

THE RIGHT TO CRITICISE RELIGION: THE UNCONSTITUTIONALITY OF EXTENDING 18C TO RELIGIOUS GROUNDS

Augusto Zimmermann*

ABSTRACT

There is a considerable risk that the Australian federal government might be contemplating the enactment of discrimination laws that could ban so-called ‘hate speech’ on the basis of severe criticism of religion. The Prime Minister has been strongly urged by Islamic groups and leadership, including the Grand Mufti of Australia, to extend to religious grounds the existing sanctions against those who might “offend” others on the basis of race, gender, age, or disability. This article explains that, rather than expanding the scope of existing discrimination laws, to cover the strong criticism of religion, Australians should be entirely free to discuss matters of religion, particularly when this is tied up with political or philosophical perspectives that encompass communicating matters of general public interest. This opinion is based, among other things, upon the view confirmed by previous High Court decisions that our democratic system of government requires every citizen in this country to be entitled to communicate in a free and open manner about matters of political nature, including when these matters are intertwined with a critical analysis or assessment of religious beliefs and practices.

* LLB (Hon.), LLM *cum laude*, PhD (Mon.). Head and Professor of Law, Sheridan College, Perth/WA; Professor of Law (Adj.), The University of Notre Dame Australia, Sydney campus; President, Western Australian Legal Theory Association (WALTA); Former Law Reform Commissioner, Law Reform Commission of Western Australia (2012-2017).

I. FIRST CONSIDERATIONS

Over the years the Australian Prime Minister, Scott Morrison, has displayed a disturbing lack of regard for one of the most fundamental rights of every tolerant society: freedom of speech. Two years ago, when asked about one of the laws that seriously impinged on this fundamental right (and his colleagues wanted him to support the amendment of such a controversial provision so as to better protect freedom of speech), Morrison notoriously refused to do so. ‘I know there are a lot of people who are interested in this issue’, he said, before going on to explain why he was not joining them in those efforts to better protect the fundamental right to freedom of speech: ‘I know this issue doesn’t create one job, doesn’t open one business, doesn’t give anyone one extra hour. It doesn’t make housing more affordable or energy more affordable’, he said.¹

Back in those days Morrison was the Treasurer and he offered no support to those who reasonably worried about the perilous state of freedom of speech in Australia.² Those politicians sought his support to legislative change because they were aware that controversial s 18C of the *Racial Discrimination Act* unconstitutionally impinges on the implied freedom of political communication.³ This implied freedom is an important constitutional principle introduced by the High Court in the early 1990s. This freedom effectively prevents any Australian government from disproportionately restricting freedom of speech. Based primarily upon the view that our Constitution has established a system of representative and responsible government, this freedom naturally requires that the Australian people and their representatives must be able to communicate about political matters in a free and open manner.

¹ Michael Koziol, ‘Scott Morrison warns against internal fight over free speech laws: ‘It doesn’t create one job’, *The Sydney Morning Herald* (online), 1 March 2017, at <https://www.smh.com.au/politics/federal/scott-morrison-warns-against-internal-fight-over-free-speech-laws-it-doesnt-create-one-job-20170301-gunoqu.html>

² David Crowe, ‘Religious Discrimination Law Are a New Culture War in the Making’, *The Sydney Morning Herald* (online), 4 July 2019, <<https://www.smh.com.au/politics/federal/religious-discrimination-laws-are-a-new-culture-war-in-the-making-20190704-p5243k.html>>

³ See: Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016). In this book, we argue that s 18C is too broad and too vague to be constitutional. We argue that relevant international treaties do not support the sweeping scope of s 18C. Further, we argue that s 18C’s breadth and complexity impermissibly infringes the freedom of communication about government and political matters implied from the Commonwealth Constitution.

The provision derived from 18C is notoriously unconstitutional because it is not supported by any of the heads of power conferred on the federal parliament by the *Australian Constitution*. The provision certainly cannot be derived from the external affairs power in s 51(xxix) of the Constitution, with such provision reaching well beyond the intended scope of the *International Convention on the Elimination of All Forms of Racial Discrimination*. Indeed, international law does not recognise the right not to be offended. Compounding to the problem is the fact that s 18C impermissibly infringes upon the freedom of communication about government and political matters implied from the Constitution.

