Law and Religion in Public Life

The contemporary debate

Edited by
Nadirsyah Hosen and
Richard Mohr

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With religion at centre stage in conflicts worldwide, and in social, ethical and geo-political debates, this book takes a timely look at relations between law and religion. To what extent can religion play a role in secular legal systems? How do peoples of various faiths live successfully by both secular laws as well as their religious laws? Are there limits to freedom of religion? These questions are related to legal deliberations and broader discussions around secularism, multiculturalism, immigration, settlement and security.

The book is unique in bringing together leading scholars and respected religious leaders to examine legal, theoretical, historical and religious aspects of the most pressing social issues of our time. In addressing each other's concerns, the authors ensure accessibility to interdisciplinary and non-specialist audiences: scholars and students in social sciences, human rights, theology and law, as well as a broader audience engaged in social, political and religious affairs. Five of the book's thirteen chapters address specific contemporary issues in Australia, one of the most ethnically diverse countries in the world and a pioneer of multicultural policies. Australia is a revealing site for contemporary studies in a world afraid of immigration and terrorism. The other chapters deal with political, legal and ethical issues of global significance. In conclusion, the editors propose increasing dialogue with and between religions. Law may intervene in or guide such dialogue by defending the free exchange of religious ideas, by adjudicating disputes over them, or by promoting a civil society that negotiates, rather than litigates.

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Nadirsyah Hosen and Richard Mohr
Editors

Introduction

Da capo: law and religion from the top down

Richard Mohr and Nadirsyah Hosen

Both law and religion relate ethical principles to life as we live it. Such common goals suggest the possibility of competition or conflict between the two, or that they should perhaps be distinguished according to some criteria for determining their respective proper spheres. Broadly speaking, some such proposals are at the basis of most debate on the subject. If law and religion can overlap, then there is scope for legal religion and religious law. If they are to be hermetically sealed off from each other, then boundaries must be defined and patrolled.

The historical links between law and religion are very different from those we see in the western world today. In pluralistic legal regimes, including those of feudal Europe, various forms of law pertained to various spheres of life: merchants, manors and churches. As law became increasingly tied to the exclusive jurisdiction of the nation, state law gained supremacy while canon law retained a diminishing sphere of responsibility for clerical affairs. If official law turns an increasingly blind eye to religious faiths and principles, we still find law-like functions operating within and around organized religions. Religious disputes, or temporal disputes over church affairs, still need to be settled, and not all of these end up in the civil courts. People adhering to particular faiths seek guidance in how best to live.

With its strong links to principles that many people hold most important, religion has been a natural source of support and legitimacy for temporal projects, be they business or charitable projects or affairs of state. Law and religion are entwined in the constitutional foundations, including the founding myths, of nations. The gods guide the conqueror, justify the conquest, persuade the native inhabitants, and endorse the law.

We introduce this collection *da capo*, from the beginning, but also from the top down. In this introduction we focus attention on those formal interactions between law, religion and the state that set the parameters of public life. How this landscape may appear when looked at from the bottom up is the subject of our final essay in the book. There we draw lessons from the rich scholarship of the authors represented here, to search for a mirror that can reflect this perspective back to us, *a posteriori*.

The book begins with broad constitutional considerations. How is a democratic state to be organized vis-à-vis religious majorities? How are we to understand the interplay of religious traditions, law and the state? The deep traditions of religious and legal regimes leave indelible marks on later generations, on subsequent regimes and on those other nations that are spawned as their colonial offspring. Legal and religious principles, assumptions about the relations of church and state, the books and stories that give us a narrative of who we are and where we come from, all contribute to habits of thought and ways of acting in public that weave through the *longue durée* of nations and laws.

Religion has always accompanied armies into battle. It has spread, like language, culture and introduced diseases, with invading forces and colonizers. For what is colonization but the subjection of peoples to new laws and new gods? Yet religion has played this role in many diverse ways over history.

The founding violence that establishes the law also legitimates the regime, shows the way its rulers are to be appointed, and defines the extent of judicial power. Constitutional lawyers share with conquering armies this bird's eye view of the territory. The law stands over the physical power wielded by the rulers, determining the limits and extent of their power. It does not stay their hand, but guides it, extending that power into the institutions of the state, into the prisons, the missions, the public services and the entire fabric of regulation.

In Europe's great founding myth, Venus, Vulcan and Jupiter meddled directly in Aeneas's project of colonizing Italy: directing storms, forging weapons and confounding enemies (Virgil 1991). Umayyads, crusaders and conquistadors left their various marks on history with more or less deft combinations of armed force and faith. Missionaries accompanied the conquistadors across the Americas and followed the British into the Australian outback where they established missions to concentrate and assimilate Aboriginal people.

Australia was established through penal colonies under military rule. If internal rule over the settlers was a secular operation under the guise of law, the dispossession of the Aboriginal inhabitants was justified by their being godless and without law (Neal 1991). Inquiring, nearly two hundred years later, into the legitimacy of Aboriginal claims to native title rights, Justice Blackburn invoked legal sources and the settlement of Massachusetts based on a 'command given by God' obliging settlers to cultivate the land.[1]

Indigenous beliefs and Australian law

Aboriginal religions, so linked to law that the western distinction seems meaningless, have been seen to pose a challenge and a threat to the colonization and the legitimacy of the legal foundations of Australian settler society. 'Sacred sites' found to stand in the way of mining or other

economic interests have been protected and opposed with equal vehemence. Around the time of the *Mabo* decision (which overturned Justice Blackburn's defence of *terra nullius*)[2] a group of Njarringdjeri women at the mouth of the Murray River opposed a bridge to nearby Hindmarsh Island 'for reasons that belonged to a secret body of knowledge'. Indigenous beliefs were denigrated, denied, ridiculed and, finally, subjected to a royal commission to establish whether the women had been lying. Other legal and media campaigns drew the case out from 1993 to 2001 (Maddox 2005: 114 ff). The words 'secret women's business' became one of the most hackneyed and offensive jokes of the era.

On the other hand, certain Aboriginal beliefs and practices have been vindicated by ecology and lauded by environmentalists and 'new age' spiritualists. Naïve and uninitiated people have profited from purported expositions of Aboriginal religions in the most lurid terms. The protection of Indigenous cultural material has become as important and contested as the protection of sacred sites (Coleman 2005).

At the time the royal commission into the Hindmarsh Island case was debated in the Australian Parliament, the Left Labor front-bencher Anthony Albanese taunted conservative members by questioning their reaction if the inquiry were to be 'into your beliefs; into whether you can prove the Holy Trinity exists' (Maddox 2005: 133). The controversy broke on a rising tide of right-wing Christian politics in Australia. This political and ideological movement protected and endorsed certain conservative views associated with Christianity (e.g. 'family values'), while questioning Indigenous beliefs and, after 11 September 2001, the loyalty of Muslims to Australia.

At that time the Australian consensus on multiculturalism fractured along religious more than ethnic lines. Difference was no longer seen to derive from random variations in costume, ethnic foods and folk dances, the staples of multicultural festivals from the 1970s onwards. Religion is now seen to underlie such choices. The most divisive communal legal controversies focus on the siting of mosques or religious schools, and disputes over religious discourse (as in the *Catch the Fire Ministries* case discussed further below). A number of contributors to this book consider the current state of play in these disputes. Despite the obvious dangers of such conflicts, both Brennan and Leone see positive outcomes. The former reports that six years after the virulent opposition to a new Islamic prayer centre in north-western Sydney, the community came to accept it and the people it brought to the area.

Politics, religion and the question of secularization

A rise in overt Christianity in Australian politics has coincided with legal disputes over religious issues to bring to the fore questions of religion's place in the polity, and the role of state law in considering religion.

A widespread belief, a 'creation myth of social science' (Davies, this volume) born of the Enlightenment and promulgated in narratives of global economic development, held that religion was destined to be superseded by science and social progress. Secularization was an almost inevitable process. According to Norris and Inglehart (2004), the more secure people become in the developed world, the more they loosen their hold on religion. Religion, meanwhile, retains its authority among the less secure but faster-growing populations of the less developed world. They conclude that rich societies are becoming more secular but the world as a whole is becoming more religious.

Recent history has upset the long-held assumption that 'progress' leads to secularism. Those who cling to an ideal of secular progress may identify the resurgence of religion in national politics as an exceptional circumstance related to the rise of particular radical movements: Al Qaeda, or the religious right of the United States. Indeed, there is some evidence that these opposing movements have stimulated each other and, with their relative power and influence in world affairs thanks to George W. Bush and Osama bin Laden, spread particular forms of religious conflict within nations and around the world. Norris and Inglehart (2004) themselves conclude that the United States remains one of the most religious in the club of rich countries, alongside Ireland and Italy, and indeed this makes the United States one of the most religious countries in the world. While there has been a tradition of seeing the United States to be in the forefront of economic, if not social, progress, there is an increasing awareness of the United States as a special case.

Against this thesis of exceptionalism as a mere interruption to a more general equation of progress with secularism, we need to draw attention to both political and social factors. We have already drawn on the work of Marion Maddox, who showed the rise of religious politics in Australia under the conservative regime of John Howard's Liberal Party. And while Maddox demonstrates amply that this was the crusade of a conservative and xenophobic individual, she also draws attention to the many forces he was able to muster. Furthermore, even after the return of Australia to Labor rule, conservative Christian values continue to have greater influence in national affairs under the overtly religious Prime Minister Kevin Rudd than under previous Labor administrations. This is despite the fact that Christianity was the only religious affiliation in Australia that declined between 2001 and 2006 (to 64 per cent of the total population). Those professing no religion showed the second highest increase (by 28 per cent) and were also the second highest category by number, comprising 19 per cent of the Australian population. All other religious affiliations are increasing from a low base of around 2 per cent or less of the population. One of the smallest groups, Hindus, increased 55 per cent, Muslims increased by 21 per cent, Buddhists 17 per cent and Jews 6 per cent.[3] All minority religions combined only made up 5.4 per cent of the Australian

population in 2006. Apart from the increasing religious diversity of Australia as a result of immigration, there is no evidence of an increasing religiosity of the population, and in fact the reverse is apparent. The increase in numbers of people professing no religious belief in 2006 was four times greater (800,559) than all those professing other religions (193,894, excluding Christianity, which declined in numbers). It would seem, therefore, that any increase in the political salience of religion in Australia is attributable more to cultural factors than to demographic ones. When we consider the declining religious affiliation overall, the narrowing gap between the traditionally dominant Christians and adherents of other religions is insufficient to explain any increase in the visibility of religious issues. While Australia is very different from the United States or other religiously active polities, international debates and domestic issues of accommodation have brought greater public awareness of religious issues.

The magnification of this trend in the United States has led to the suggestion that it has become a religious democracy. Bruce Ledewitz (2007) explores the implications of participating in this new form of American government. He explains the decline of secular democracy, describes some of the legal, political and religious implications of this new religious democracy and, finally, invites secular voters to participate in religious democracy. According to Ledewitz, the 2004 Bush re-election clearly showed that a substantial number of voters in America now vote the way they do for what they consider to be religious reasons and that, as a result of their voting, government policy is changing to reflect their religious commitments (see also Davies, this volume).

Other social factors weigh against the 'progressive secularization' thesis. *Contra* Norris and Inglehart, it appears that in both western and predominantly Islamic countries there is an increasing awareness of religious issues in public debate, and not just in politics. Casanova (1994) looks at five cases from two religious traditions (Catholicism and Protestantism) in four countries (Spain, Poland, Brazil and the United States). In Spain and Poland, Casanova analyzes the positive role of the Catholic church in the transition from authoritarian to democratic regimes. In Brazil, the case of Liberation Theology is examined as an instance of the church's commitment to human rights, and the defence of society and its autonomy from the incursions of the state. His final cases deal with evangelical Protestantism and Catholicism in the United States. Here too, analysis centres on the politicized nature of religion, its intervention in public debates (around military power, economic justice, abortion), and its role in participating in and also in restructuring the public sphere through civil society.

We may see western finance professionals who, increasingly in the wake of the global financial crisis, relate their work to Christian or other moral values. Islamic banking attracted new interest since it largely escaped the fallout from the global financial crisis, thanks to rules that forbid the sort

of risky business that is felling mainstream institutions. In Indonesia, Islamic academics and technical professionals retain an attachment to traditional religion while 'modernizing' in other aspects of their lives. Celebrity television preachers, internet fatwa services, mass religious rallies in soccer stadiums, glossy jihadist magazines, Islamic medical treatments, alms-giving via mobile phone and electronic Shari'a banking services are just some of the manifestations of a more consumer-oriented approach to Islam which interact with and sometimes replace other, more traditional expressions of the faith (Fealy and White 2008). In other parts of the world we also observe the increasing levels of debate over the existence of God and the veracity of natural selection theory, largely stimulated by atheists and scientists. Even the atheists are promoting debate on religion!

Secularism

Each of these challenges to the assumption of progressive secularism invites a reassessment of the nature of secularism and its proper place in contemporary social and political life. Secularism has been an unexamined foundation of the compact over religious diversity which has come to the fore in recent times. The key question around secularism becomes: is it part of the solution or part of the problem? The first section of the book focuses on secularism, revealing that it has a rich history (Mohr), a multitude of expressions (Jensen), and an ambiguous impact (Davies). While the contributions of Jensen and Mohr are particularly focused on secularism in the Christian tradition, it is important to consider how secularism may relate to non-western, and particularly Islamic, societies. A closer look at the Islamic world reveals patterns of church- (or mosque-)state relationships that are familiar from our knowledge of Europe and the West. Turkey's 'assertive secularism' (Kuru 2009) is a close match for France's *laïcité*, both of which aim to exclude religion and its personal expression from the public sphere. Kuru (2009) contrasts this approach with the 'passive secularism' more familiar from English-speaking countries, which tolerates public visibility of religion.

The Turkish approach may also be considered in the light of contrasting approaches in other Islamic countries. Of the one billion Muslims living in predominantly Muslim countries, 28 per cent live in 10 countries that, according to their constitutions, declare themselves to be Islamic states.[4] There are an additional 12 predominantly Muslim countries that have chosen to declare Islam as the official state religion without any constitutional declaration that they are Islamic states.[5] By contrast, the constitutions of 11 predominantly Muslim countries proclaim the state to be secular.[6] These countries account for nearly 140 million Muslims, or 13.5 per cent of the Muslims living in predominantly Muslim countries. Finally, the 11 remaining predominantly Muslim countries have not made any constitutional declaration concerning the Islamic or secular nature of the

state, and have not made Islam the official state religion. This group of countries, which includes Indonesia, the world's largest Muslim country, accounts for over 250 million Muslims.[7] Again, this informs us that there is no single model of state–religion relationship in the Muslim world. It also should be noted that approximately 300 million Muslims live in countries that are not predominantly Muslim, such as China, India and Russia (Stahnke and Blitt 2005).

Intellectual and historical roots of secularism can also be discovered in Islam. In the Sunni Islamic world, the idea of separation of state and mosque was first advocated by 'Ali 'Abd al-Raziq (1888–1966), who was the most controversial Islamic political thinker of the twentieth century. His book *al-Islam wa Usul al-Hukm*, written in 1925, invited wide criticism in the Muslim world. He was then condemned and isolated by the Egyptian *ulama* council of al-Azhar, and also dismissed from his position as judge and prohibited from assuming a position in the government. Raziq disagreed with many *ulama* who mandated the establishment of a unified caliphate to establish temporal rule over all Muslims.[8] He could not find any strong foundation to support this belief (Hosen 2004b). Instead he was of the view that:

> Islam did not determine a specific regime nor did it impose on the Muslims a particular system according to the requirements of which they must be governed; rather it has allowed us absolute freedom to organise the state in accordance with the intellectual, social and economic conditions in which we are found, taking into consideration our social development and the requirements of the times.
>
> (Gazi 2009)

Secularism in the traditionally familiar Christian sense, involving a distinction between the realms of the temporal and the sacred, has deep roots in the Shi'i Muslim world. Karen Armstrong (2003) argues that Shi'ism has inherited deep revolutionary zeal from the battle of Kerbala, when supporters and relatives of Muhammad's grandson Hussein ibn Ali clashed with a military detachment from the forces of Yazid I, the Umayyad caliph. The 'Kerbala paradigm also inspired what one might call a religiously motivated secularism'. Armstrong further claims that 'long before western philosophers called for the separation of church and state, Shias had privatized faith, convinced that it was impossible to integrate the religious imperative with the grim world of politics that seemed murderously antagonistic to it'. As a result of this, Armstrong concludes that 'by the eighth century, most Shias held aloof from politics, concentrated on the mystical interpretation of scripture, and regarded any government – even one that was avowedly Islamic – as illegitimate'.

