1) a provision reflecting universal principles of human rights:

“Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation.”

Moreover, art.11(1) of the Constitution provides:

“Every person has the right to profess and practise his religion ... and to propagate it.”

Nevertheless, the foregoing entitlements are limited by a number of provisions of the Constitution, including art.11(4). This provides that the states of Malaysia ‘may control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam’. In 1988, a new article 121(1A) was inserted into the Constitution stipulating that civil courts have no jurisdiction over subject matters that fall within the jurisdiction of the Islamic courts. Those courts have jurisdiction over Muslims with respect to religious and family matters.

An adult Islamic citizen of Malaysia, with the birth name of Azalina Binti Jailani, desired to marry a non-Muslim and to embrace his religion. She was baptised and sought amendment of her identity documents to reflect the change. Such amendment was held to require the approval of the Shariah courts. Commonly, in Malaysia, those courts denied or long-delayed the provision of approval. They did so, by inference, upon the basis of instructions appearing in Islamic religious texts forbidding the abandonment or renunciation of the Islamic religion.

Using her new name, Lina Joy challenged the administrative decision withholding amendment of her identify documents. She claimed that this was contrary to her entitlements to religious freedom under the

Malaysian Constitution. She pointed to the fact that the *Holy Koran*, containing divine law, did not itself forbid change of religion but insisted upon free and conscientious decisions in such matters. However, in the *Hadith* (or recorded sayings of the Prophet Mohammed), a secondary source of Islamic law is recorded as holding that whosoever changes their Islamic religion must be killed⁵³. The statement in the *Hadith* was written in the early days of Islam, when adherents were fighting for the very survival of the faith in the face of its enemies. At that time, renouncing Islam was a form of treason or rebellion against the Islamic state. It was in this context that a punishment of death for apostasy came into the Islamic tradition. Over time, the requirement of an element of treason disappeared. In the manner of formalistic reasoning, apostates were punished for mere renunciation of their faith. To this extent, the developments based on the understanding of the *Hadith*, reflected similar thinking in the application of scripture to sustain animosity towards Jews and against homosexuals.

The claim for relief by Lina Joy was rejected both by the High Court of Malaysia⁵⁴ and by the Court of Appeal⁵⁵. On a further appeal to the Federal Court of Malaysia (the nation's highest court), Lina Joy's claim was also rejected; but by majority⁵⁶. It did not escape notice that the two judges in the majority (including the Chief Justice of Malaysia, Ahmed Fairuz FCJ) were Muslims. The dissenting judge, Richard Malanjum (Chief Justice of Sabah and Sarawak) was not Muslim. Commentators on the decision were specially concerned about the implications of the case for the reconciliation of Islamic beliefs about apostasy and the

⁵³ Hussain (2006), p97 cited (2008) 17 *Griffith Law Review* 151 at 167.

⁵⁴ *Lina Joy v Majlis Agama Islam* [2004] 2 MLJ 119.

⁵⁵ *Lina Joy v Majlis Agama Islam* [2005] 6 MLJ 193.

⁵⁶ *Lina Joy* [2009] 1 LRC 2; [2007] 3 CLJ 557.

universal principles of human rights reflected in most modern constitutions, including that of Malaysia.

In 1981, the Islamic Council of Europe adopted the *Universal Islamic Declaration of Human Rights*. In 1990, the organisation of the Islamic Conference adopted the *Cairo Declaration of Human Rights in Islam*. Both instruments addressed freedom of religion. Neither of these instruments meets the level of freedom provided for in the UDHR of 1948. Specifically, neither recognises expressly the right of a Muslim to change his or her religion. There are differing views within the Islamic community as to whether religious freedom includes a right of change⁵⁷. Some Islamic scholars who uphold that right rest their case on the provision in the *Koran* providing that God alone has the right to punish those who do not adhere to the Islamic faith or who cease to do so⁵⁸. However, the Lina Joy decision demonstrates the high sensitivity of this issue in Islamic countries and the difficulty of accommodating common beliefs about the demands of religion with both the language and jurisprudence of instruments that enshrine universal human rights.

Other cases from Malaysia have also attracted attention for reported enforcement of Shariah law. One case involved Kartika Sari Dewi Shukarno, a 32 year old Muslim citizen, and mother of two children. She was apprehended for the offence of drinking beer. She was sentenced by a Shariah court to receive six strokes of a rattan cane in what was said to be a warning to other Muslims to abide by religious laws forbidding consumption of alcoholic liquor. She did not appeal⁵⁹. When

⁵⁷ Abdullah Saeed and Hassan Saeed, *Freedom of Religion, Apostasy and Islam* (Ashgate, 2004), 14.