Now it is the political freedom to discuss religious matters that is at a serious risk of being completely undermined. As reported by the media, the Morrison government has been urged by Islamic groups to create a provision that is similar to the one found in s 18C, thus introducing a matching law on grounds of religion to existing sanctions against those who might offend people on the basis of race, gender, age, or disability.⁴ This is a dangerous development because the Prime Minister has previously expressed his support for restriction of free speech on religious grounds.⁵ In an interview with the Fairfax Media, in December 2017, Morrison stated:

It all starts when you allow ... mockery to be made of your faith or your religious festivals — it always starts innocently and it's always said it is just a joke — just like most discrimination does. And I'm just gonna call that out ... I've just taken the decision more recently, I'm just not going to put up with that any more, I don't think my colleagues are either. Where I think people are being offensive to religion in this country — whichever religion that might be ... well, we will just call it out and we will demand the ... respect that people should provide to all religions.⁶

The ongoing push for laws which protect religionists from ever feeling “offended” comes from Dr Ibrahim Abu Mohamed, the Grand Mufti of Australia. This controversial Muslim authority has called on the Prime Minister to introduce new laws that greater protect Muslims against so called “Islamophobia”; that is, the reasonable criticism of the Islamic

⁴ David Crowe, ‘Morrison Risks Free Speech Clash Over Religious Protection’, *The Sydney Morning Herald* (online), 9 July 2019, <<https://www.smh.com.au/politics/federal/morrison-risks-free-speech-clash-over-religious-protection-20190709-p525mt.html>>

⁵ Augusto Zimmermann, ‘Where’s the Prime Minister on the Free Speech Crisis?’, *The Spectator Australia* (online) 26 June 2019, <<https://www.spectator.com.au/2019/06/wheres-the-prime-minister-on-the-free-speech-crisis/>>

⁶ ‘Scott Morrison is as Mad as Hell and He’s Not Going to Take Your Free Speech Any More’, *The Australian* (online), 22 December 2017, <<https://www.theaustralian.com.au/commentary/cutandpaste/scott-morrison-is-as-mad-as-hell-and-hes-not-going-to-take-your-free-speech-any-more/news-story/74677d60fe958f9979b352ca44be103c>>

religion.⁷ He told *SBS Arabic 24* that, as the country's highest Islamic authority, he personally requested the Prime Minister to introduce new laws that make it a legal offence to criticise Islam.⁸ This is confirmed by a leaked video of the Prime Minister meeting with Dr Mohamed and other Islamic leaders at Lakemba Mosque. The video shows the Grand Mufti sitting next to the Prime Minister and directly instructing him to create a federal law against "discrimination" based on religion.⁹

At the same meeting, Muslim Association Director Ahmad Malas went even further, calling on the government to stamp what he evidently perceives to be Australia's inherent "white supremacy". As reported, Mr Malas has demanded the Prime Minister to review all the federal laws so as to address 'the need for the Government to take responsibility at stamping out the ideology of white supremacy'.¹⁰ Curiously, people who do not read Muslim sources would never know that Mohammed is often described as being "very white". The prophet bought and sold dark-skinned slaves and took these black slaves as spoils of war. The number of black slaves owned by Mohammed is estimated as high as seventy.¹¹ Some of these dark-skinned slaves were women whose husbands were killed at war. The two primary books of the Islamic religion, the *Koran* and the *Hadith*, endorse unlimited sexual relations with these female slaves, even if these women have just been captured.¹²

Because Mohammed owned a remarkable number of slaves, as did all his successors, slavery has been widely accepted throughout the Islamic world as an acceptable practice. Contrary to the message of love conveyed in the Bible (particularly in Jesus's teachings in the New Testament) the Islamic texts do not condemn the kidnapping and enslavement of unbelievers, together with the forcing of their families into slavery.¹³ To the contrary,

⁷ Abdallah Kamal, 'Grand Mufti Calls for Laws to Protect Muslims Against the Virus of Islamophobia', *SBS Arabic* (online), 18 March 2019, <<https://www.sbs.com.au/yourlanguage/arabic/en/article/2019/03/18/grand-mufti-calls-new-laws-protect-muslims-against-virus-racism>>

⁸ Ibid.

⁹ Avani Dias, 'Leaked Video Shows Islamic Leaders Calling on Scott Morrison for Protection Against Hate Speech', *ABC Triple J* (online), 21 March 2019, <<https://www.abc.net.au/triplej/programs/hack/islamic-leaders-scott-morrison-hate-speech-christchurch/10925660>>

¹⁰ Ibid.