It must be noted that various definitions of secularism can be perceived in the classification of different religious and constitutional arrangements,

political theories and religious traditions. In its strongest version, secularism as *laïcité* can almost be seen as a civil religion, safeguarding itself from the threats of competing religious affiliations. Such an interpretation is consistent with its revolutionary origins in response, respectively, to the *ancien régime* and the Ottoman Empire, with champions like Robespierre and Atatürk. Even if this position is only dominant and sponsored by the state in France and Turkey, it is a popular and perhaps spreading creed in a number of countries, where secular forces are resisting the spread of religious influence (whether of the Christian right or of publicly visible or politically influential Islam).

Those countries with formal and low-keyed constitutional provisions separating religious from political matters, or simply remaining silent on the question, may be open to a range of interactions depending on the relative strength and organization of different groups. With the rise of public religion and increasing contests between different religious or secular groups within the polity, these arrangements are more likely to be resolved democratically. Even in a democracy, of course, the most powerful and numerous forces are likely to prevail, so that such tendencies can pose risks to minorities, or to groups with less power to appeal to dominant traditions and tropes. A cultivated blindness to religion on the part of the state and its law may not overcome all potential difficulties in accommodation between those of different faiths, and those professing none at all.

A third approach to secularism might be described as pluralist or discourse-oriented. Charles Taylor (2009: xii) follows Rajeev Bhargava in proposing such a version, with three elements that Taylor relates ironically (in contrast to *laïcité*) to the founding virtues of the French revolution: liberty (freedom of religion), equality (no religion has a status privileged over others, specially as a state religion), and a broad version of 'fraternity': that all 'spiritual families must be heard' and be involved in processes of deciding social goals and how they are to be met. Various non-western regimes, while not professing 'secularism' in the traditional sense, have nonetheless been referred to as 'secular' in the broader sense of tolerance, pluralism and dialogue. Taylor (2009: xxi) mentions the sixteenth-century Mughal regime established in India by the Emperor Akbar as exemplary of 'secularism' in a distinctly non-European sense. Taylor points out that secularism in its original meaning was not concerned with dialogue between faiths and social goals, but nonetheless did highlight the dialogue between the immanent, or 'secular', and the transcendent or spiritual, without denying the legitimacy of either.

It may be that a secularism emphasizing dialogue and tolerance is so far from the original sense of the term, and so far removed from its contemporary usage, that an alternative term may be preferable. Secularism originally referred to a specific distinction, initially in ecclesiastical circles, between clerical and civil roles, while the term is associated today with an

increasing intolerance towards the more visible religions, modelled on *laïcité*. A contemporary multicultural and multi-religious world requires a new approach.

It may therefore be proposed that we look beyond that contested and multifaceted word, to distinguish alternative approaches which tolerate and accommodate a variety of religious views while privileging none. As Taylor emphasizes, the aim of dialogue or conversation about broad social goals suggests a positive programme of accommodation and communication, in distinction to the negative one which simply turns attention away from matters of religion or other communal values. As suggested above, if states are not just blind but also insensitive to religious views, these may enter political life in new and unwelcome forms. Laws that associate terrorism with specific religious views, as seen in Hosen's contribution to the present volume, may survive tests of a narrow secularism, particularly one for which religions other than Christianity are conspicuous (if not suspicious). A broader approach to tolerance and dialogue would recognize the offence in such an approach and seek ways to overcome it.

Jurisdictional borders between law and religion

There are other reasons to seek more active accommodation between religions, the state and civil society. The Christian heritage of western law, including its Australian common law manifestation, is shown in the contributions by Sharp and Mohr to this volume. Sharp's analysis of the relationship of Christian theology to the theory and practice of punishment in common law shows both the deep-seated continuities and the surprising role of atonement by the sacrifice of an innocent. If Mohr's tracing of secularism to its Christian origins leads him to question its impartiality as between different religions, Sharp's recognition of both the heritage and the disjuncture between law and the religious tradition from which it grew suggests tantalizing jurisprudential, theological and sociological questions. Babie, on the other hand, takes an overt moral philosophical approach to his jurisprudence, mounting a sustained argument for a more communitarian conception of property, based in Eastern Christianity, as a means to promote climatic sustainability on Earth. The common element of sacrifice runs through Sharp's and Babie's contributions, playing different roles in their arguments about criminal and property law, respectively.

As seen in the contributions by Lawrence and Abdalla, disputes and questions about what is right and just cannot be confined to the area of the civil law and state institutions. Many of the questions of how one should live, which will be considered further in the book's afterword, arise in diverse religious traditions but cannot always be resolved exclusively within them. Disagreements within religious groups over property or the employment of representatives of the faith, such as rabbis, priests or imams, may need to be resolved in the shadow of the civil law, and

sometimes actually by civil courts and state law. At the same time, civil legal authorities often find it convenient to delegate certain disputes within communities to the religious courts of those communities.

Several such areas are considered in our final chapter, including matters of banking, eating, medical care, legal advice and other areas of everyday life. The most common area in which civil and religious law reach accommodation, and respect each others' precepts and rulings, is in matters of family law and succession. In multi-religious societies (including Indonesia, Singapore and South Africa),[9] state authorities may recognize diverse customs or religious courts in certain family matters. The rationale for such boundaries may relate to matters of custom and tradition, but they can also derive from a particular view of the proper spheres of the public and the private.

These boundaries have long been disputed in western societies by feminists (Pateman 1989), who have argued that the sanctity of the private sphere has allocated it to the exclusive jurisdiction of the patriarchy, a historical legacy of the *paterfamilias* in Roman law. The issue has been rekindled in multicultural societies when various differences from current western mores have raised suspicion of the oppression of women, or where men from other cultural or religious backgrounds mount 'cultural defences' to criminal charges. Clearly, civil courts should not accept arguments from culture or tradition as a defence in matters of assault or other serious criminal charges. Neither should western law presume that women's choices in matters of dress, where those differ from western fashions, must derive from some patriarchal oppression, from which women need to be liberated. There is, however, a vast field of jurisprudence and custom lying between these two polar examples.

We are fortunate to have the feminist contribution of Davies in this volume to cast new light on these issues. Recognizing the impossibility of the liberal secularist ideal of impartiality, Davies opens the notion of the private sphere not to the incursions of the secular state, but to pluralist contestations of faith and alternative identities and sexualities. She conceives secularization as a process rather than an end point, and so emphasizes the multiple parties and identities who may be involved in decisions over matters of faith and the polity. This can extend to law-making based on religion within limited communities. However, on Davies's account this would clearly be a space for open debate and multiple voices to be heard. By pluralizing involvement in religious, cultural, political and legal discourse, a diverse society may be more fully democratized than by simply accommodating religious and political hierarchies within a corporatist decision-making apparatus.

Starting *da capo*, to this point we have largely focused on the relationship between the state and religions, or between state law and religion or religious laws. Yet there are also important controversies surrounding relations *between* religions or between citizens professing different religions.

Little of substance needs to be said here, since three distinct and well-argued views are to be found in this book's section on 'Religion and speech in a pluralist society'. The question exercising each of the authors represented there goes to the role of the state, and of state law, in adjudicating such disputes. The differences between their views may explicitly be seen in their views of religion compared, for instance, with the category of race. If religion is a subjective phenomenon and a matter of free choice, as defined in the human rights instruments to which Brennan draws attention, then it is not an essential and unavoidable characteristic, marking its adherents in the way race may have been seen to. (This was before race itself was subjected to the critique that it is a social and not an essential or biological category, as Leone points out.) The rights-based approach to religion insists that we should be free to exercise our faith without interference. It is treated as something we *do*, not something we *are*.

Exercising one faith rather than another can, of course, come down to arguing for one over the other. This is where religious vilification laws tread carefully, as mentioned by Gelber and Leone in relation to the *Racial and Religious Tolerance Act 2001* (Vic), since proselytizing may simply be part of what religions do. So certain arguments for the limits to the role of state law in regulating relations between religions, including religious vilification, stop before a line that assumes the robust promotion of a particular religion. We are and should be free to express our religious beliefs.

The question remains: where to draw a line between different religions, which disputes to avoid or prohibit, and which may be regarded as robust debate over religious conscience. Such terms emphasize the subjective aspect of religion and can be mustered on the side of a laissez-faire approach to religious expression, as seen in Brennan's contribution. And yet one does not need to look far to see bitter disputes over matters of religious expression that can poison community relations within one nation and create ugly diplomatic international incidents.

At issue here, we suggest, are alternative views of law more than alternative views of religion. The differing approaches of these three contributors to the *Catch the Fire Ministries* case, which each discusses, may be seen to derive from their varying views on whether law is a minimum set of rules for a viable polity, an instrument for promoting good community relations, or a medium through which we converse with each other. Depending on those views, the case may be seen as a waste of money under a redundant and troublesome law, a necessary but not sufficient approach to challenging prejudice, or an opportunity to learn how to live together in a diverse society.

One might go further, to suggest that our approach to the nature of law, and to regulating or fostering community relations, will also depend on the polity we imagine ourselves to be a part of. It matters whether that is the state of Victoria, the nation of Australia, an international congregation of fellow-believers or the global human community. Contemporary

media and communications technology amplify both good and bad communicative practices beyond the city and the country in which they arise. Here we are at the limits of law, for even if Victoria has enlightened laws and an infallible judiciary, the ramifications of a conversation in Melbourne will be felt across Australia and the world. Even if the laws of Victoria struck exactly the right balance between challenging vilification and protecting religious expression, those laws will not apply to Danish newspapers or Iranian blogs.

We commenced this introduction purporting to start from the top, from the state, the constitution and their stance on secularism and religious freedoms. Yet having reached the end of this beginning, we see what heights are yet to be scaled in accommodating a world of beliefs and religions, and not just a world religion. This collection of writings on law and religion is located in Australia, in the sense that the contributors either live in or write about that country. Our sensibilities and assumptions respond to that place, its laws and politics, its people and their religious or irreligious beliefs. It is multicultural, diverse and sceptical, and so is as good a place to start as any. But it is not a place to finish, because we are aware that we share a whole world that is even more diverse, and rather more volatile than our rather remote corner of it. We can learn from the rich range of experiences and approaches that are played out across the globe, we can hope that some other places can learn from our experiences and our analyses of them, and we must do all we can to promote communications across the boundaries of beliefs and nations. This book is a start.

Notes

1 *Milirrpum v Nabalco* (1971) 17 FLR 141, 200.
2 *Mabo v Queensland [No 2]* (1992) 175 CLR 1.
3 Australian Bureau of Statistics, Census data www.censusdata.abs.gov.au accessed 22 April 2010.
4 These states are Afghanistan, Bahrain, Brunei, Iran, Maldives, Mauritania, Pakistan, Qatar, Saudi Arabia and Yemen.
5 They are Algeria, Bangladesh, Egypt, Iraq, Jordan, Kuwait, Libya, Malaysia, Morocco, Qatar, Tunisia and UAE.
6 The secular Muslim states are Burkina Faso, Chad, Guinea, Mali, Niger, Senegal, Azerbaijan, Kyrgyzstan, Tajikistan, Turkey and Turkmenistan.
7 Albania, Lebanon, Syria, Indonesia, Comoros, Djibouti, Gambia, Sierra Leone, Somalia, Sudan and Uzbekistan have no constitutional declaration regarding the Islamic or secular state.
8 The term caliphate or *khilafa* refers to the first system of governance established in Islam, which represented the political authority and unity of the Muslim world. It is one state with a single ruler. The caliphate was the product of history, an institution of human, rather than divine, origin, a temporary convenience, and therefore a purely political office.
9 The 1996 Constitution of South Africa provides for the recognition of religious and traditional marriages, while a number of acts include as 'dependents' or 'spouses' those married under various laws, religions or customs (Rautenbach 2003: 169–71).

Part I

Law, state and secularism

1 Classifying church-state arrangements

Beyond religious versus secular

Darryn Jensen

Introduction

A major stumbling block to sensible discussion of the role of religion in contemporary society is a widespread, but mistaken, assumption that thorough secularization – by which is meant a conscientious detachment between religion and the political life of the community[1] – is a necessary concomitant of political modernization. Where this assumption takes hold, any degree of state support or endorsement of religion or religious organizations or any religiously motivated contribution to political discussion is taken to place the state on a slippery slope towards theocracy.[2]

The attitude that there are only two stable and coherent alternatives – theocracy and thorough secularism – is in tension with the fact that there is hardly a national polity in the world today which conforms perfectly to either type. Fox's empirical study for the period 1990–2002 concluded that separation of religion and state defined as 'no government support for religion and no government interference in the religious practices of both the majority and minority religions in a state' (Fox 2006: 538) is the exception rather than the norm (Fox 2006: 561). Furthermore, while Muslim states were found to have higher levels of government interference in religion and Christian states were found to have lower levels of interference (Fox 2006: 562), there was found to be no significant difference between democracies and non-democracies in the level of separation of religion and state (Fox 2006: 563). Fox suggested that the findings of his study contradicted the assumption that modernization is associated with a diminution in the importance of religion:

> It is precisely in those states where modernity has most undermined the traditional community that religious elements within the state are most likely to try and legislate religious morals and traditions that were previously enforced at the social level. Similarly, it is precisely the most modern states that have the greatest ability to interfere in the daily lives of their citizens, including the regulation of religion.
>
> (Fox 2006: 562)[3]

At the very least, Fox's study reveals that the relationship between church–state[4] arrangements, individual liberty, democratization and modernization is a very complex one and that a multiplicity of types of church–state arrangements have proved to be practically workable companions for political modernization. One would think that, if government support and endorsement of religion is so bad, fewer modern states would persist in providing it.

The various intermediate positions between theocracy and thorough secularism which exist today have arisen largely as pragmatic responses to particular historical contingencies – for example, the anti-establishment clause in the United States' First Amendment may be explained, in part, by the history of the American colonies as a refuge for a plurality of religious minorities who fled from persecution in Europe as well as experience of church establishments in particular colonies,[5] and French *laïcité* might be seen as a reaction against the close relationship between the *ancien régime* and Roman Catholicism. Notwithstanding that these arrangements are, historically speaking, pragmatic arrangements does not prevent them from being *stable* arrangements – in the sense that they are capable of enduring in the long run – and *philosophically coherent* – in the sense that they are seen to be rationally justified within the frame of reference adopted by the communities which adopt those arrangements. Particular historical instances of the confrontation between religious authority and civil authority and the means used to resolve these conflicts are capable of illuminating the more general moral issue raised by the coexistence of the two forms of authority. Even if the particular arrangements which are adopted are not universally valid responses to the general moral issue, they may, nonetheless, be philosophically coherent responses to the issue within the context of the framework of basic values held by people who make up the relevant political communities. The rationality of particular church–state arrangements is not necessarily defeated by the mere fact that those arrangements represent an accommodation between religious authority and secular authority. Indeed, it may be a mistake to regard religiosity and secularity as opposite poles. That the various compromises represent commitments to deeper values than the paramountcy of either religious or secular authority is a plausible thesis.