⁵⁸ *Holy Koran*, 2:256 [“There is no compulsion in religion”].

⁵⁹ “Malaysia Stays Hand on Caning of Woman”, *The Australian*, 25 August 2007, 7; “Caning Case Exposes Malaysian Tensions”, *Financial Times*, 22 August 2009, 4.

widespread attention was given to her case, Malaysian authorities postponed the caning until after the end of Ramadan. Use of corporal punishment was known to colonial law in Australia and other British settlements. However, whereas once such a sentence would have attracted little attention, in the modern world, such cases are widely reported. This happens, in part, because they are seen as inconsistent with universal principles of human rights.

As to Lina Joy, she continues to declare her desire to change her religion, marry and live peacefully in her own country. So far, that desire has been denied by the courts of Malaysia.

CONCLUSION

The three instances recorded here evidence what might be described as 'the problem of the text'. Scriptural texts are written in words. They come to contemporary adherents from a time, centuries earlier, when human knowledge and community experience were considerably narrower than they are today.

Anti-Semitism flourished in Europe and was, to some extent at least, reinforced by Christian religious beliefs and instruction, an absence of proper protection for the Jews and a formalistic interpretation of scriptural language without sufficient attention to the broader concepts that lie at the centre of religious beliefs.

Textual passages that are said to forbid homosexual acts (even between consenting adults in private) are contested by some theologians. In any case, they are found in a code of conduct many of the provisions of which no rational contemporary believer would seek to enforce (strict

isolation instead of treatment of lepers; death for adulterers; and offering of sacrificial animals to temples to assuage alleged female impurity). Despite these contextual indications of inapplicability, religious advocates of discrimination against homosexuals and other sexual minorities choose to highlight the injunction against such people and to forget, or downplay, the equally stern prescriptions directed to others.

As to apostasy, this was once part of the legal tradition of the common law. But it has long since been abandoned. An attempt to revive the common law and to assert that Christian apostates have to be burned at the stake would receive short shrift today. Yet the journey that Australian society and lawyers have taken still remains to be accomplished by Malaysian courts and lawyers, as the *Lina Joy* decision demonstrates.

The lesson of the three instances examined here is that care must be observed in the interpretation of scriptural texts. In particular, words should not be construed in isolation. They should be understood in context. They should be reconsidered against the background of contemporary knowledge; in particular knowledge based on science, but also on social practice where the letter of scriptural law is no longer observed. Above all, scriptural texts need to be interpreted in the light of the fundamental tenets of each religion. Almost without exception, all the major religions embrace principles of love, reconciliation, forgiveness, tolerance and acceptance of diverse humanity.

The debates over the content of fundamental human rights to freedom of religion will continue in Australia and in the world. The existence in Australia of adherents to all of the world's major religions necessitates

the engagement of Australian lawyers with the international dialogue about the precise content of religious freedom. Like every other fundamental human right, both by its text and context, that freedom is not absolute. It must find its place in dialogue with the tenets and laws of other religions and of the community generally, including such members of the community who deny, or fail to observe, any religious belief.

Because Australia is a microcosm of the multiplicity of races, cultures and religions of the wider world, it affords a very useful setting for inter-faith dialogue. Such dialogue has been facilitated in a number of Australian universities and amongst adherents to different religions or different denominations of the same religion⁶⁰. That progress can be made in Australia, is evident from the decline of the sectarian conflicts that existed up to the middle of the twentieth century. To some extent, the temperate secularism that now exists in Australian public life and institutions affords a neutral space in which the adherents of different religions can freely express and practise their beliefs.

Australia is neither as absolutist in its secularism as republican France has proved in its prohibition of religious symbols in public schools. Nor is Australia as inclined to intrude religion into partisan politics to the same extent as occurs in the United States of America, despite that country's stricter constitutional norms. Australia has neither an unwavering *laïcité*, nor a strict constitutional tradition of separation of religion and the state. Within the temperate Australian tradition of acceptance of many religions, we should be able to build a constructive

⁶⁰ Such as the proposed professorial chair at the Australian Catholic University (Chair in Muslim-Catholic Relations) and the Interfaith Dialogue of the Griffith Asia Institute. See Kirby (2008) 17 *Griffith Law Review* 179.

conversation and to search amongst all religions (and varieties of humanism) for the common ground towards which the principles of universal human rights beckon us.