¹¹ Daniel Pipes, *Slave Soldiers and Islam: The Genesis of a Military System* (Yale University Press, 1981) 140.

¹² Sahih al-Bukhari book 8, hadith 367, <<https://muflihun.com/bukhari/8/367>>; Sahih Bukhari, book 62, hadith 137, <<https://muflihun.com/bukhari/62/137>>; Sunan Abu Dawud, book 12, hadith 2167, <<https://muflihun.com/abudawood/12/2167>>; Sahih Muslim, book 8, hadith 3373, <<https://muflihun.com/muslim/8/3373>>; Sahih Muslim, book 8, hadith 3371, <<https://muflihun.com/muslim/8/3371>>

¹³ Murray Gordon, *Slavery in the Arab World* (Amsterdam Books, 1989) 19.

leading Muslim scholars such as the celebrated Ahmad Baba authoritatively state that the Islamic law fully authorises the enslavement of non-Muslims.¹⁴ This has led to thirteen centuries of institutionalised slavery across the Islamic world. For instance, the African slave trade has been regularly carried out by Muslim Arabs since the advent of the Islamic religion. Such a religious endorsement of slavery explains why in countries like the Islamic Kingdom of Saudi Arabia the institution of slavery was abolished only in 1962, although slavery is still practiced in a significant number of Muslim countries, including Libya¹⁵, Mauritania,¹⁶ and Yemen¹⁷, to name only a few. In today's Libya, 'thousands of black Africans find themselves bought and sold, forced to work for nothing, and facing torture at the hands of their owners'.¹⁸

II. ONE WAY ROAD?

One cannot hide the irony that, in their attempt to prevent themselves from ever feeling offended, Muslim leaders have no qualms in offending the country's majority ethnic group. Having arrived in the democratic West, many Muslims escaping from remarkably oppressive theocratic regimes start to develop a visceral hatred of the local citizens of the Western democracies that have so generously received them, and not so often as refugees from their native Islamic nations. Some of these religious individuals objectively aspire to take revenge against our tolerant society, 'for some fault so heinous that a visceral hatred for the ethnic majority is developed'.¹⁹

A clear evidence comes from a statement by the *Australian Muslim Community*. Entitled 'Christchurch and Islamophobia' and announced on 25 March, 2019, such document promotes race-oriented accusations aimed at the majority white population. It notoriously accuses white Australians of collective responsibility for the "systematic massacre" of Aborigines. Apparently, the majority ethnic group would be collectively guilty of the

¹⁴ See: Paul E. Lovejoy, *Transformations in Slavery: A History of Slavery in Africa* (3rd Ed., Cambridge University Press, 2012) 15.

¹⁵ 'People for Sale, Where Lives are Auctioned for \$400', *CNN* (online), 14 November 2017, <<https://edition.cnn.com/2017/11/14/africa/libya-migrant-auctions/index.html>>

¹⁶ The Unspeakable Truth about Slavery in Mauritania', *The Guardian* (online), 8 June 2018, <<https://www.theguardian.com/global-development/2018/jun/08/the-unspeakable-truth-about-slavery-in-mauritania>>

¹⁷ 'The Ongoing Fight to Free Thousands of African Slaves in Yemen', *Al-Jazeera* (online), 5 June 2016, <<https://www.youtube.com/watch?v=KVuQTiQNJOE>>

¹⁸ 'The Good Muslim Arabs of Libya Are Enslaving Blacks And Selling Them For \$500', *African Globe*, 28 March 2019, <<https://www.africanglobe.net/africa/good-muslim-arabs-libya-enslaving-blacks-selling-500/>>

¹⁹ Roger Scruton, *The West and the Rest: Globalization and the Terrorist Threat* (Continuum, 2002) ix.

systematic genocide of Aborigines. White people, as a general rule, concludes the statement, must be held collectively accountable for the promotion of ‘white supremacist violence on this continent for over two centuries’.²⁰ This Islamic statement has been signed by approximately 450 Muslim leaders and organisations, including presidents, both past and present, of the Islamic Council of Victoria. Contained in such assertion is the demand that s 18C should now be extended to religious grounds. This is followed by a clear threat to the Australian government:

We remember the numerous times the Coalition have used the Muslim community as targets of vicious debates around immigration, multiculturalism and national security... We remember when elected Liberal Party representatives campaigned to remove s 18C of the Racial Discrimination Act under the guise of protecting free speech.²¹

The Muslim Community’s statement goes in line with the long-held position adopted by the Australian Grand Mufti, who states that s 18C should be amended to allow Muslims receive the same level of legal protection afforded to ethnic groups.²² This is the same leader who criticised a judge (Justice Fagan of the NSW Supreme Court) for simply daring to ask why Muslim leaders often fail to disavow the “belligerent” verses of the Koran so as to weaken the convictions of terrorists. Justice Fagan made a fair comment, particularly with regards to the apparent reliance on Koranic verses to support a religious duty of violence against the “infidel” – a fact that has been testified in a number of cases across Australia. If these verses upon which terrorists rely are not really the binding commands of the god of Islam, then, Justice Fagan concluded, ‘it is Muslims who would have to say so’.²³

This was a valid point and it comes from a person who holds a respected judicial position in the country. However, the opinion of this judge was met with indignation by the Grand Mufti of Australia. Dr Mohammed was adamant that no Koranic verses can ever be criticised, including verses which promote violence. ‘This will never happen’, he said, before accusing Justice Fagan of being ‘uninformed’ about the teachings of the Koran: ‘You don’t ask to

²⁰ ‘Christchurch and Islamophobia’, *The Australian Muslim Community*, 25 March 2019, <<https://www.communitystatement.com.au>>

²¹ Ibid.

²² Rose Lewis, ‘Grand Mufti Seeks Racial Discrimination Act Cover for Muslims’, *The Australian* (online) 19 January 2017, <<https://www.theaustralian.com.au/nation/politics/grand-mufti-seeks-racial-discrimination-act-cover-for-muslims/news-story/cf45cf93b9a10ae3be431736f2ccd984>>

²³ Fares Hassan and Abdallah Kamal, ‘Will Never Happen: Grand Mufti Rejects Judge Call for Muslims to Denounce ‘Hostile’ Koran Verses’, *SBS Arabic* (online), 1 February 2019, <<https://www.sbs.com.au/yourlanguage/arabic/en/article/2019/02/01/will-never-ever-happen-grand-mufti-rejects-judge-call-muslims-denounce-hostile>>

disavow medicine if some doctors exploit it, you don't ask to disavow law if some judge misuse it', Dr Mohammed said.²⁴

In the exercise of his religious role as the country's Grand Mufti, Dr Mohammed has met several times with our Prime Minister. He recently visited Morrison to request 'the introduction of new laws which would make it an offence to discriminate against Muslims'.²⁵ He took the opportunity to issue the following warning to the Australian government:

We are waiting for the response of the two big parties, the prime minister and the opposition leader ... and we know that hate and racism are incidental viruses to [Australia's] society. Everyone, Muslim or non-Muslims, no matter what colour they are, we are all guests on Aboriginal land.²⁶

If the same rationale were applied to all the countries of Northern Africa, and even most of the countries in the Middle East, then all Muslims living in these regions should be considered "guests on Christian land". When Muhammad was born, in 570, 'a large area in northern Arabia was fully Christianised, and there were also a number of Christian towns in the south (modern Yemen)'.²⁷ Following his conversion, the Apostle Paul devolved his initial missionary efforts to Arabia, and not Europe (Gal. 1:17). As for North Africa, by the year 300 that region was the most Christianised of the Western Roman Empire, and home to such great early leaders as Tertulian, Cyprian, and St Augustine.²⁸

Christianity did not start as a Western movement. Prior to the advent of Islam, it was predominantly a Middle Eastern religion. By 325, more than half of all Christians lived in the East and North Africa. Christianity existed primarily in Syria, Persia, Armenia, North Africa, and considerable parts of Arabia. Christianity became a predominantly European faith only when it was destroyed by the Muslims in the Middle East and North Africa. Christianity became a "Western faith" because Europe was the only continent where it was

²⁴ Ibid.

²⁵ Kamal, above n 7.

²⁶ Kamal, above n 7.

²⁷ Rodney Stark, *The Triumph of Christianity: How the Jesus Movement Became the World's Largest Religion* (New York/NY: HarperOne, 2011), p 200

²⁸ Ibid., p 199.

not destroyed.²⁹ This destruction began in the seventh and eighth centuries when these areas were brutally overrun by Islam.