Bases of classification

Madeley (2003a) surveyed the movement of church–state arrangements in Europe (including the USSR and Turkey) during the period between 1980 and 2000. The various church–state arrangements in European states were arranged on two dimensions. One dimension focused upon the state's formal stance, whether constitutional or otherwise, towards religion – namely whether the state's commitment was 'religious', 'secular' or 'atheistic' (Madeley 2003a: 13). In 1980, Denmark (where the Evangelical

Lutheran Church enjoys constitutional recognition as *Den Danske Folkekirke*) was religious, France was secular and the USSR and other communist states were atheist. The other dimension focused upon actual support or obstruction of religion by the state (Madeley 2003a: 15). This dimension ranged from states which existed solely to promote a religion – of which the Vatican was the only example – to states which attempted to suppress religion completely – of which Albania was the only clear example in 1980. When a table was constructed using both dimensions, it was apparent that, in 1980, not all of the states of Europe fell into a single line ranging from most religious to least religious. There were some notable outliers, such as Ireland (which was 'religious' but neither supported nor interfered with religious activity) and Austria (which was 'secular' but gave large subsidies to religious institutions). Nevertheless, the majority of states could be arranged along a diagonal line across the table. 'Religious' states, for the most part gave significant financial support to religion and 'atheistic' states tended to obstruct religion. The Netherlands ('secular' and 'indirect state aid') and France ('secular' and state subsidies to religious schools and hospitals) occupied the centre of the table.

By 2000, there had been considerable movement among states. By far the most important factor was the collapse of communism and the ensuing break-up of Yugoslavia and the USSR. This resulted in a vacation of the 'atheistic' column and a general movement towards the centre of the table. This movement to the centre also involved the reunited Germany. Germany's movement to the centre involved the adoption of a compromise between the religious stance and large state subsidies of the former West Germany and the atheistic, obstructionist stance of the former East Germany. Two new states carved out of former Eastern bloc countries, namely the Muslim countries of Bosnia and Azerbaijan moved from the 'atheistic' camp to the 'religious' camp and began to obstruct religions other than Islam.[6] A less radical movement involved the disestablishment of the Lutheran Church in Sweden in 2000, so that Sweden was now formally 'secular' but the state continued to provide large-scale financial support for religion. Madeley summarized the changes between 1980 and 2000 as follows:

> In all but two cases change has been in the direction of dismantling controls on religion and increasing the availability of state assistance, whether in the form of funds for the rebuilding of cathedrals, as in Russia, or the widespread use of national taxation systems to funnel resources to recognised denominations.
>
> (Madeley 2003a: 17)

The significant move away from controlling or obstructing religious practice should be understood as a one-off seismic shift precipitated by the

demise of communism in Europe. The most important lesson of Madeley's survey was that there was, between 1980 and 2000, no significant tendency on the part of European states to distance themselves from religion. The two states which loosened the ties between the state and religion were the former West Germany – where the change was driven by reunification with the East – and Sweden – where the changes were extremely modest and have not resulted in a significant reduction of the practical entanglement between church and state.[7] While the 1980 situation displayed a strong correlation between formal commitment to religion and practical support for *that* religion and formal opposition to religion and practical obstruction of religion, the 2000 situation was much more complex. Formal commitment to religion is not always matched with practical support for religion and *vice versa*. The distinctions between formally 'religious' Denmark and formally 'secular' Sweden and between formally 'religious' Britain and Ireland and formally 'secular' Holland are, in some respects, less interesting than the cultural and historical factors which result in Denmark and Sweden being similar to each other and Britain, Ireland and Holland being similar to one another in terms of the level of practical support given to religion.

It might be observed that both dimensions ultimately turn back on themselves. States with formal commitments to religion are usually committed to a particular religious vision, which might be, for example, Roman Catholicism, Lutheranism, Ukrainian Orthodoxy or Islam. The more committed a state is to *one* of these competing religious visions, the more we would expect it to support the favoured religious vision *and* discriminate against or obstruct the other religious visions. The more committed a state is to secularism or atheism, the more we would expect it to be active in promoting particular value systems which provide a substitute for religious value systems. There are two reasons why we might expect this to be the case. First, no political community can endure for very long without having at least a set of core *political* values which define the extent to which the apparatus of the state may make decisions for the community as a whole and which inform the decision-making process. Where traditional religion is suppressed, the vacuum needs to be filled by other values systems – in other words, *civil* religion. Secondly, a state's secularist or atheistic commitment will not necessarily be satisfied by the establishment of a framework of religiously neutral political values. It is not difficult to find historical examples of a state's strong secularist or atheist commitment (and corresponding hostility towards theistic religion) providing the setting for an attempt to replace traditional religious values with a single, comprehensive philosophy about the common good of the community. Atheistic communism is the example *par excellence* of a political system which is committed to the promotion of its own quasi-religious vision about the common good and to the suppression of alternative religious visions. Indeed, communism, being a comprehensive doctrine about the

organization of society, is impelled to suppress the rival visions provided by theistic religions.

These observations point to an alternative basis for the taxonomy of church–state arrangements, namely the dimension of *religious–ethical monism* versus *religious–ethical pluralism*.[8] A reconstructed taxonomy of church–state arrangements will now be attempted. In attempting this reconstruction, two assumptions are made. Firstly, states are not to be judged by their formal constitutional commitments alone. Political *praxis* and prevailing attitudes about political morality must also be taken into account in order to obtain a true picture as to whether a state is committed to a particular religious-ethical vision or seeks to facilitate an accommodation between a number of visions. Secondly, a state which is truly neutral between different religious-ethical systems is a practical impossibility. The existence of political community is predicated upon the widespread acceptance of *political* values which determine where the line is to be drawn between matters of public concern and matters of private concern and how disagreements about matters of public concern are to be resolved. The most liberal of states is not a neutral state but a 'minimally committed state' (Galston 1991: 93).

Monism and pluralism

a Monism

'Religious–ethical monism' is the idea that political *community* ought to be coextensive with religious *communion* or, at the very least, there is room for only one paramount system of values within each political community. Therefore, it is part of the state's role to promote a state religion or philosophy. Modern self-consciously Islamic states, such as Iran, are the obvious examples of states committed to religious–ethical monism. Since Islam is the frame of reference for discussion of social issues, 'mediation with the other is achieved only through the prism of Islamic categories' (Marcotte 2005: 54).[9] From the Peace of Westphalia in 1648 until the early nineteenth century, most west European states were committed to religious–ethical monism, in so far as the religion favoured by the ruler – Roman Catholicism or one of the versions of Protestantism – was established as an official religion which was meant to unite the people under their ruler and God and distinguish them from other societies (Bouma 1999: 11–12). A monistically committed state need not be religious in the traditional sense. A communist state is a monistically committed state because it enthrones a single philosophy as the paramount basis for ordering the life of the community and marginalizes or suppresses alternative philosophies. A weaker form of monism exists in modern France, in which the preamble and opening article of the Constitution sets out a national ideology which endorses values such as democracy, equality and laicism.[10] A tendency to

proscribe forms of religious expression by which one group distinguishes itself from the rest of the community, such as the wearing of Muslim headscarves by students in public schools, needs to be understood in the context of the state's commitment to these values. The defining feature of a monistically committed state is that it enthrones a single philosophy about the common good of the community as the paramount frame of reference for resolving political questions.

One can envisage two theses which provide coherent (if contentious) justifications to religious–ethical monism. The first thesis is that the state has a mission to ensure that the 'true' religion or ethical system prevails within its borders. This might be described as the 'national salvation' thesis. If the state sees itself as a historical agent and protector of the true religion or philosophy and has the means at its disposal to enforce uniformity, it is rational for it to propagate and support that religion or philosophy and persecute the partisans of other religions or philosophies. The national salvation thesis stresses the state's obligation to promote and support a particular religious or ethical system because it is true. It is conceivable that versions of the national salvation thesis might be adhered to by the partisans of both theistic religion and atheist, 'scientific' ethical systems. Indeed, national salvation might be regarded as being an underlying thesis for totalitarianism in all of its forms. The rationale and the obligations of the state are ultimately derived from a single philosophy relating to the common good of the community. It is self-consciously Islamic countries, such as Iran, and hard-line communist countries, such as North Korea, which conform most closely to this paradigm. Historical examples might include the Spain of Philip II, in so far as Philip sought to promote himself as a champion of Catholicism in Europe. Elizabeth I of England, on the other hand, seemed uninterested in becoming the champion of the Protestant cause and had other reasons for resisting the power of Spain (Sutherland 1973: 278–79).

The case of post-Reformation England points towards the other possible thesis in favour of religious-ethical monism. State support for a single religious vision might proceed on the basis that the stability of a shared commitment to (or, at least, a general acquiescence towards) a set of political values is underpinned by shared religious values or, at the very least, a shared story or mythology. Therefore, the state should endorse and provide material support for a particular form of religious expression. This thesis might be described as the 'social cohesion' thesis. According to this thesis, religious minorities might legitimately be persecuted or discriminated against, not because they are heretics or infidels, but because they are politically unreliable.[11] Like national salvation monism, social cohesion monism may be either religious or secular. Where social cohesion monism continues to take the form of the state's support for traditional religion, it is not necessarily strict in matters of dogma. Madeley has observed that 'some traditionally mono-confessional societies would

appear to provide a natural context for the development of a broad moral consensus which embraces even the religiously indifferent' (Madeley 2003b: 29). Since it is social harmony rather than the standing of individual souls which matters, the religious establishment tends to be tolerant and latitudinarian and there is no significant tension between the religious culture and the surrounding secular culture. This tendency remains strong in Scandinavia (Jensen 2005: 38; Lamont 1989: 161–62), although the episode concerning the Muhammad cartoons in the Danish newspaper, *Jyllands-Posten*, illustrated the tensions which may arise between majority latitudinarians and intensely religious minorities.[12] Elsewhere, traditional theistic religion is privatised – in the sense that public expression of religion is discouraged, without necessarily being persecuted – and the resulting religious vacuum in the public sphere is filled by a public philosophy which is distinct from the private religious commitments of individual members of the political community. State support for the provision of social services by religious groups is not necessarily inconsistent with the secular version of social cohesion monism, in so far as the subsidized activities do not challenge the hegemony of the public philosophy within the public sphere. It is rational, on this basis, that the French state subsidizes religious organizations in relation to their provision of educational, health and social services. When evaluated on these terms, what Monsma and Soper (1997: 10–11) have seen the 'strict church–state separation model' and the 'established church model' to represent different faces of religious-ethical monism.

b Pluralism

Religious–ethical monism might be challenged in two situations. Firstly, its *stability* might be challenged where the adherents of two or more competing religions or philosophies exist within a territory and are more or less evenly balanced in terms of their power to impose themselves upon the other group. All groups might perceive that their own survival requires that they abandon their attempts to secure hegemony and, instead, treat one another as political equals. Secondly, its *coherence* comes under challenge where the dominant group becomes committed, on the basis of its own religious–ethical system, to toleration of other groups. The dominant group would, on the basis of its own religious–ethical commitment, tolerate other groups or, at the very least, those groups who also appear to be committed to toleration.

Pluralism differs from monism in so far as it does not assume that there is or can be a single set of moral categories to which members of the political community can be expected to adhere. Nevertheless, if a political community is to exist at all, there must be agreement about *political* values. The creation of political consensus is an ongoing project or, to borrow a phrase from Waldron, it must be 'forged in the heat of our disagreements'

(Waldron 1999: 106). According to the pluralist thesis, the religious–ethical beliefs which are actually held by members of a political community are relevant data in determining what constitutional arrangements and what specific rules of conduct ought to be observed and enforced for the purpose of maintaining peace and good order among members of the community, but no single religious–ethical system possesses a hegemony in relation to this discussion (Monsma and Soper 1997: 11–12). It behoves the representatives of the various religious–ethical systems to explain their positions to one another in the hope of reaching positions (on the particular policy questions at stake) which are acceptable to most people. Furthermore, there can be no objection, in principle, to the state supporting the activities of religious institutions or communities so long as that support is available on equal terms to *all* genuine religious institutions and communities. It would be an equally coherent policy for the state to refuse to support *any* religious institutions or communities. These two aspects of the pluralist thesis may be labelled the 'political inclusion' commitment and the 'equal support' commitment.

Where a state adopts a pluralist stance, this may be a pragmatic response to the existence within a political community of a plurality of potentially hostile groups defined by their religious–ethical commitments[13] or a principled commitment to toleration. The latter may emerge from the experience of the former. Monsma and Soper suggested that church–state arrangements in the Netherlands are the example *par excellence* of this. Perhaps uniquely among European nations, the religious–ethical cleavages of the Dutch nation were between groups of more or less equal strength who were 'unlikely to be able to impose their beliefs on the nation as a whole' (Monsma and Soper 1997: 59). This provided the context within which a number of Dutch thinkers were able to articulate a philosophy which affirmed liberty of conscience as against both the church and the state, thereby placing limitations on the power of both institutions. The neo-Calvinist thinker, Abraham Kuyper, explained the matter in this way:

> [T]he sovereignty of the Church finds its natural limitation in the sovereignty of the free personality. Sovereign within her own domain, she has no power over those who live outside of that sphere. And whenever, in violation of this principle, transgression of power may occur, the government has to respect the claims on protection of every citizen. The Church may not be forced to tolerate as a member one whom she feels obliged to expel from her circle; but on the other hand no citizen of the State must be compelled to remain in a church which his conscience forces him to leave.
>
> (Kuyper 1898: 108)

It is important to appreciate that Kuyper's pluralism was not grounded in scepticism about the truth of any particular religion or of religion

generally. Kuyper's appeal to conscience is an appeal to the idea that each individual has an obligation to discover the truth and order her or his life accordingly and that neither church nor state should impede this process. Kuyper, in asserting that 'liberty in Calvinism and liberty in the French Revolution are two quite different things', drew attention to the tyrannical (and anti-pluralist) tendencies of systems which recognize nothing more than 'a civil liberty for every Christian to agree with the unbelieving majority' (Kuyper 1898: 109). Recognizing the dignity of individual people as self-determining subjects involves allowing people to decide the truth or falsity of religious–ethical claims for themselves. On this view, adherents of particular religious–ethical systems need not abandon their doctrinal rigour or their universalistic claims, so long as they acknowledge that adherents of other systems ought to have the same freedom.

This 'equal dignity' thesis is neither unique to Kuyper nor confined to Dutch political thought. Long before Kuyper's time, Locke had emphasised the futility of attempting to change a person's mind about religious–ethical beliefs by coercion. Locke described 'observance of the things which are necessary to obtaining God's favour' as 'the highest obligation that lies upon mankind' (Sherman 1965: 206). As Waldron has explained, Locke understood that this obligation belonged to each person as an individual:

> [Locke's] argument did not depend on any misgivings about contemporary orthodoxy … nor was it based on any suspicion, however slight, that at the last trump the sects that he proposed to tolerate might turn out to have been right all along. His position was rather that a false belief, even if it is objectively and demonstrably false, cannot be changed by a mere act of will on the part of the believer, and that it is therefore irrational to threaten penalties against the believer no matter how convinced we are of the falsity of his beliefs.
>
> (Waldron 1993b: 97; see also Waldron 2002: 80)

The Roman Catholic Church has, in recent times at least, proposed a version of the 'equal dignity' thesis which has enabled it to maintain a principled commitment to religious–ethical pluralism without abandoning its claim to being the most perfect in kind of the Christian churches.[14]

The principal appeal of the 'equal dignity' thesis (as opposed to the 'sceptical' thesis) is that it is open to affirmation by people of different religious–ethical traditions who are profoundly convinced that their own traditions represent the truth. A combination of deep commitment to a particular religious–ethical tradition and commitment to pluralism is a coherent position because one cannot deny the legitimacy of a claim by others to force one to abandon what one considers to be true religious or ethical beliefs without simultaneously disclaiming a freedom to coerce those others in matters of religion and ethics.

This denial of a freedom to coerce others in matters of religion implies that people are not to be excluded from the political processes of the community on account of their faith commitments. Genuine pluralism in matters of religion implies a commitment to political inclusion, which, in turn, implies that all religious–ethical traditions ought to be free to place their perspectives on matters of the common good (as opposed to matters of religious belief and worship) in the public forum. Political interventions by religious leaders are not meant to enlist support for particular positions simply because they represent a particular religious position. A representative of a religious tradition who is committed to pluralism will seek to challenge co-religionists to consider whether their political preferences are a coherent outworking of their professed religious–ethical commitments.[15] Furthermore, the intervention might invite all people of good will to consider whether they can arrive at similar conclusions on the basis of their own religious–ethical commitments. Since there is no assumption that there is a shared religious–ethical tradition, representatives of different traditions need to explain their perspectives to others. Through explaining their perspectives to one another, areas of agreement about political problems may be identified (Waldron 1993c: 838; Waldron 1999: 106).