Take the example of Egypt. The Egyptian Church was founded in the first century AD by St. Mark, the gospel writer.³⁰ By the third century, 'onomastic analysis indicated that as much as 50 percent of Egypt's population was already Christian.'³¹ In 639, however, Caliph Umar initiated the invasion of Christian Egypt, at that time indisputably a major centre of Christianity. Because Egyptian cities were strongly fortified, Muslim armies could only resort to massacres of the villages and rural areas in the hopes that Christian forces would be drawn to battle. When the Muslim invaders finally succeeded in conquering Alexandria (the second largest city in Christendom), they engaged in widespread 'massacre, plunder, and arson ... until half the city was destroyed'.³²

It was not until 670 AD that a Muslim army advanced further along the North African coast. As it happened with Alexandria, in 705 Carthage was 'razed to the ground and most of its inhabitants killed'.³³ 'By the twelfth century, the last indigenous Christians disappeared from North Africa, and by the fifteenth century the Christian Coptic population of Egypt itself was reduced to a minority of only 15 percent'.³⁴ The Christian population of indigenous Berbers in Tunisia and Morocco officially surrendered to the Muslim invaders by 711, after half a century of brutal fighting and bitter resistance against the brutal conquest of their land.³⁵ By the end of the fourteenth century, only tiny remnants of native Christians had survived, having been Christianity almost entirely completely wiped out by Muslim persecution.³⁶

²⁹ Ibid., 211.

³⁰ Ibid. 184.

³¹ Malcolm Choat, Jitse Dijkstra, Christopher Haas, and William Tabbernee, 'The World of the Nile', in William Tabbernee, *Early Christianity in Contexts: An Exploration Across Cultures and Continents* (Baker Academic, 2014) 201.

³² Rodney Stark, *The Triumph of Christianity: How the Jesus Movement Became the World's Largest Religion* (HarperOne, 2011) 203.

³³ Ibid.

³⁴ Nehemia Levtzion and Randall L. Pouwels, 'Patterns of Islamization and Varieties of Religious Experience Among Muslims of Africa', in Nehemia Levtzion and Randall L. Pouwels, *The History of Islam in Africa* (Ohio University Press, 2000) 1.

³⁵ Peter von Sivers, 'Egypt and North Africa', in Nehemia Levtzion and Randall L. Pouwels, *The History of Islam in Africa* (Ohio University Press, 2000) 23.

³⁶ Rodney Stark, *The Triumph of Christianity: How the Jesus Movement Became the World's Largest Religion* (HarperOne, 2011) 211.

Because of many centuries of violent Islamic invasion, brutality, and genocide, Christians have almost entirely disappeared from those conquered lands. They are historically subject to all forms of physical violence and discrimination on account of their faith. Of course, Islam only became the dominating religion in Northern Africa after many centuries of violence, slavery and ultimately the genocide of the original Christian inhabitants of these conquered lands.³⁷ And even to this very day radical Muslims attack and kill Christians in the Middle East and Northern Africa, and burn down their places of worship.³⁸

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 Muslims constitute the majority of the population, then ‘religious persecution is reported in 100 percent of cases’.³⁹ As Grim and Finke point out, ‘religious persecution is not only more prevalent in Muslim-majority countries, but it also generally occurs at a more severe level’.⁴⁰ There has been in these Muslim-majority countries an unequal relationship between Muslims and non-believers, and undoubtedly between men and women as well. For example, a Christian woman caught practising her faith in Saudi Arabia is most 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.⁴¹

III. THE ISLAMIC GRIEVANCE INDUSTRY

The Organization of the Islamic Cooperation (OIC) introduced a couple of years ago at the United Nations a notorious motion imposing strict limits on free speech in the domain of religion. On the occasion, the OIC urged the U.N. Secretary General to convene a special session of the U.N. General Assembly to declare “Islamophobia” a form of discrimination akin to the crime of racism. A special rapporteur for the monitoring and combating of

³⁷ See: Augusto Zimmermann, ‘Islamic Imperialism and Christian Genocide’, *Quadrant Online*, 2 July 2019, <<https://quadrant.org.au/opinion/qed/2019/07/islamic-imperialism-and-christian-genocide/>>

³⁸ See: Augusto Zimmermann, ‘Islam’s War on Christianity – Part II’, *Quadrant Online*, 3 July 2019, <<https://quadrant.org.au/opinion/qed/2019/07/islams-war-on-christianity-part-ii/>> See also: David Pryce-Jones, ‘Islam Faces its Demons’, *The Weekend Australian*, September 22-23, 2012, 15-16.

³⁹ Brian J. Grim and Roger Finke, *The Price of Freedom Denied: Religious Persecution and Conflict in the Twentieth-First Century* (Cambridge University Press, 2011) 21.

⁴⁰ *Ibid.*

⁴¹ David Pryce-Jones, ‘Islam Faces its Demons’, *The Australian Weekend* (online), 22 September 2012, <<https://www.theaustralian.com.au/news/inquirer/islam-faces-its-demons/news-story/f27b5e43750099ec4d5fce7abd747297>>

“Islamophobia” was suggested on the occasion. In the context of assuming that widespread “Islamophobia” has been practised by people living in Western democracies, presumptions of guilt and attributions of potential crimes, including religious terrorism, were rejected.⁴²

Due to this ongoing pressure by the OIC and economically powerful Islamic regimes, the U.N. Committee for the Elimination of Racial Discrimination recently proposed a vast range of substantive changes to combat the alleged problem of “Islamophobia”. This includes beefing up s 18C of the Discrimination Act in Australia, as well as censoring certain aspects of this country’s media and public commentary.⁴³ The international resolution goes on to claim that racist incidents in Australia are common occurrence and often ‘treated with impunity’, and that s 18C must therefore be better policed by ‘law enforcement officials’.⁴⁴

Naturally, this allegation is deeply insulting of the tolerant Australian people. First of all, to speak of “Islamophobia” is to censor discussion and to avoid rational debate about the causes and concerns regarding this religion. It is to maintain the crudest confusion between a belief system and the person who voluntarily adheres to this. Second, s 18C is most definitely not a law that is rarely being used. To the contrary, this is a law having a very real and detrimental impact on free speech in Australia. Between 2010 and 2016 alone, there were about 840 complaints lodged under 18C before the Australian Human Rights Commission.⁴⁵

Turkey’s autocratic President, Recept Erdogan, is a notorious Islamist who claims that the integration of Muslims in our Western democracies would amounts to a ‘crime against humanity’. At the same time, he has been engaged in the dismantling of his own country’s secular system. A key element in his ‘plan of conquest’ is to coerce Western governments into accepting a “right” of Muslims to resist any social integration, and to regard Sharia as superseding every Western law and custom when the two appear to be in conflict.⁴⁶ This

⁴² ‘OIC Urges UN to Tackle Islamophobia, Declare it a Form of Racism’, *Express Tribune* (online) 23 March 2019, <<https://tribune.com.pk/story/1935888/3-oic-urges-un-tackle-islamophobia-declare-form-racism/>>

⁴³ Michael Koziol, ‘UN Warns Racism on Rise in Australia, Calls for Section 18C to be Strengthened’, *The Sydney Morning Herald* (online), 9 December 2017, <<https://www.smh.com.au/politics/federal/un-warns-racism-on-rise-in-australia-calls-for-section-18c-to-be-strengthened-20171209-h01qi0.html>>

⁴⁴ *Ibid.*

⁴⁵ Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, ‘Indeed, Mr Abbott, Section 18C is Clearly a Bad Law’, *On Line Opinion*, 6 May 2016, <<http://www.onlineopinion.com.au/view.asp?article=18212>> See also: Simon Breheny, ‘Racial Discrimination Act: Turnbull Should Revisit 18C Repeal Case’, *The Australian*, 29 April 2016, <<https://www.theaustralian.com.au/business/legal-affairs/racial-discrimination-act-turnbull-should-revisit-18c-repeal-case/news-story/03037ee74deee25572fe2fd41bccf721>>

⁴⁶ Andrew C McCarthy, *Islam and Free Speech* (Encounter Books, 2015), 21.

matches the perspective of the OIC, which has determined that ‘Muslims should not be ... attempted to be assimilated, but should be accommodated’.⁴⁷

The accommodation by Western governments of such Islamic pressure is the opposite of promoting real tolerance and a healthy social integration. A conquering ideology takes well-meaning accommodation as nothing but another sign of weakness and it always commands more.⁴⁸ This undisputable fact is easily identified in the discourse of the Turkish Foreign Minister, Mr Mevlüt Çavuşoğlu, who claims that ‘that the rise of Islamophobia in the western countries and India has morphed into violent expression of ... abhorrent manifestation of racism’.⁴⁹ Hindu Indians are therefore called by him “racist” because of their rational fear of Pakistani Muslims who belong to the same ethnic group. Of course, Islam is not a race and the problems related to this religion are not the product of fear-mongering and fiction, but the result of rational thought and empirical evidence.