A commitment to pluralism permits a variety of arrangements in relation to the state's support of the church. An aspiration to support all schools without regard to the religious creed which they represent (as in the Netherlands and Australia) is as legitimate as a refusal to provide any direct subsidies to non-government schools (as in the United States). The former strategy seems to be widely understood in the communities which adopt it as merely subsidizing choice in education as opposed to conferring advantages upon religion (Monsma and Soper 1997: 67–68 (concerning the Netherlands), 102–6 (concerning Australia)). Moreover, the pluralist thesis treats religious communities and the various social, educational and charitable institutions which spring from them as an aspect of civil society.[16] A state committed to pluralism may choose either to support these institutions through subsidies, taxation relief or other legal privileges (such as, in Australia, the role of the attorneys-general as proper plaintiff in legal proceedings for the enforcement of charitable trusts) or to leave them alone to do their own thing in their own way. What the state must not do is to attempt to curb the activities of these institutions in any way which is not equally applicable to all individuals and associations.

Pluralism and social cohesion monism blend into one another at their margins. States which give pride of place to a particular religious–ethical vision may permit a variety of religious practice and, moreover, may have constitutional commitments to religious toleration. They may, in practice, exercise a high degree of religious toleration. The key distinction between the two ideas is that pluralism places a high value on the inclusion of the different religious–ethical systems which exist within a political community in discussions about the common good. It denies the necessity for the

prior existence of a shared *comprehensive* philosophy about the common good. The common good is to be discovered by way of discussion of competing values in the light of particular political problems. Social cohesion monism insists upon starting political discussions from within a shared framework of values and treats as private matters those aspects of an individual's religious commitments which are not shared by the community as a whole. Where the state is committed to pluralism, political discussion is likely to be a messy affair which involves considerable scope for misunderstanding and acrimony. Nevertheless, pluralistically committed states would regard this as a reasonable price to pay for inclusiveness in political decision-making. States committed to monism for the sake of social cohesion would prefer not to pay that price, but, in so far as there are minority groups who dissent from the state-endorsed philosophy, these states run the risk that those groups may resent the exclusion of their beliefs from discussions about the common good and may either withdraw from the community or, worse still, react violently.

The limits of pluralism

The idea of pluralism which has been expounded in the previous section of this paper is not a complete relativism about the good of the person. It is certainly fair to say, as Berger has, that pluralism 'multiplies the number of plausibility structures competing with one another' so that it 'relativizes their religious contents' (Berger 1973: 155). Nevertheless, in order for a commitment to pluralism to be a practical commitment for a political *community*, there must be a shared commitment to a number (albeit a small number) of political principles. If individuals are entitled to inquire and decide about the truth or falsity of religious–ethical claims for themselves, then the state must refrain from interfering with the process of enquiry and from giving preferential treatment to particular religious groups. Equally, the state must refrain from expressing or endorsing hostility to religion. If all religious–ethical perspectives are entitled to a hearing on questions about the peace and good order of the community, the state needs to ensure that political discussion is reasonably open to all. There ought to be legal protection of freedom of speech and of participation in the political process.

The envisaged pluralistically committed state is not an infinitely tolerant state. Certain types of deviant behaviour may be punished or suppressed for the sake of maintaining the peace and good order of the community, which is the very reason for the existence of the state. States committed to pluralism may, of course, allow various sub-communities a degree of autonomy in relation to the ordering of their internal affairs. Examples of the sub-community normative systems which might exist within a political community might include religious rules concerning marriage and annulment of marriage, rules of trade or professional

associations or the customary laws which are observed within communities of indigenous people. There may be, in other words, a degree of *legal* pluralism within a community committed to religious–ethical pluralism. That said, legal pluralism can only be carried so far without dissolving the bonds of political community. The parallel existence of different sub-community normative systems is compatible with broader political community only in so far as it is possible to define with reasonable clarity the respective domains of authority of the different normative systems.[17] Where there is interaction between different groups or individuals from different groups who are unable to agree upon the terms of their interaction, coordination problems need to be resolved at the level of the political community by recourse to laws of general application. Legislatures exist to make those types of decisions about resolving these coordination problems on behalf of the political community as a whole. Pluralism requires that those processes be open to comment and criticism from all religious–ethical perspectives, but there can be no right to disobedience or exemption merely upon the ground of membership of a sub-community which possesses a distinctive religious–ethical perspective.

The problem is well illustrated by the experiences of one particular religious minority within western pluralist democracies. The Jehovah's Witnesses have been at the centre of constitutional litigation in both Australia and the United States. They are, for the most part, law-abiding citizens who do not pose any serious challenge to the stability of the political communities to which they belong. They have come into conflict with the state in relation to a small number of issues which have excited strong passions. Their entry into the annals of Australian constitutional history occurred as a result of the Federal Parliament's enactment of certain national security measures during the Second World War. The *National Security (Subversive Associations) Regulations* provided for the dissolution of organizations whose existence had been declared to be prejudicial to the defence of the Commonwealth and to the prosecution of the war and for the compulsory acquisition of the property of those organizations.[18] The Jehovah's Witnesses found themselves within the ambit of these regulations by reason of their refusal to cooperate in the war effort. In *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth*,[19] Justice Williams explained the basis for the conflict between the Jehovah's Witnesses and the Commonwealth:

> They [the Jehovah's Witnesses] do not engage in any overt hostile acts; their attitude to the war is one of strict neutrality; but it is apparent that an attitude of non-cooperation in the prosecution of the war and a propagation of a belief that no benefit will flow from defeating the enemy must have an eroding effect on the national war effort.[20]

Justice Williams observed that the basis for this refusal to cooperate was the Jehovah's Witnesses' 'primitive Christian beliefs' which included a

belief that nation states are 'under the control of Satan' and that 'it will be necessary for Jesus Christ … through His true followers to overthrow all these satanic governments in order to establish His kingdom on earth'.[21] What is interesting about the terms of this conflict is that it focuses upon one of the critical implications of pluralism. Pluralism involves the recognition of distinct functional domains of civil authority and religious authority. The twinning of a prohibition upon 'establishment of any religion' with a guarantee of 'freedom of religious exercise' in section 116 of the Federal Constitution assumes this functional distinction. When we identify distinct *functional* domains for civil authority and religious authority, we do not say that the religious authorities may not, on the basis of the insights of the traditions which they represent, criticize the way that the state performs its role or that the state may not require obedience from religious bodies in respect of measures which are necessary to secure the peace and good order of the community. What we say is that religious authorities do not have the *final* say on matters of the peace and good order of the community as a whole and the state is not entitled to restrict the activities of religious groups on *religious* grounds. For example, adultery is not to be punished *because* the seventh commandment prohibits it and human sacrifice is not to be banned *because* of its association with pagan religion, although states may (and do) use other grounds to justify making laws which attach consequences to adultery or prohibit human sacrifice. Equally, the state may require a form of national service in a time of war or national emergency, although, in doing so, a pluralist state would recognize the religious sensibilities of different sections of the community – which might include a rejection of violence – and provide for different ways in which people could perform that national service. The state need not tolerate a refusal to cooperate in the defence of the community where that refusal is founded upon a rejection of the political order which the state represents.

The majority justices of the High Court of Australia, in deciding that section 116 of the Constitution did not *of itself* prevent the state from making regulations of the type which were being challenged, drew upon this understanding of the functional distinction between civil authority and religious authority. Chief Justice Latham, for example, said:

> [I]n the early history of mankind it was almost impossible to distinguish between government and religion … A clear distinction between ruler and priest developed only at a relatively late stage in human development. Those who believe in a theocracy refuse to draw the distinction between government and religion which is implicit in s. 116.[22]

Similarly, Justice Williams rejected the notion that free exercise of religion included a freedom to deny the legitimacy of civil government:

> It is impossible, in my opinion, to impute to the framers of the Constitution an intention that the phrase 'the free exercise of religion' should confer an absolute right to propagate a belief that the system of government created by the Constitution was of a satanic nature, the functioning of which, in spheres which the common sense of the community generally would regard as entirely secular, was not to be judged on its merits or demerits as worldly legislation, but to be condemned in every instance as an emanation of Satan.[23]

Since the Jehovah's Witnesses' belief about the state manifested itself in a refusal to cooperate with the state in defence of Australian during a time of war, it was not necessarily inconsistent with the Constitution's guarantee of free exercise of religion to restrict the activities of the Jehovah's Witnesses during that time of war.[24]

Since, however, the Commonwealth Parliament was a legislature with enumerated powers, it became necessary to consider whether the regulations fell within the defence power in section 51(vi) of the Constitution. The question was not whether Jehovah's Witnesses might be harassed and discriminated against in relation to everything that they did – indeed, Justice Williams acknowledged that a group such as the Jehovah's Witnesses might be tolerated to a large extent, notwithstanding their rejection, in principle, of the authority of civil government[25] – but whether particular restrictions upon their conduct were permissible on the basis that they were laws to protect the community in relation to a subject matter within the legislative power of the Federal Parliament (rather than laws to prohibit the free exercise of religion). To this end, the particular measures had to be examined as individual measures which were adapted to the constitutionally authorized ends of government and, in so far as those measures prevented or restricted activities which were not prejudicial to the defence of the community in a time of war, the measures were unconstitutional.[26] The High Court decision in the *Jehovah's Witnesses* case did not justify the withdrawal of toleration from a group *as a group* on account of their *beliefs*, but merely acknowledged that a pluralistically committed state does not have to tolerate *conduct* which is at odds with the legitimate aims of the state. Of course, a pluralistically committed state will, for the purposes of determining how the legitimate aims of the state are to be pursued, involve itself in a process of deliberation which is open to contributions made from different religious–ethical perspectives.

While a pluralistically committed state might prohibit much religiously motivated conduct in the course of legislating for the peace and good order of the community, a person's status in the political community should not depend upon that person being able to pass a test of orthodoxy in belief. While a state cannot, in practice, require people to believe or refrain from believing certain things, some regulation of conduct may impinge so closely and directly upon beliefs as to offend the pluralist

commitment to religious–ethical freedom. This is more likely to occur where the state requires citizens to perform positive acts which are contrary to their religious beliefs. Practical compulsion to participate in ceremonies which celebrate the values and achievements of the nation state, for example, might be objectionable on this basis.

In *West Virginia State Board of Education v Barnette*,[27] the Supreme Court of the United States had to consider whether a school board's requirement that students salute the flag and recite the pledge of allegiance during morning assembly infringed the rights of a student who was a member of the Jehovah's Witnesses. Students who refused to participate in this ritual could be expelled from school. A majority of the court found that this requirement infringed the First Amendment guarantee of freedom of *speech*. Justice Jackson said:

> To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind.[28]

Porat has suggested that the complaint of a Jehovah's Witness against this requirement was of a completely different kind to the kind of measures which have merely an incidental effect upon freedom of expression in the course of pursuing a legitimate aim of the state. The constitutional commitment to protection of freedom of speech operated as 'a (second-order) reason for the government not to act on the (first-order) reason that it wishes to have uniformity of opinion with regard to patriotic feelings, or that it disagrees with those opinions which reject patriotism' (Porat 2007: 442). Porat went on to suggest that a similar analysis is available on the basis that the measure infringed the First Amendment right to free exercise of religion (Porat 2007: 443–44). According to this view, the case did not involve a situation in which the state was seeking to regulate how people exercised their freedom of belief and expression in a way which is consistent with the peace and good order of the community. It was a case of the state seeking to encourage uniformity of belief and expression of that belief.

Justice Frankfurter, in his dissenting opinion in *Barnette*, did not doubt the validity of this distinction. What he doubted was whether the particular measure in question was correctly to be characterized as a measure for encouraging uniformity of belief as opposed to a measure for the peace and good order of the community which had merely an incidental effect upon freedom of speech and religion. According to his Honour, this was a case of 'conscientious scruples' which 'cannot stand against every legislative compulsion to do positive acts in conflict with such scruples'.[29] If the First Amendment were to allow people to refuse to obey the law on the basis that doing so offended a person's religious sensibilities then 'each

individual could set up his own censor against obedience to laws conscientiously deemed for the public good by those whose business it is to make laws'.[30]

Instances of imposition of ceremonies or oaths as a means of inculcating national loyalty are difficult cases precisely because of the quasi-religious overtones of the mandated ceremony. The ceremony might not amount to a direct attack on particular beliefs, but may easily be perceived by Jehovah's Witnesses (and others with similar beliefs) as state-worship – idolatry would not be too strong a term[31] – in which they cannot participate without severely compromising their religious commitment. One might compare the situation of the Jehovah's Witnesses to that of Shadrach, Meshach and Abednego, who were thrown into a furnace for their refusal to bow down before a golden image which King Nebuchadnezzar had set up on the Plain of Dura (Daniel 3). One ought to be reluctant to deny to the nation state a power to inculcate, especially in the young, certain attitudes – such as obedience to lawful authority and a general sense of civic duty – according to the means which the legislature considers to be best adapted to that end. On the other hand, a state committed to pluralism certainly ought to take note of the sensibilities of religious minorities when deciding what means to adopt. The extension of constitutional protection of religious freedom to the prevention of these indirect interferences with religious liberty would seem to be a very blunt instrument for performing this particular operation of reconciling public good and minority sensibilities.

Final comments

The appeal of the type of pluralism envisaged herein lies in its potential to give most people some of what they want – in the sense that their proposals about the common good are adopted or their religious–ethical perspective is determinative upon the matter – some of the time. Its stability lies in the fact that the shifting majorities which determine questions of the common good include, at various times, most members of the community. Two challenges to the stability of pluralism remain. Firstly, individuals and groups who have found themselves to be constantly in the minority in relation to questions about the peace and good order of the community may cease to believe that a commitment to pluralism on their part offers the best opportunity for the flourishing of their preferred way of life. When this point is reached, pluralism may implode in the face of assertion of rights to legal exemptions or secession or, worse still, sectarian violence. Secondly, pluralism, so understood, may ultimately not be able to escape its historical roots in the conflicts between the different traditions within Christianity and, accordingly, turn out to be less successful as the range of religious and philosophical traditions which must be accommodated within modern western societies expands.

Nevertheless, appeals to the 'secular' nature of the state and society and refusals to give a hearing to minority religious perspectives do nothing to alleviate these problems. As Bishop Frame has suggested, the risk of dissolution of political community would be minimized by adhering to a 'genuine secularism' which does not 'prohibit the expression of any religious view' or 'exclude the religious views of citizens from influencing the shape of the public space' or 'ignore or dismiss those views when formulating policy that will affect every citizen' (Frame 2008: 20). In other words, the best way to keep the community intact is by maximizing the opportunities for individuals and groups to participate in the processes whereby answers to questions about the peace and good order are sought. The term 'secularism' is apt to be misunderstood. The 'genuine secularism' of which Bishop Frame spoke should be called 'pluralism' to distinguish it from those ideologies which would banish religion from public spaces.

Notes

1 Compare the term 'secular', meaning 'of or pertaining to the world', with the term 'secularism', meaning 'the doctrine that morality should be based solely on regard to the well-being of mankind in the present life, to the exclusion of all considerations drawn from belief in God or in a future state'. These definitions are taken from the *Oxford English Dictionary Online* (2nd ed, 1989) http://dictionary.oed.com. See also Richard Mohr 'The Christian origins of secularism and the rule of law' in this volume.

2 The Secular Party of Australia has suggested that Australia 'resembles a pluralistic theocracy, where numerous religions have been "established"'. See 'The Separation of Church and State' in *The Secular Party of Australia* www.secular.org.au/separation.php accessed 12 March 2008.

3 Note also Huntington's thesis that westernization and modernization are initially closely linked but that, as modernization continues, the tendency is towards a revival of the indigenous culture. Many Islamic countries, in particular, have modernized in the *technological* sense, without abandoning the hallmarks of traditional Islamic culture. See Huntington (1996: 75–78).

4 Throughout this paper, 'church–state relationship' and 'church–state arrangements' are used as convenient (if imprecise) labels for the relationship between the state and whatever organized religion exists within the nation's boundaries, whether that religion is Christian or not. 'Church' is not, in this context, intended to be limited to institutional Christianity.

5 See *West Virginia State Board of Education v Barnette* (1943) 319 US 624, 653 (Frankfurter J).

6 A Norwegian organization, Forum 18, claims that official harassment of minority religions – particularly 'new' Evangelical and Pentecostal churches – has become commonplace in a number of former Soviet republics, including Belarus, Uzbekistan and Russia www.forum18.org accessed 23 April 2008.

7 For example, the Swedish state continues to collect the church membership fee (*kyrkoavgiften*) from church members and the burial fee (*begravningsavgiften*) from all Swedish residents and pays this revenue to the parish in which the payer is resident. The Church of Sweden continues to control the cemeteries in all parts of Sweden except for the municipalities of Stockholm and Trånas. See 'Facts about the Church of Sweden', *Svenska Kyrkan* www.svenskakyrkan.se/default.aspx?di=37017 accessed 9 May 2008; see also Gustafsson (2003: 67–68).

8 In asserting that this is the critical distinction, the author notes that it draws the line in much the same place as some other classificatory schemes. Most similar to that which is proposed here is the model of 'religious identification' and 'religious freedom' proposed in Durham Jr (1996: 23 (Fig 4)), in which the extreme ends of the religious identification gradient – 'absolute theocracy' and 'persecution' – correspond with 'absence of religious freedom' on the religious freedom gradient. 'Total religious freedom' on the latter gradient corresponds with 'accommodationism' on the former gradient. Less similar, but nonetheless analogous, is the distinction between 'ethnonationalism' and the 'liberal' or 'civic' idea of national identity, whereby the former insists upon one or more of linguistic, religious or ethnic uniformity as the hallmark of a nation, while the latter does not insist upon this. See Muller (2008: 20).

9 Marcotte (2005: 50) noted that, during the 1990s, this traditionalist perspective has been challenged by other perspectives (which she labels as 'neo-traditionalists', 'modernist' and 'secularist'). 'Neo-traditionalists' retain the 'exclusivistic' outlook of the traditionalists, while alluding to 'the need for a re-conceptualization of traditional jurisprudence' (Marcotte 2005: 56). Many of the 'modernists' and 'secularists' have served or are serving prison terms (Marcotte 2005: 60–62).

10 *Constitution*, 4 October 1958, art 1, i.e. 'La France est une République indivisible, laïque, démocratique et sociale. Elle assure l'égalité devant la loi de tous les citoyens sans distinction d'origine, de race ou de religion. Elle repecte toutes les croyances. Son organisation est décentralisée' www.assemblee-nationale.fr/english/8ab.asp.

11 It seems that, from the reign of Elizabeth I, the dominant theme in English religious policy was provision for and enforcement of uniformity of religious *worship* but to refrain from inquiring too closely into people's religious *beliefs*, so long as those people remained loyal to the state. See Weir (1999: 58–59). This tendency continued, to a greater or lesser extent, until the early nineteenth century, when pluralist pressures became stronger. See also Bouma (1999: 13–15).

12 See Richard Mohr's comments in this volume.

13 Judith Shklar's 'liberalism of fear' is an example of the appeal to pragmatism. Shklar insisted that her liberalism has a *summum malum* rather than a *summum bonum*. It is a response to the evil of 'cruelty and the fear it inspires' (Shklar 1989: 29). Liberalism must 'restrict itself to politics and to proposals to restrain potential abusers of power in order to lift the burden of fear and favor from the shoulders of adult women and men, who can then conduct their lives in accordance with their own beliefs and preferences, as long as they do not prevent others from doing so as well' (Shklar 1989: 31).

14 Pope Paul VI, *Dignitatis Humanae* (Declaration on Religious Freedom), 7 December 1965; Congregation for the Doctrine of the Faith, *The Participation of Catholics in Political Life*, 24 November 2002. The latter document states that 'the right to freedom of conscience and, in a special way, to religious freedom, taught in the Declaration *Dignitatis humanae* [sic] of the Second Vatican Council, is based on the ontological dignity of the human person and not on a non-existent equality among religions or cultural systems of human creation' (par 8).

15 *The Participation of Catholics in Political Life*, above n 14, para 6.

16 'Civil society' means all of the formal and informal associations between individuals which are smaller than the political association of the whole which constitutes the nation state, e.g. markets for goods and services, churches, cultural, sporting and social clubs. The common characteristic of these institutions is that they are voluntary associations of people for the purpose of satisfying

common needs. These are the institutions which Burke called 'little platoons' (see Burke 1968: 135). This understanding of civil society is associated with the idea that, where people can satisfy their common needs by associating freely, the state should allow them to do so and protect them from coercion by others. See Murray (1988: 291).

17 For an account of the complexities of the interaction of customary law and introduced law in one South Pacific Island nation, see Care (2001). Corrin Care noted that applying customary law involves difficulties in knowing 'what the law is and how far it applies' (Care 2001: 174).

18 Regulation 4 provided that '[a]ny body in respect of which a declaration is made in pursuance of the last preceding regulation shall, by force of that regulation, be dissolved'. Regulation 6 provided, in part, that '[a]ny person having in his possession or custody any property which immediately prior to the dissolution of a body which has been declared to be unlawful belonged to, or was used by or on behalf of, or in the interests of, that body … shall on demand deliver that property to a person thereto authorized by a Minister'.

19 (1943) 67 CLR 116.

20 *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 159.

21 *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 158.

22 *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 125 (Latham CJ).

23 *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 160 (Williams J).

24 *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 126 (Latham CJ), 159 (Williams J).

25 *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 160.

26 *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 131–32 (Latham CJ), 160 (Williams J).

27 (1943) 319 US 624.

28 *West Virginia State Board of Education v Barnette* (1943) 319 US 624, 634.

29 (1943) 319 US 624, 652.

30 (1943) 319 US 624, 653.

31 Jackson J (319 US 624, 629) noted that the Jehovah's Witnesses took the commandment that 'thou shalt not make unto thee any graven image' (Exodus 20:4–5) literally. It appears that fear of committing idolatry was the central concern of the Jehovah's Witnesses in this case.

2 The Christian origins of secularism and the rule of law

Richard Mohr

Introduction

Secularism is a means of organizing political, legal and constitutional matters so as to exclude religious considerations and institutions from public affairs. This may be seen as a way of denying the legitimacy of particular religious considerations as a basis for public deliberation, of prohibiting certain religious actions from public spaces or institutions, or removing the rights of religious institutions to be formally represented in particular public forums. As a consequence, secularism is represented as a belief or a method different from and explicitly opposed to religion in public affairs. Secularism is distinguished from any particular religion by its apparently equal opposition to the involvement of all religions in state affairs. A state aligned with a particular religion may exclude the considerations, actions or participation of other religions, but secularism purports to exclude all of them. In the following pages I will question secularism's neutrality and its apparent independence from religion, and specifically from Christianity. The inquiry proceeds by first outlining the historical and theological context of the rise of secularism in western Europe, and then by investigating three legal principles at the heart of modern secular assumptions. In exploring the Christian origins of those principles I will consider the extent to which theological tropes, imagery or paradigms persist in their contemporary manifestations.

Secularism is often assumed to be the normal way for a modern liberal state to function. Darryn Jensen's contribution to this collection is a helpful corrective to any simplified view of states as either secular or religious, since he indicates some ways in which apparently secular liberal democracies admit or support specific religious practices in the public sphere. Margaret Davies, in her contribution, gives pause to another assumption, that secularism is somehow superior to other forms of organization, in her suggestion that excluding religion or religious considerations from the public sphere may indirectly limit religious pluralism and dissent, in part by strengthening internal religious hierarchies.

This contribution considers the origins of secularism in the particular

historical circumstances of western Europe at a time when the ecclesiastical and temporal rulers were struggling to assert their respective positions. The specific institutional arrangements that grew out of those struggles had legal and political parameters. They defined the responsibilities, competencies and jurisdictions of religious and temporal authorities. Originally they were based in a common epistemological environment. That is to say, the arguments and justifications for these arrangements grew out of the intellectual currents of the day, which were rooted initially in the church and the new universities (particularly among legal scholars) and subsequently in the work of philosophers and intellectuals who served other political interests, such as those of princes and republicans. Built on a theological and legal foundation, secularism subsequently acquired other, newer sources of legitimacy, to establish itself as a system of belief in its own right. To understand these developments it will be necessary to appreciate the three dimensions in which it operated: the political, the legal and the epistemological. Each of these has resonances in the contemporary world, since secularism still relies on these same dimensions for its institutional arrangements, legitimacy and theoretical justifications. I will consider the current salience of those three dimensions before returning to investigate their historical origins.

To succeed politically in a multicultural society or a global community of many religions, secularism must be able to persuade a broad constituency that its programme is, indeed, equally placed in relation to all religions. Secularism's fundamental intervention at the boundary between religious considerations and public affairs can only succeed if it equally rejects all religious considerations. An established connection between secularism and Christianity would be politically damaging since, in aligning secularism with one particular religion, it would call into question its equal rejection of *any and all* religious intervention in affairs of state.

This problem is closely related to the question of secularism's legal justification, going directly to its legitimacy. Modern law requires strict uniformity, and universal application. Were secularism to be seen as not only a product of the west, but also having characteristics that link it to the ongoing religious traditions of the Christian west, then its universal applicability would be questionable. Such arguments are well known in regard to human rights. If 'human' rights are simply western rights, then they lose their claim to apply uniformly in all communities. This argument is distinct but related. If secularist principles derive from Christianity and maintain their connection with Christian theology and paradigms, then they lose their claim to apply to communities adhering to other religious traditions.

Epistemology, or the justification of belief, is the third of the dimensions in which secularism operates. Secularism sets itself apart from other, religious belief systems by its robust opposition to religious intellectual justifications of belief. While there are obvious characteristics, such as

reference to a supernatural being or God, that secularism does not share with traditional religions, it shares other characteristic ways of knowing and deciding. Secularism can be seen to be a credo about how public institutions and decision-making processes should be organized, the relevant values that should be taken into public account, and the preferred models of decision-making. As a belief system like another, secularism makes certain claims by which it purports to be preferable or superior to other (we might say competing) religious or political ideologies. Those claims are based on 'rational' grounds, which is to say that they may be assessed according to clear criteria that can be openly debated according to generally recognized logical criteria, unlike arguments based on 'faith', for instance. In fact, a key component of secularism's claims is its very reliance on reason as opposed to faith. Drawing on a long tradition of Judeo-Christian iconoclasm, contemporary secularism is distinguished from religion as reason is distinguished from idolatry (Mitchell 1986: 198). This opposition may be called into question if secular principles can be seen to share a heritage, and indeed a common epistemological foundation, with a particular religious tradition. Löwith (1949: 1) connected historical pretensions to finding an end or purpose of history with the Christian eschatology of a final judgement, of 'a history of fulfillment and salvation'. He concluded (191) that '[h]istorical processes as such do not bear the least evidence of a comprehensive and ultimate meaning. History as such has no outcome'. Yet despite these secularist arguments against theology in history, we will see that theological notions, symbols and practices persist in the heart of secularism itself. The epistemological opposition between faith and secularism, based on post-religious claims of reason, may turn out to be less substantial than they appeared, if religious icons persist at the very foundation of secular principles.

In the following pages I will analyze three key legal principles at the heart of contemporary liberal democratic ideologies: the separation of church and state, the rule of law ('and not of men') and the separation of powers. The first of these is the fundamental principle of secularism, while the other two support the western compact between church, state and civil society. The analysis will show how these developed out of crucial events in Christian history, and from particular motifs or paradigms in Christian theology.

These findings raise the question of the neutrality of secularism, as a principle of western law, from Christianity in the political, legal and epistemological dimensions considered above. Those issues are further considered in the conclusion. I do not prejudge them, nor overrate them. The purported benefits of decoupling church from state, or judicial from executive power, are not thereby dismissed as illusory, though their benefits may need to be argued in different terms. Nor do I seek to demonstrate some Christian or western imperialist plot against the rest of the world. My conclusion is nonetheless critical, going to the heart of secularism's

self-justification. In denying its religious origins, western secular law is based on a perverse form of myth-making. This is myth-making of the same type that Peter Fitzpatrick (1992) called 'the mythology of modern law'. It is mythical because it invents an origin story which is at variance with its own history. It is perverse because it is a myth aimed at denying its mythological status, while at the same time labelling others as myth-makers and idolaters. Yet I do not purport or seek to root out all traces to theology from secularism, or of religion from the state. My aim is to find their common roots and to discover how those deep connections continue to operate today.

The foundations of the secular state

Brian Tierney, a preeminent historian of Christian theology and its interface with the development of western law, has identified the Christian origins of European political and legal ideas from the twelfth to the seventeenth centuries. Tierney (1982: 1) has proposed:

> that the juridical culture of the twelfth century – the works of the Roman and canon lawyers, especially those of the canonists where religious and secular ideas most obviously intersected – formed a kind of seedbed from which grew the whole tangled forest of early modern constitutional thought.

Carl Schmitt drew on certain connections between Christian theology and modern political theory to justify the myth-making power in contemporary politics. Summed up the redolent title 'political theology' of his major work, this nexus could even be seen to underpin his famous justification of exceptional powers under the Third Reich:

> All significant concepts of the modern theory of the state are secularized theological concepts … The exception in jurisprudence is analogous to the miracle in theology.
>
> (Schmitt 1985: 36)

With such precursors in political and religious history, there is nothing novel about my contention that secularism has arisen out of Christianity, and particularly the tensions between Christian and political institutions in the west. Tierney and others have shown that the social and political history of the churches of Europe have been the main source of the compact at the foundation of the western state. Schmitt took this to the level of an ideology. In drawing on and even noting the continuation of these connections, my intention is critical, not celebratory, like Schmitt's, and my scope is both narrower and more pointed than Tierney's in the work quoted above. I am not seeking to trace the origins of 'the whole

tangled forest of … constitutional thought'. I am instead selecting a couple of old trees for special attention, trees whose roots go even deeper into Christianity than the twelfth century, to show that secularism itself is part of this ideological constellation under whose sign we demarcate, criticize and regulate the boundaries between various institutions of state, church and civil society. Furthermore, secularism can be seen to be basic to the founding compact between states and churches which lies at the origin of modern constitutional assumptions.

The central section of this paper will analyze the origins of and connections between each of the key elements of the western political compact. It is in drawing the implications of this analysis for current controversies that I am more pointed than Tierney. I will be suggesting that the origins of those particular elements of constitutional thought have quite specific influences today. The Christianity underlying the pillars of the secular polity, repressed and overgrown though it is, continues to influence the way the principles of secularism are applied. Indeed, the very repression of those origins is reproduced in their application: secularism continues to mask its Christian origins and affiliations.

The separation of church and state, the very earliest aspect of our 'founding compact', is as central to contemporary political and ethical debates as it ever was. Disputes such as those over the wearing of headscarves in France and Turkey have been conspicuous manifestations of this debate. The issues flare frequently in the United States, that most Christian of countries with a most secular constitution, over issues ranging from the teaching of evolution in schools to the 'right to life', whether related to abortion, euthanasia or the death penalty. In Australia, a less religious nation with a nominally Christian constitution, where legislators offer prayers to open Parliament, the questions of secularism, once fought out over state aid to church schools, were reframed during a recent decade of conservative government as a debate over the place of 'values' in school curricula, and policies for ensuring that immigrants to Australia understood and endorsed a particular western version of constitutionalism.

Even in traditionally tolerant (if not exactly pluralist) secular societies of northern Europe, the baiting of deeply religious minorities seems to have emerged as something of a national sport. Newspapers run insulting cartoons in Denmark and Dutch filmmakers denounce non-European religious traditions in the most inflammatory terms, all in the name of secular rights to free expression. These rights are assumed to be neutral between religions: secularists have as much right to offend Christians as Muslims. However, if secularism is, as Graeme Smith (2008: 2) has recently claimed, 'the latest expression of the Christian religion' then it is harder to see it as neutral. Secular challenges may be expected to be more commonly directed at non-Christian religions than at Christianity and, being less familiar with the source of the attack, those religions may find it more difficult to counter or otherwise deal with them. In this scenario

secular–religious disputes, which have been rife in Christian polities for centuries, would take on the hue of partisan religious conflicts. Though it is not my aim to quantify these conflicts, the obvious examples I mentioned above begin to suggest the asymmetrical relations between Christianity and other religions in dealing with secularism.