IV. AUSTRALIA’S INTERNATIONAL HUMAN RIGHTS OBLIGATIONS

We should resist any legislative reform to protect religious people from feeling offended. Instead, we must strive to put Australia in line with its international human rights obligations to effectively protect religious freedom in the context of free speech, freedom of conscience, freedom of association, and the right to peaceful assembly. The *International Covenant on Civil and Political Rights* 1966 (“ICCPR”) supports these important freedoms of the individual. It was signed by Australia in December 1972 and its protection to freedom of religion is found in Article 18 of the ICCPR, which came into force on 23 March 1976.

Article 18 of the ICCPR is concerned with the right to ‘freedom of thought, conscience and religion’, which encompasses the right to ‘adopt a religion or belief’. An infringement of one’s rights protected by Article 18, such as freedom of religion, may also simultaneously involve the infringement of the right to privacy (Article 17), the right to peaceful assembly (Article 21), the right to freedom of association (Article 22), and the right to the equal protection of the law without discrimination (Article 26).

Having endorsed the ICCPR and other international law instruments, the Australian government is obligated to use its legislative powers to further support Australia’s

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ *Express Tribune*, above n 40.

constitutional freedoms. It should protect not only religious freedom but freedom of speech, freedom of conscience, freedom of association, and the right to peaceful assembly. This can be done because the Australian High Court has generally adopted an expansive approach to the construction of “external affairs”. The external affairs power found in the Australian Constitution, wrote Chief Justice Gibbs in *Tasmania Dams* (1983), subjects the federal government to ‘no significant limits’, thus offering a potential to invalidate State law in virtually every respect regarding any infringements upon religious freedom.⁵⁰

The Morrison government has under international law the legal (and moral) duty to adhere to Australia’s international human rights obligations. Furthermore, the free exercise of religion is a fundamental freedom of the individual that is legally protected by section 116 of the Australian Constitution. Courts have also found an implied freedom of political communication, which includes as a corollary freedom of association. These freedoms must be extended, by logical extension, to religious people and religious organisations. Adding religious people as an additional “class” of protected people further compounds the problem of the constitutional invalidity of laws that may already unreasonably impinge the freedom of political communication. On this count, the changes proposed by these Islamic groups are constitutionally invalid.

V. RELIGIOUS FREEDOM AND THE IMPLIED FREEDOM OF POLITICAL COMMUNICATION

Because religious freedom is not the only human right that must be legally protected, the question of the relationship between different legally described rights arises. Article 18 of the *International Covenant on Civil and Political Rights* specifies that ‘only such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others’. Religious freedom can therefore be limited on grounds of broader protection of fundamental rights for all. That being so, writes Robert Forsyth,

As important as the right to religious liberty is, it is crucial to add that protecting it should not entail any laws that remove others’ rights to criticise, deny or even ridicule any particular religious belief or practice ... Therefore, it is essential to rule out any notion that blasphemy should be either reintroduced or reinvigorated as an offence. Nor can religious freedom protection guarantee that religious points of view will necessarily be listened to, or religious

⁵⁰ (1983) 158 CLR 1 [96] (Gibbs CJ). See also: Sir Harry Gibbs, ‘*The Decline of Federalism?*’ (1994) 18 *University of Queensland Law Journal* 1, 4.

leaders respected in public debate. These are matters properly outside the reach of law in liberal democracies'.⁵¹

Professor Adrienne Stone of Melbourne Law School notes that religious speech is in its nature quite often intertwined with 'political opinions, perspectives, philosophies and practices'.⁵² Similarly, Nicholas Aroney of Queensland Law School contends that, indeed, 'religion, religious beliefs and religious practices (as well as irreligious beliefs) not infrequently inform, or are tied up with, political perspectives, philosophies and practices'.⁵³ Indeed, the Full Court of the Australian Federal Court has already stated that 'Religious beliefs and doctrines frequently attract public debate and sometimes have political consequences reflected in government laws and policies'.⁵⁴ What is more, in *Adelaide Company of Jehovah's Witnesses Incorporated v The Commonwealth*,⁵⁵ Latham CJ noted with respect to religious beliefs:

Such beliefs are concerned with the relation between man and the God whom he worships, although they are also concerned with the relation between man and the civil government under which he lives. *They are political in character, but they are none the less religious on that account.* [emphasis added]⁵⁶

The political process is necessarily wide, reflecting the freedom to receive all information that may affect a citizen's choices. Since the communication of political ideas may sometimes be embedded in a strong religious perspective, such communication should not be limited or restricted by the positive law. On the contrary, any provision which unreasonably affects the critical assessment of religious ideas with political implications greatly burdens the freedom of political communication that is implied in the Australian Constitution; indeed a concept that has been upheld on numerous occasions by the Australian courts.

If religious and political matters are so often intertwined, one must conclude that any limitation imposed on the freedom to discuss religious matters of public interest does necessarily amount to a violation of the broader protection to the constitutional freedom of

⁵¹ Robert Forsyth, 'A Test of Maturity: The Liberal Case for Action on Religious Freedom', *The Centre for Independent Studies - Policy Paper, No.8*, August 2018, 5.

⁵² Adrienne Stone, 'Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication' (2001) 25 *Melbourne University Law Review* 374, 386–87.

⁵³ Nicholas Aroney, 'The Constitutional (In)Validity of Religious Vilification Laws: Implications for their Interpretation' (2006) 34 *Federal Law Review* 288, 306.

⁵⁴ [2008] FCAFC 130; (2008) 168 FCR 576, 578 [2] (French, Branson and Stone JJ).

⁵⁵ [1943] HCA 12; (1943) 67 CLR 116.

⁵⁶ *Ibid* 125 (Latham CJ) (emphasis ours).

political communication. In other words, since views concerning religion may influence government policies derived from the nation's constitutionally-prescribed system of representative government, s 116's protection of the free exercise of religion must also encompass communicating and associating about a religion's view on government or political matters.⁵⁷

Above all, no law should ever forbid the strong criticism of religion. The idea coming from Muslim leaders of extending s 18C to religious grounds is no doubt unreasonable and ultimately unconstitutional. To start with, some religious ideas actually deserve to be severely criticised, perhaps for embracing values that conspire against a free and tolerant society. If such a demand for constitutionally invalid legislation were to be attended, then the final outcome will be to outlaw freedom of speech if such a political communication may displease the inflated sensitivities of radical religious groups. As Fairfax journalist David Crowe correctly asserted in the *Sydney Morning Herald*, 'the obvious danger is a blasphemy law – if not in name, then in effect. At what point does speaking out against a religion turn into a form of discrimination that should be stopped?'⁵⁸

VI. FINAL CONSIDERATIONS

Australians should be perfectly entitled to manifest their political opinions concerning any religious issue. Religion is rarely a private matter alone and it is particularly important to recognise that the nature of religious speech is often intertwined with 'political opinions, perspectives, philosophies and practices.'⁵⁹ However, the radical Islamic push to extend anti-discrimination laws to religious grounds would violate the Australian Constitution and provide a legal shield for extremists to advocate a "religious war against the West". In a true democracy, of course, everyone must have the fundamental right to criticise religion, and to regard any particular manifestation of religion as mendacious, retrograde, and ultimately a threat to the preservation of a democratic society of free and responsible individuals.

⁵⁷ For a more comprehensive treatment of the subject, see: Augusto Zimmermann, 'The Unconstitutionality of Religious Vilification Laws in Australia: Why Religious Vilification Laws are Contrary to the Implied Freedom of Political Communication Affirmed in the Australian Constitution' (2013) *Brigham Young University Law Review* 457, 493-503. See also: Augusto Zimmermann, 'Religious Freedom of Political Communication: A Constitutionally Protected Freedom', *The Spectator Australia* (online) 20 March 2018, <<https://www.spectator.com.au/2018/03/religious-freedom-of-political-communication-a-constitutionally-protected-freedom/>>

⁵⁸ Crowe, above n 2.

⁵⁹ Stone, above n 52.