Just as French or Turkish secularists assert the ascendancy of their secular state over internal Muslim minorities or majorities, and Dutch or Danish culture warriors paint themselves as oppressed liberals, so between nations there is a hierarchy of secular moral ground. This ranges from the heights of secularism's western bastions down to the fundamentalist state of Wahabi Saudi Arabia or the murky relations of religious fundamentalism and politics characterized by Al Qaeda or the Taliban. This hierarchy was formalized in the *Clash of Civilizations*, the book that was to draw the battle lines for the new cold war, when Samuel Huntington placed the 'fault line' of western civilization not between Christian Europe and Muslim Asia, but between western and eastern Christianity: Catholic and Protestant in; Orthodox out. To the extent that Huntington defined his historical criteria for doing so, he maintained that 'it dates back to the division of the Roman Empire in the fourth century and to the creation of the Holy Roman Empire in the tenth century' (Huntington 2002: 158). The convenience of Huntington's schema, at the end of the era of the threat of Soviet communism and the search for a new 'axis of evil' at which to direct North Atlantic military and ideological force, was that it drew a narrow boundary around western Europe (and its civilizational offspring in the new world), leaving a very broadly defined other civilization with which to clash. The boundary ran through the middle of the Balkans, including the western, Catholic portions of the then Yugoslavia (whose independence had a few years earlier been so precipitously recognized by Germany, followed by other western nations), as well as the ex-Soviet allies that were soon to join the North Atlantic Treaty Organization (NATO). Huntington's thesis was thus lent a degree of credence by geopolitical developments, but we may still enquire whether this derived from its historical accuracy, from its influential role in directing western thinking and foreign policy, or from the sort of combination of the two that might best be put down to Huntington's astute reading of the Zeitgeist in the early 1990s.

The historical accuracy alone of Huntington's ideas may have had little impact on their political appeal. However, in defining the nature of church–state relations as dividing the world, Huntington's thesis lies at the heart of recent habits of thought and assumptions about the importance of these issues in analysis of the world order. The origins of those relations are therefore worthy of closer inspection.

The separation of church from state

From its earliest days, Christianity showed a certain disdain for worldly goods and a hostility to temporal power. Having arisen within the (original) Roman empire, the church from the outset distinguished itself from the institutions and values of the dominant religious and philosophical traditions. As it gained more support, the church could even appear as a threat to the temporal power, adding to the opposition between the Roman secular authority and the Christian church. The more common pattern for the rise of world religions such as Islam, Tierney (1964: 7) notes, is that they grow up in parallel with an ordered civilization: 'the creation of political institutions quite separate from the organization of the accepted religion seems hardly conceivable'. Such cultures develop their religious and secular institutional arrangements within the one time and tradition. By contrast, Christianity 'irrupted into an ancient civilization that already had its own established hierarchy of government and its own sophisticated tradition of political thought based on non-Christian concepts' (Tierney 1964: 7), leading to a potential for tension between these two distinct sources of social, cultural and political influence.

While the very origin of Christianity is based on the story of Christ's martyrdom by authority of the empire, the early Christian church advocated avoiding open conflict with the temporal authorities. The gospel of Matthew describes Christ's exhortation to 'Render therefore unto Caesar the things which are Caesar's; and unto God the things which are God's' (Matthew 22:21; also described by John 20:25). Here Christ was referring to a coin with Caesar's image on it, thus linking the rejection of 'filthy lucre' (St Paul's First Epistle to Timothy 3:3) and state power. This denigration of temporal power and of worldly goods may also be seen as the origins of a compact between the temporal and the spiritual, allocating to each its own sphere of influence.

St Augustine elaborated this distinction in *The City of God*, whose central theme is the separation of the temporal and spiritual realms. In defining the spiritual realm as a 'city', in explicit contrast to a corrupt, earthly city, Augustine was making an appeal which was at once spiritual and institutional. While Augustine did not equate the city of God with the organized church in opposition to imperial authority, subsequent interpretations did (Tierney 1964: 9), and the church would develop the institutional implications of that distinction for centuries to come.

Early Christianity distinguished itself from the worldly cities of the Roman empire quite literally, by transforming the urban public spaces of the empire into interior spaces of churches. At Jarash, in Jordan, an arcaded street was roofed over to become a nave and two apses, the road was blocked at one end of the church, and at the other a small square was modified to form the atrium. While this was typical of opportunistic architectural practices such as reutilizing old foundations or city walls, there

was also an element of subversion of the Roman public order, indicating a 'deep distrust of the existing city as a well-defined architectural organism' (Ferlenga 1990: 49). Alberto Ferlenga concludes that efforts to block vistas and close routes were intentional rather than purely opportunistic, calling such urban projects 'an operation aimed at switching off the preexisting urban qualities' (Ferlenga 1990: 49) of the Roman city. Christian settlements quite literally turned their backs on the public space of the Roman polity: closing it out of churches, looking inward instead of outward, emphasizing the privacy and intimacy of the institutions and rites of worship, distinct from the civic life of the town or empire.

With the declining political power of the empire, Christian institutions expanded their temporal influence into the vacuum that was left. The western empire had converted to Christianity under Constantine, and as the papacy at the Roman See gained power and influence on the Italian peninsula, its relations with Constantinople became increasingly strained. In western Europe, emperors and princes were negotiating their power by military means, and their legitimacy through the church. The Pope's move in 800 to crown Charlemagne appears to have been a preemptive move by the church to assert its authority to anoint emperors that only renewed tensions between religious and temporal authorities. These came to a head with the investiture crisis. Bishops, who usually controlled considerable feudal estates, had been ordained by secular rulers in much of Europe. Challenged by the church, this conflict escalated into disputes over the role of the church in crowning secular rulers and the role of the Emperors in supporting candidates for the papacy. The crisis erupted under Pope Gregory VII (1073–85), coinciding with the revival of Roman law in Europe in the eleventh century. The new legal scholars were enthusiastic volunteers in these battles: western constitutional principles, and western law itself, have their origins in this political, legal and theological ferment. The contest was only resolved by agreements between Pope Paschal II and Henry V to separate spiritual and temporal power, formalized with the Concordat of Worms (Calixtus II and Henry V, 1122), and justified by Bernard of Clairvaux's *On Consideration* in 1153 (Tierney 1964: 91 ff). Harold Berman referred to these events as a 'papal revolution' and saw in them the origins of western law. Indeed, Berman (1983: 165) points out: 'Western legal science is a secular theology, which often makes no sense because its theological presuppositions are no longer accepted'.

As these origins suggest, the separation of temporal from ecclesiastical authority, far from a hermetic seal, was a process of give and take. The forums appropriate to state business and church business were established within their own spheres. While clerics could act in secular roles, they were to wear the insignia of their religious orders while doing so (Agamben 2008: 78). Popes needed imperial armies to assert their claims to authority; emperors needed popes and bishops to legitimize their rule. The popes had vast temporal power in the southern part of the Italian peninsula, and

it is no coincidence that the revival of Roman legal scholarship occurred in Bologna, at the edge of the papal states, precisely where these conflicts were at their keenest. If Christianity's founding moment was the crucifixion of Christ by the Roman authorities, the origin of western law derives from the concordat between the secular and ecclesiastical authorities, built on Christian theology and the precepts and methods of Roman law as it had been codified by the Christian emperor Justinian.

By establishing a clear demarcation between secular and religious law, the church gained the autonomy to administer canon law within its own jurisdiction. In the period of consolidation of ecclesiastical legal principles that followed, we find the emergence of doctrines establishing and authorizing canonical legal traditions and limiting the power of individual popes. The laws of the church and the institutions that administered it came to be seen as an entity supporting the wellbeing of the church itself, so that a pope was constrained not to 'enact a law to the prejudice of its "general state" (*generalis status ecclesiae*)' (Berman 1983: 214).

While these elaborate and sophisticated negotiations established the framework for the separation of church and state at the foundation of the secular creed, further conflicts several hundred years later reinforced the practical need for such provisions. The medieval compact of church and state had left each to its own legal sphere but, by linking temporal power to papal legitimacy, it enshrined a specific religious institution as the spiritual protector of sovereign rulers. With the outbreak of the Protestant revolt, religious conflicts embroiled states, and vice versa. The thirty years war from 1618–48 and the English civil war (1640–88) that flowed from the same source prompted scholars from Descartes to Locke, and through to the *philosophes* of the following century, to batten down the seals separating religious passions from rational deliberation and good government (Toulmin 1990: 129, 177). It is these writers and their origins in the religious conflicts of the seventeenth century that led many to link secularism to the Enlightenment and to see secularism as an 'Enlightenment value'. However, as has been seen in the earlier historical events, and will be seen further in the origins of particular ideas, the key elements of secularism run a lot deeper in European history, law and theology.

The empire of laws and not of men

The origin of the separation of church and state is a story that runs from the beginning of the Christian era to the end of the middle ages; the next stage in this history is that of the Renaissance. The institutional players in the original contest and its eventual resolution were the church and the empires, notably the Holy Roman Empire. Its intellectuals were the glossators and canonists. The Renaissance that followed it was nurtured in the city states of northern Italy, small principalities or republics that fostered their own intellectuals outside the ecclesiastic structures of church and universities.

These intellectuals brought new understandings and meanings to many of the ideas that had been developed in the middle ages. If the glossators revived the Roman law of Justinian, the Renaissance intellectuals of the city states revived the *res publica*. Thus, Machiavelli (1513) elaborated the notion of the state of the institution, captured in the phrase '*generalis status ecclesiae*', so that it became simply '*lo stato*', the secular state itself.[1] Here is a 'public thing' that is almost mystical in its lack of specificity.[2] Like a 'thing' (*res*) it is simply a state of affairs, a being (*stato*, past participle of *stare*, to be).

Machiavelli elaborated the possibility that the state could have its own 'reason', *ragione dello stato*. Within twenty years of the publication of *The Prince*, Donato Giannotti, writing about and in support of the Venetian Republic, proposed that law itself could rule independently of the rulers, in the phrase 'an empire of laws and not of men' (Casini 2002; Sellers 1998). The well-known translation is from Harrington's *The Commonwealth of Oceania* (1656) from whence the phrase entered English, to subsequently become 'the rule of law'. Republicans from Venice to England were happy to co-opt ecclesiastical ideas that limited the arbitrary power of the popes in their arguments against the tyranny of monarchs.[3] In doing so they seized on the image of a thing or a being that rules, a state that has an identity and even a reason and a will (or judgement) independent of the flesh and blood rulers who actually appoint the judges or pronounce the decisions.

In tracing the development of the idea of the rule of law from medieval times to the Renaissance, it is important to note that both the explicitly theological imagery and that of a more self-consciously rationalist approach share the same semiotic code. I will also use this illustration of longevity and change to indicate that, far from being simply an anachronistic coincidence, we can see the connection of these two myths in the work of the one artist: Ambrogio Lorenzetti. As recently as 2003 this myth was being invoked to display the credentials of candidates for the High Court of Australia (Heydon 2003).

In an eleventh-century depiction of the Emperor Henry II sitting in judgement, discussed by Kantorowicz (1957: 113–15), justice descends from God (via the Holy Ghost). The dove descending to Henry is clearly a Christian religious symbol, the Paraclete or Holy Spirit. This illustration predates later theological and legal justifications of the rule of law or the impersonality of judgement. When we come to explore subsequent elaborations of the myth of law's divine origins, we find important jurisprudential changes, within the same semiotic structure. A generation after this depiction, St Anselm (1033–1109) developed a theory of the dual nature of Christ in the following terms: 'Since only God can and only man ought to make an offering which would [satisfy the dishonouring of God through original sin], it must be made by a God–Man'. An early depiction of reason follows St Anselm,[4] in the 'temple of Justice' described by Placentinus in

the twelfth century. His description envisaged the figure of Justice, Reason hovering above her head, while she embraced her daughter Equity, and was surrounded by the civic virtues (Kantorowicz 1957: 108–9).

Berman (1983: 177) shows that Anselm's theory of atonement, coinciding with the birth of western law, 'first gave Western theology its distinctive character and its distinctive connection with Western jurisprudence'. Law was made compatible with theology by equating God's justice with the rational application of law. The will of God is no longer inscrutable, but may be interpreted. At the same time, the consequences of justice and mercy are to be meted out according to the law. St Anselm had based his proof of the existence of God in both faith *and* reason, so that reason can form the basis of the application of justice.

In the eleventh-century illustration of Henry II as a judge, reason is out of the equation: divine guidance passes directly through the emperor. Yet both this illustration, and Lorenzetti's fourteenth-century frescoes in the Siena town hall, use the same semiotic code, a code Lorenzetti used in depictions of the Annunciation as well as of law (Kantorowicz 1957: 111–12). In his fresco of '*buon governo*', Wisdom (*Sapientia*) is an angel with a crown and a book hovering above Justice, who plays the role of the judge. In his Annunciation, an angel appears before Mary, while the Holy Ghost hovers over her head (as in Fra Angelico's later depiction). In Lorenzetti's Annunciation, the figures of the angel and the Holy Ghost clearly symbolize the divine nature of Christ's Immaculate Conception. In both the eleventh- and the fourteenth-century depictions, Justice descends from heaven mediated by some figure of divinity. After the eleventh century, this figure is *Ratio* or *Sapientia*.

These accounts of the divine origin of law date from the first four centuries of the western legal tradition in its contemporary form. They predate Harrington's 'empire of laws' formulation, but were rooted in the notion that the secular or religious leader was subject to law.[5] The depiction of law's origins in divine justice precedes the introduction of reason as a source of law. Even reason, in the centuries following Anselm, derived from a superhuman source. Just as the dual nature of Christ as the God–Man was required in order to redeem humanity from original sin, so too does law have a dual nature.

The rule of law is precisely that which is not 'the empire of men'. The impersonality of Justice in a depiction like Lorenzetti's, combined with the image of transcendent guidance, can be seen as a model for the theory of impersonal law. It is more permanent, it constrains individual judgement, and it is not of the flesh. So far I have concentrated on the divinity of law. However, a transcendent law cannot remain in the realm of the ideal, but must be brought to earth, in the enunciation of a decision and the execution of judgement.

The separation of powers

The necessity of explaining the impersonality of law – an empire of laws and not of men – in the face of the obvious fact of judicial decision-making by a flesh-and-blood judge presents some delicate theological issues. Even though the inspiration of justice was transferred from divinity to reason, from the Holy Spirit to Wisdom, the source remained outside any specific body. Just as the body of Christ could be divided into two natures, so too could the body politic be divided: hence, the 'separation of powers'.

The idea receives its first constitutional expression in the 1701 English *Act of Settlement*, dating from a decade or so after Locke had expounded the theory in his *Treatises of Government*. In the situation where the king had the temporal power, the allocation of the transcendent power of the law to a separate body was necessary for a constitutional monarchy, and it made sense in theological terms as well.

The separation of judicial power arose out of the republican ferment in England within fifty years of the adoption of the rule of law doctrine. Initially designed to remove the judges from the influence of the king, it was made over in the next century by Montesquieu, who offered a veritable Holy Trinity of the state, adopted as such by the French and United States constitutions. Now there were three powers, separate but indivisible, in the executive, the legislature and the judiciary. How these can be separate when they are all organs of the one government is very difficult to understand unless we are steeped in Christian theology and the indivisibility of the Father, the Son and the Holy Ghost.

The separation of judicial from executive or legislative power, secular though it may be, nonetheless has theological origins in the dual nature of Christ. If law is 'not of men' it must have some other source. If it is to be pronounced by men, then they must have a dual nature, or at least have access to spiritual guidance. The idea of a dual nature had already been introduced to politics as the two bodies of the king: the body physical (which was mortal) and the body politic (eternal). As discussed above, just as Christ has a dual nature, human and divine, so law is conceived as divine or disinterested in its inspiration, human in its application.

By 1100 it was clear that bishops and kings could be two types of person in one *persona mixta*, in their spiritual and secular capacities. The representational and performative economy of the Middle Ages, which required the host to be transformed into the body of Christ through the Eucharist, had no difficulty with an ontological move which endowed the king with two natures in one body. Subsequently the ontology of power shifted from the idea of two real natures in one to the separation of an abstract *dignitas*, which was eternal and attached to office, from a material corporeality, which was mortal. In this way the divine origin of infallible Justice was preserved in a two-natured king, while avoiding the heresy of dichotomy proscribed by Augustine. This distinction persists today as a separation of

powers existing within the individual judge, a flesh and blood employee of the state, who channels the transcendent principles of the law.

Responsibility for the substantiation of justice in the temporal world shifted, between the reception of Roman law and the Enlightenment, from the king to the judge, a shift formalized in the doctrine of the separation of powers. Locke held that men give up the freedoms of the state of Nature, and join together in society in order to preserve their property (broadly defined to include 'their lives, liberties and estates'). To this end, society provides three key elements lacking in Nature: first, 'an established, settled, known law'; second, 'a known and indifferent judge, with authority to determine all differences according to the established law'; and, third, the power to execute the sentence. Locke's judge is necessary to lift us out of the state of Nature since in that state, 'men being partial to themselves, passion and revenge is very apt to carry them too far' (Locke 1884: 256–57). Montesquieu determined that these powers were to be separated from each other and that the judge was to be subordinated to the formal law. He admits this formal law may be in danger of being too rigorously applied:

> But the judges of the nation are … only the mouth that pronounces the words of the law, inanimate beings who can moderate neither its force nor its rigour.
>
> (Montesquieu 1989: 163)

Locke's impartiality presents us with another conundrum, to which I return below. The 'law of Nature' to which Locke's judge must respond demands a continuation of the medieval *persona mixta* who is above the fray and yet part of the human world. Montesquieu overcomes the theological component in a judge who must nonetheless be manifest in the world and pronounce the positive law by eliminating both the divinity and the humanity of the judge. By so sharply distinguishing the decision from 'the individual opinion of a judge' Montesquieu (1989: 158) has presented us with an automaton, literally, an '*être inanime*', who merely channels the formal law.

Nancy (1982: 504–5) explicates the essential link between authority, reason and will through the judicial pronouncement: 'The transformation of abstract will into concrete will is a performative'. This diction 'always requires the existential posit of a *judex*, of an unique individual who says the right, and who is not unique because he takes the power to himself…, nor because the people have decided to give it to him…, for it is not properly speaking a question of a "power". But the *judex* is unique because *only a single individual can speak*' (Nancy 1982: 505). While the judge is required to arrive at decisions through reason, the decision itself is performed in person. The difference denied by law's abstraction of the citizen returns in the decision, 'infinitely undecidable: it adds nothing, and it adds itself'

(Nancy 1982: 504). If legal debate and the abstraction of rights dematerializes the body of the legal person (Mohr 2008), the act of judging, like that of corporal punishment or detention, returns the body to a central place in the law.

Medieval political theology and post-Enlightenment positivism deal with this problem in different ways. As long as law was derived from divine will, and was legitimized by the *persona mixta* of the divinely ordained sovereign or judge, it was theologically justified. With a 'law of Nature' discoverable through reason, a similar logic applied: the rational nature of the judge could participate in the other realm, while requiring a material presence, however irrelevant to the proceedings, to deliver judgement. Positive law appears to solve the problem by denying the judge any relevance at all. In Montesquieu's formulation law itself is its own body, of which the judge is simply the mouth ('*la bouche de la loi*').

More recent positivist jurisprudence, demands for legal predictability, and witch hunts against 'judicial activism' also favour the image of the judge as an automaton. Under the demands for economic and legal rationalism, Weber proposed:

> the judge is more or less an automatic statute[*sic*]-dispensing machine in which … you insert the files together with the necessary costs and dues at the top, whereupon he will eject the judgment together with the more or less cogent reasons for it at the bottom: that is to say, where the judge's behaviour is on the whole predictable.
>
> (quoted in Lukács 1971: 96)

The twinning of the judicial persona into a fallible human body and a vehicle for infallible justice, begun with medieval theology, was mirrored by the ceremonial and symbolic forms of the seventeenth and eighteenth centuries, and subsequently by the technologism of the nineteenth and twentieth centuries. The trappings of judicial or regal authority – be these symbolic objects, doctrines of process or techniques of performance – continue to represent eternal justice and reason. Beyond the material and bodily elements of this performance, there are also doctrines of the role of the judge and the decision-making process which they are to go through, which frame the performance as distinctively as the bench and the insignia of the courtroom. This out-of-body manifestation of justice *qua* system frames the judge's presence with a material architecture and system of signs, serving simultaneously to dignify the judicial body and to distract attention from it.

The secular compact between the Christian church and the state, inspired first by Christianity's suspicion of the temporal powers, was worked out between the twelfth and the eighteenth centuries. In locating independent sources of authority in the church and in the state, law played a key role. First, it was the guarantee of republican freedom from

arbitrary rule and judgement; then it was to be adjudicated by a power separated from that of the executive. The decision-making power is to be separated from the executive power, the power of deliberation from that of enforcement, the reason of judgement from the will to act. Franz Neumann described the separation of legal and executive power as an irreconcilable opposition between formal law and absolute sovereignty, and Fred Dallmayr (1992: 292) saw this as an 'aporia [carried] into law itself', which must be composed of a 'political' (*voluntas*) and a 'material' (*ratio*) dimension.

Conclusion

The western image of law as a transcendent guarantee of freedoms, a limit on human power, is portrayed as something which is not human. Whether it is represented as that part of man which is God, as that force deriving from long tradition, from reason, or from natural justice, western law has denied its human origins by employing a theoretical apparatus originally deriving from medieval theology. When the law must take on human form, in the moment of pronouncing judgement, we encounter another distinction of theological origin: the judge is at once set apart from his or her human nature, becoming no more than the mouthpiece of the law. At the same time, the judge is set apart from the executive power. In a move reflecting the separation of church and state, we find the separation of powers: the will of the executive separated from the reason of the judge. I have shown above how these divisions were modelled on the mystery of the dual nature of Christ, as both God and man. I have also suggested that Montesquieu's classic formulation of the separation of powers into executive, legislative and judicial followed the tripartite logic of the Holy Trinity.

Behind the theoretical justifications, which may change from one era to another as the influence of the church or other intellectual currents ebb and flow, there exist powerful metaphors, images and material expressions that are less prone to change. These have been encountered, in the foregoing analyses, in urban form, in imagery of heaven and earth and the Holy Spirit, and in the place of the judge in courtroom architecture. In each case, premodern and Christian practices survive into modern times, and their influence can be seen in contemporary practices. If theories may come to appear archaic, and be left behind as outdated epistemologies, their ontological expressions and undercurrents have vastly greater staying power.

Agamben (2008: 33–34) has referred to the effect of such long-running and deep-seated expressions as a 'paradigmatic ontology', noting that such paradigms have neither a beginning nor an original form (or *archê*), but rather that 'every phenomenon is the origin, each image is archaic'. The enduring social and political power of artefacts, inanimate objects, and cultural practices has been asserted by Gagliardi (1990), explored by

Latour and Weibel (2005) and analyzed by Geertz (1983: 124), who encourages us:

> to look for the vast universality of the will of kings (or of presidents, generals, führers, and party secretaries) in the same place as we look for that of gods: in the rites and images through which it is exerted.

We have identified one of the first manifestations of the separation of sacred from secular in the early Christian spatial practices of 'switching off' the power of Roman civic space, while turning acts of worship inward to a sacred space distinct from the temporal. Even with the renewal of various forms of civic space, the distinction of spiritual and political spaces generally persists in the spatial semiotics of contemporary cities (Mohr 2006; Mumford 1966).

The image of the Holy Ghost, or some divine inspiration, was seen to persist from the eleventh to the fourteenth centuries, transformed as it was into a symbol of wisdom, reason displacing divinity as the transcendent source. Up to the present, in courtrooms in Britain, Canada and Australia, the mysterious symbol of the coat of arms of the state or monarch occupies the equivalent position above the head of the judge. This provides continuity with the notion of the dual nature of Christ, and the paradoxical relationship of the judicial and executive powers. In drawing attention to the materiality of the courtroom performance, the processes of law display a seemingly impersonal process in which the role of any particular judge is only coincidental. But if we blink, as on waking from a dream, and refocus on that materiality we see the physical body of the judge in a central and indispensable place in the whole procedure. This opens the way to a fresh view of the legal condition. Divine law, natural law, reason and positive law, so finely distinguished at the level of epistemology, are all clothed in the same ontology. Whether the judicial decision works by applying reason or a rule, the will of God or the intention of the legislators, it can only be manifest through the body of the judge and it is always authorized by the material setting. Here ontology meets epistemology.

It was noted above that when moving from the religious to the temporal sphere, clerics were to display the insignia of their order. Acting in a secular role, they were nonetheless to show a sign of their religious affiliation. Agamben (2008: 78) proposes that the mark itself persists as a signature that can enact certain effects in the social world, like the performative power of a signature on a document. In the Renaissance tradition of Ficino and Paracelsus, natural objects such as plants, constellations or planets had powers over our physical condition and social affairs as a result of their physical similitude to body parts or to aspects of the human condition. Bianchi (1987) points out that this is not an influence at a distance, but it is possible because of the ontological identity between the different objects: plants and body parts, planets and human capacities.[6] Drawing on

this same ontology of powers, Agamben sees secularism acting, as it did for the cleric bearing his insignia, as a signature that marks the affairs of state with their theological origins. Agamben (2008: 77) suggests this as a means of cutting through the debates between Schmitt (1985: 36), who saw theological origins as a perpetual justification of exceptional powers, and Löwith's (1949: 191) suspicion of the influence of religious millenarianism in the interpretation of human history. For Agamben, secularism is not a *concept* which is argued to one end or another in contemporary history and politics, but a *signature* that continues to effect political powers through its existence. While Schmitt wished to employ the fictitious powers of myth, and Löwith wished to critique its influence, at the level of a conceptual critique (Barash 2000: 123–30), Agamben wants to unearth the power it exerts by its very persistence.

The devices of law and political theology that I have been describing have some of the characteristics of myths. Fitzpatrick (1992: 24), citing Edmund Leach, refers to myths as devices intended to resolve problems 'which are, by their very nature incapable of any final resolution'. Like myths, the theological devices of secularism operate not as arguments for or against particular public policies, but as a residue, through their continued existence. The myth of the rule of law detached from human will serves to resolve the otherwise irresolvable contradiction of the dual nature of law. By separating these two natures institutionally and constitutionally, the judiciary is able to assume the mantle of channelling the transcendent law. Resting on the theory that there could be an empire of laws and not of men, it required the judges to be removed from their own human natures.

These elaborate devices would have no use or meaning in an intellectual tradition which has no need to deny the human origins of law. The origins of law in human flesh only became shameful when they were set against a transcendent ideal which justifies the law. There was no such ideal in either Roman *lex* or Greek *nomos* (Arendt 1973: 187). I will leave it to others to relate these observations to contemporary non-Christian traditions, addressing my final remarks to the implications for secularism.

Contemporary western secularism is depicted as the state turning away from religion: the state has no role in religion, nor religion a role in the state. Religious concerns can be denied political salience, even as religious symbols are excluded from the secular realm. We see these arguments when a south-western Sydney council refuses consent for an Islamic school on 'planning and development grounds' (ABCTV 2008), or when French law bans the wearing of conspicuous signs of religious affiliation in schools.[7]

My argument is not that secularism has no place in political or legal decision-making. It is rather that an unexamined secularism retains its theological origins beneath the surface, masking other approaches, interests, and histories. In this paper I have demonstrated that secularism itself grew out of Christian theological traditions. I have pointed to some of the

theological traces that remain in the legal traditions that have been spawned by this movement. The archaeology of knowledge is not a substitute for the living tradition: the origins of ideas do not determine their application. Yet in this case I would like to point to parallels between the repressed history of secularism, with its the overlay of non-religious terms substituting for religious ones, and the application of secularism as a contemporary western policy. Having covered the traces of its Christian sources, secularism is seen as a universal ideal. Yet the application of secularism, like its origins, also often masks a specific approach. Secularism, having grown from and with Christianity, often seems to be blind to it. Would the Camden Council have refused a Christian school on planning and development grounds? Would the Conseil d'état even have become aware of a nun's habit?

I do not attempt to answer these hypothetical questions, but to open the possibility that there may be historical and ontological reasons why secularism has a certain tunnel vision, based in its origins and the persistence of certain theological practices and paradigms. Once we become aware of those reasons it may be possible to explore new compacts between states and churches, between churches and churches, and of each with civil society.

Notes

1 '…già nel *Principe* del Machiavelli (1513) la parola appare a pieno diritto, anzi sacralizzata' ('Stato' in Gianni 1988).

2 I have referred elsewhere to the state's 'excess of signification over denotation … characteristic of the floating signifier [that] *means* more than we can ever *say*' (Mohr 2006: 240).

3 Rousseau was explicit on the link between republicanism and the rule of law: 'Any state which is ruled by law I call a "republic," whatever the form of the constitution; for then, and then alone, does the public interest govern and then alone is the "public thing," or *res publica* a reality' (*Social Contract*, quoted in Dallmayr 1992: 288).

4 Placentinus's description of the temple of Justice follows Anselm chronologically: Placentinus died nearly one hundred years after Anselm. It may also follow intellectually. In a footnote to his description of Placentinus's temple, Kantorowicz (1957: 108) notes that a 'less philosophical variety of *templum Iustitiae* is described by Anselmus de Orto'.

5 'Thus the canonists' identification of imperium with jurisdictio corresponded to the living constitution of the ecclesiastical polity. The church was a *Rechtstaat*, a state based on law. [The limitations imposed by secular polities on religious authorities] fostered something more than legality in the *Rechtstaat* sense, something more akin to what the English later called "the rule of law"' (Berman 1983: 215).

6 'If man can cry, speak, desire and reproduce, that is not because Chronos, Hermes, Aphrodite and the Sun influence him from the outside, but because he is himself already Chronos and Aphrodite, Hermes and the Sun' (Bianchi 1987: 27).

7 'signes ou tenues par lesquels les élèves manifestent ostensiblement leur appartenance religieuse' (Conseil d'état).

3 The future of secularism

A critique

Margaret Davies

Introduction

Secularism means different things to different people in different contexts: it is a layered, ambiguous, and politically contested term. Is Australia a secular society? That depends, of course, on what 'secularism' describes – a religiously neutral political and legal structure, the non-religious nature of public debate in political and moral issues, or the agnosticism of the population. Does secularism entail the complete removal of religion from the public sphere, or is it compatible with a reasonably high profile for religion in policy debate and formation? Is secularism, like democracy, aspirational as much as factual, requiring constant vigilance and protection in the face of those who would deliberately blur the boundaries between religion and public discourse? Or are those boundaries already and inevitably blurred?

My aim in this paper is to identify some of the uncertainties surrounding the concept of secularism and to defend a version of secularism which is consistent with a reasonably high level of engagement between religion and the spheres of politics and civil society. By some, it is said that the more dogmatic and fundamentalist versions of secularism go too far in promoting the total exclusion of faith-based perspectives from the public domain. Those who hold a religious belief may feel forced to disguise or disavow it when they participate in public life. Others argue that softer and more liberal manifestations of secularism have not gone far enough, and point to the disproportionate influence of religious lobby groups on policy formation, the use of public money – including tax concessions – to support religion, the informal and often only partly visible cultural preference for Christian principles within western polities, and the seemingly immovable residue of establishment religions in some formal settings such as opening (Christian) prayers in Parliament. Both perspectives – that secularism has gone too far and that it has not gone far enough – have credibility. This is not a contradiction, but rather a recognition that secularism can and should operate differently in different areas of public life.

I approach these issues as a feminist and with a view to promoting the interests of women and sexual minorities. I will argue that a pluralist or participatory secularism is in the interests of promoting diversity, and allowing dissent to emerge both within and beyond religious communities. At the same time, there are areas where formal entanglement between religion and the state has been allowed to persist, undermines democratic participation, and is indefensible.

Secularization and secularism

Secularism in the west has often been understood as a process rather than a static state of affairs. This process, known as 'secularization', has traditionally been understood as an aspect of the political and social modernization which resulted from the Enlightenment. By the early twentieth century many scientists and philosophers had rejected religious belief, regarding it as an irrational superstition of ignorant times. Secularization is a narrative of the gradual and inexorable separation of religious institutions from state institutions. Such institutional separation is accompanied at the level of social, cultural and political discourse with the replacement of religious authority and influence with more rational, enlightened, scientific and evidence-based authority. At the individual level, secularization is associated with a decline in personal religious belief and observance.[1] As one prominent theorist describes the traditional secularization story, 'modernization is the causal engine dragging the gods into retirement' (Stark 1999: 251).

Until the 1980s, many western legal, sociological and political theorists would have accepted the view that our secularization – while not complete – was rather advanced. At the institutional level religion is, as it should be, largely confined to the private sphere and the sphere of privately organized communities – although there are obvious variations across the west. Many nations have some constitutional method of ensuring the separation of religion and the state and many demand equal treatment of religious institutions and of individuals on the basis of their religion. Even where state religious institutions remain, these have, as in the UK and Scandinavia, been increasingly regarded as subordinate to the political process rather than definitive of it – *under* the authority of the state, rather than determining political agendas.[2]

At the cultural and discursive level, secularization means that public life ought to be increasingly shaped by non-religious, rational discourse, and that political debate ought to avoid explicitly religious reasoning. In this model of social change, Christianity is regarded as part of a western cultural history which has left some clear residue in political processes, but is of decreasing significance in our political present. Any political influence held by religious interests is more than counteracted by the interests of secularists and agnostics. Swatos and Christiano summarize this view, dating from Max Weber, as follows:

> At most, the 'religious point of view' will be treated as one among many competing claims to authority. Priests, ministers, rabbis, and mullahs are less sought for solving world problems than economists, physicists, and political scientists, while psychologists, social workers, and medical doctors are the societally recognized experts at the individual or microsocial level.
>
> (Swatos and Christiano 1999: 212)

As I will indicate, the general picture of secularization as a description of socio-political change has been subjected to very considerable pressure from various directions in recent years. For a start, the historical and sociological narrative of secularization has been criticized as descriptively inaccurate: although religion and the state have become more separate at the institutional and perhaps the discursive level, modernization has not necessarily resulted in a consistent and widespread decline in individual religiosity (Stark 1999). Moreover, in Australia, elsewhere in the west and indeed throughout the world, political events and public debate have recently been characterized by an intensified religious consciousness. This is due, in part, to the increased profile of fundamentalisms as well as to the heightened visibility of non-Christian, and in particular Muslim, communities in both international and domestic contexts.

The narrative of secularization is underpinned by a normative goal – the attainment of secularism. Secularism is the *telos* or end of secularization, or where our socio-political evolution is apparently headed towards in the future. Whether or not a particular nation or legal system counts as 'secular' in the present obviously depends on the definition of that term. At the most general level, secularism simply means the separation of religious institutions and the state implying some measure of (if not total) mutual non-interference. The state should not interfere in religious matters or prefer one religion to another, and nor should any religion have undue influence over the state. However, such a general definition of secularism obscures many uncertainties and controversies. Must religion be confined entirely to the private sphere, meaning, for instance, that public debate and government activity should not be influenced by religious feelings or beliefs? Should public holidays be observed only for non-religious reasons? Should all references to supernatural beings be removed from official documents? Should state-sponsored institutions such as schools and universities be free of religious symbolism (for instance as they are in nations such as France and Turkey: cf. Scott 2005)? On what basis, if at all, should a secular state provide tax benefits and even direct support to religious groups? What counts as a 'religion' for these purposes?

The claim that a particular system is or should be 'secular' might be regarded as a matter of degree or even an aspiration which is impossible to achieve in practice. Is the United States, which has strong constitutional separation between religion and the state but a politically very influential

Christian lobby more or less secular than the UK, which has an established religion, but where religious political influence appears to be comparatively less? Is Australia secular, with its weak constitutional principle of state impartiality towards religion, which coexists with parliamentary prayers and church services, Christian public holidays, tax benefits for religious (and overwhelmingly Christian) organizations, influential religious lobby groups, exemptions from aspects of discrimination law for religious groups, reference to 'Almighty God' in the constitutional preamble, and vocal fundamentalists?

Feminism and secularism

From the 1970s and the 'second wave' of western feminism, the mainstream feminist view has on the whole accepted the narrative of secularism and secularization and positioned itself as external to religion. This stands in contrast to the first wave of feminism, which included many Christian women who used their religion to pursue what might now be seen as a politically narrow agenda or to correct the gender biases of mainstream Christianity. Elizabeth Cady Stanton's *Woman's Bible*, originally published in 1898, is a good example (Stanton 1999). However, with one or two high-profile exceptions such as Mary Daly (Daly 1968; Daly 1973), it is hard to think of a post-war feminist working from a position internal to a religious tradition whose work has been influential within the mainstream of women's studies and feminist scholarship. Daly of course did not remain a Christian feminist: her feminist radicalism and the intransigence of Catholic dogma led to her transition from Christian to 'post-Christian' to a more neo-pagan-identified feminism (Daly 1984). The tone set by the second wave was decidedly anti-Christian and anti-religious. Simone de Beauvoir commented that 'Christian ideology has contributed no little to the oppression of woman' even though 'there is in the Gospel a breath of charity that extends to women as to lepers…' (de Beauvoir 1972: 128). Robin Morgan also made the point strongly in the introduction to her 1970 anthology *Sisterhood is Powerful*, defending her decision to include a chapter by Mary Daly about the Catholic Church while neglecting critique of other religious organizations:

> … although every organized patriarchal religion works overtime to contribute its own brand of misogyny to the myth of woman-hate, woman-fear, and woman-evil, the Roman Catholic Church also carries the immense power of very directly affecting women's lives everywhere by its stand against birth control and abortion, and by its use of skillful and wealthy lobbies to prevent legislative change. It is an obscenity – an all-male hierarchy, celibate or not, that presumes to rule on the lives and bodies of millions of women.
>
> (Morgan 1970: xix)

For Morgan, all 'organized patriarchal' religions contribute to the oppression of women, but Catholicism stands out for its extremism and the dogmatic nature of its positions regarding questions of sex, sexuality, and equality, and also for its power to enforce those positions through resistance to legal reform and church hierarchy.

It is not difficult to understand why second wave and subsequent feminism has taken such a dim view of Christianity. Christianity traditionally promoted (and often still promotes) several variations on what was nonetheless a basic theme of suspicion of women, fear of sexual expression, and loathing of the body (see generally Becker 1992: 459–69). For a start, Christianity was a key source of the broader cultural mythology which categorizes women dualistically. The perfect Mary was held out as a role model for women and especially mothers, while Eve's responsibility for human sin was inherited culturally by women as their daily burden (Daly 1973: chapter 2). Women's subordination to men in both the public and private spheres was (and still is, by some) justified by scriptural sources such as Paul's claim that the 'head of the woman is the man' (1 Corinthians 11:3) or the creation story which has Eve coming from Adam's rib – and hence the creation of the feminist journal *Spare Rib* (Genesis 2:21–23). In the 1970s church officials and hierarchies were still almost exclusively male, and discussion about the ordination of women priests was only at an early stage in non-Catholic and non-Orthodox churches. This is a topic upon which the current Catholic hierarchy still completely forecloses debate, in the face of continued if somewhat internally repressed criticism (cf. Zeller 2003). From the second wave onwards, of course, the question of reproductive control and general control over one's body has been central to feminism. In contrast (and to state the obvious), Christianity has tended to be anti-abortion and anti-choice while mainstream Catholicism was and remains anti-abortion, anti-choice, anti-birth control, and generally anti-feminism, while nonetheless proclaiming that it is not anti-woman.[3] Homosexuality was (and still is, by many Christian and other religious groups) regarded as a sin, and the 'family' is frequently defined in a rigidly nuclear and patriarchal fashion (see generally Buss and Herman 2003). For feminists wishing to promote equality, human rights, and autonomy, it is therefore easy to see why traditional Christian belief has appeared to be regressive and obstructive, rather than offering a useful path for women in the contemporary world.

Mainstream feminism has of course not ignored questions of religion, but the approach has generally been that of the external critic of religious institutions and religious mythologies. Even though many parallel arguments to those made by secular feminists have been put by feminists within religious organizations,[4] a distance has been maintained between religious and non-religious feminisms. Secular feminism has had little evident public contact with a more specifically reformist religious feminism. While many religious organizations have responded positively to feminist calls

for equal respect and involvement and have promoted not only tolerance but also positive recognition and acceptance for gays and lesbians, homophobic and misogynist attitudes have been more than kept alive by the rise of various Christian and other fundamentalisms.

Like secularism generally, feminist secularism can take a more dogmatic form – or what some have called a fundamentalist secularism – in that it demonstrates an intolerance towards religion especially as it is manifested in public or civil society arenas. Or it can take the more liberal form, where religion and religious symbolism are accepted and even welcomed at least in so far as they are compatible with general liberal principles. Liberalism's limits of tolerance are of course not always coherent, and tolerance and intolerance are constantly in conflict within liberal contexts. Nonetheless, secularism has been and remains an important strategic point of departure for feminist and gay and lesbian activists because it makes any religious grounding of homophobia, patriarchy, and the control of women's bodies politically irrelevant and severs institutional religious authority from morality. Therefore, the clear advantage of secular political debate for feminism is that it sidelines religiously conservative rationales for discrimination and control. The potential disadvantage is that in doing so it may also sideline feminist and other progressive dissent within religious communities, and neglect opportunities for feminist alliance across religious boundaries.

This is illustrated by the recent development of a more global consciousness within western feminism, and the impact this has had on the intersection between feminism and religion. Interestingly, there is more engagement between secular western feminism and the Islamic women's movements at the present time than there has ever been between secular and explicitly Christian or Jewish (or any other) feminisms. There are political reasons for this, as well as semantic, cultural and 'standpoint' reasons. Global political events have clearly led to heightened awareness of the Islamic world and of Islamic communities within western nations. The position of Muslim women (or the essentialized Muslimwoman: Cooke 2008) has been an intense site of interest for feminists as well as for other commentators. Much debate has, of course, been over highly visible social markers of religious difference, such as the Muslim imperative for women to dress modestly. *Hijab* can be seen as a symptom of the oppression of Muslim women (whether enforced or internalized), a political statement against western imperialism, a liberation from the demands of female beauty as defined by the male gaze, and/or vastly overestimated in significance (Ahmad 2008). Among western critics, concern, and sometimes hysteria, over women's dress is sometimes motivated by genuine feminist disquiet over what can appear to be a lack of choice for Muslim women, by an ideologically fundamentalist secularism which promotes complete exclusion of *any* religion or religious symbolism from the public sphere, or by other historical and political factors too complex to explain

in detail here (but see e.g. Najmabadi 2006; Winter 2006). On the other hand, the preoccupation with *hijab* is also clearly at times motivated by fear of the Islamic 'other' concentrated into one of its most visible symbols (a fear and 'othering' which is accompanied by a convenient forgetting that veiling/unveiling and being passed from father to husband remains prevalent in ritual form in western wedding ceremonies).

More important than discussions over the meaning of veiling, however, is that, with others, Islamic women's movements have challenged the simplistic dichotomy of cultural rights and gender rights. Some liberal feminists have warned against recognition of cultural (and within this, religious) rights on the grounds that this legitimates practices and values intrinsically oppressive to women, an argument which reflects the general secularism of mainstream feminism (Okin 1999; Shachar 1998; cf. Razack 2007). However, as many others have made clear, the argument that gender rights are necessarily in conflict with group rights essentializes cultures, erases the western cultural context of rights, and rewards those who hold the power to insist upon 'authentic' and unquestionable representations of their religious or cultural beliefs (Razack 2004; Tamale 2008; cf. Post 2003). In doing so it negates the existence of dissent within cultural or religious groups and tends to silence or erase the views of those who would promote gender equality within the group.

Although there is little doubt in my mind that organized religions – at least in the Abrahamic genre – still generally promote a gendered and unequal view of the family, of women's role in the public sphere, and of the ability of women to participate in religious institutional structures, there is significant dissent counteracting these views (MacDougall 2005; Mir-Hosseini 2003). While the reasons behind feminism's rejection of 'organized patriarchal religion' are straightforward, it is arguably not religion per se which is problematic for women, but rather religiously based promotion of insularity and dogmatism (Wilson 2002) and the consolidation of socio-religious power in mystically defended male-dominated religious hierarchies.

Critiques of secularism

In recent years, the story of western secularism has been challenged and a more complicated picture has emerged than that which assumed a simple march of progress towards a clear separation between religion and the state. There are several points of departure for these critiques: first, that the story of secularization imposes a rather simplistic historical narrative on what has been an uneven, complicated and ambiguous process; second, that even in the most secularized nations some formal residues of state endorsement of religion remain and these are strangely resistant to secularization; third, that, in fact, the boundary between religion and culture is blurred, meaning that it will always be difficult to separate religion from

the cultural and therefore political fabric of a society;[5] and finally, at the level of personal involvement in political discourse, it is unreasonable and probably impossible to demand that people should wear two hats – the private religious one and the public rational one. Rather than separation, the aspiration ought to be for honesty and clarity in political discourse rather than dogmatic non-religiosity.

First, then, there is doubt over the accuracy of the secularization thesis as a description of social change. The story of secularization harnesses a typically Eurocentric narrative of political progress, which has as its objective the elimination of all forms of irrationalism and superstition from public life. Logically, modernization ought to lead to declining levels of faith and strong privatization of religion. Arguably, this narrative entered academic discourse as an untested assumption, ideology, or even dogma. By the mid-1980s, the secularization thesis was under attack, Jeffrey Hadden arguing persuasively that secularization had become a sociological assumption, itself sacralized:

> As I interpret the history of sociology and the social sciences, our understanding of how the process of modernization has unfolded has carried paradigmatic status right from the dawn of the social sciences. Secularization has always been an integral part of this paradigm; its status was so obvious that it scarcely constituted a problematic issue requiring empirical investigation. In a word, secularization was more than taken-for-granted; *the idea of secularization became sacralized.*
>
> (Hadden 1986–87: 588)

On this view, secularization is a creation myth of social science, evidence of academic and intellectual wish-fulfilment, rather than describing a general social trend. Of course, elements of the secularization story are defensible: the western world *has* seen a trend towards functional differentiation of different social spheres, including religion and law/politics, and principles of impartiality *have* been incorporated into constitutional law (Stark 1999: 252; Swatos and Christiano 1999: 214). At the same time, there is apparently little evidence supporting the view that individual belief has declined over the twentieth century, and indeed evangelical and fundamentalist beliefs seem to have increased, not necessarily in Europe, but in the United States and elsewhere in the world (Habermas 2006; Jupp 2008; Swatos and Christiano 1999: 215–16). Indeed, Habermas comments that the United States, once seen as the exception to the secularization theory, is now looking more like the global norm, while Europe's more evidently secularizing tendencies are in fact exceptional (Habermas 2006: 2). In the longer term, it has been argued that secularization presupposes a mythical premodern 'age of faith': while religious organizations may have had greater political influence in the middle ages than they do now, it is wrong to assume that general populations were more pious (Stark

1999: 255–60). At the level of public discourse, in recent years there has been an intensification in the consciousness of religion, and arguably an increase in the visibility of religious influence in public life. In general, secularization is uneven, contradictory, and expressed differently in different national, cultural, and local settings (Jensen in this volume). Secularization is a general name for a wide variety of different social movements.

Therefore, while secularization has undoubtedly played an important role in western political and legal histories, this has clearly been a fragmented and non-linear process. The idea of a gradual evolution towards secularism is a myth. Even in the most secularized nations, the process remains incomplete. A second criticism of the current state of secularism, therefore, is that even institutional and formal separation of religion from the state has not been achieved in many of the western nations routinely thought of as guided by secular principles. It is often assumed that at the institutional political level western democracies are governed by a primarily secular ethos. There has certainly been a trend throughout the west towards separating religion from the state and promoting impartiality in the state's treatment of various religions. Nonetheless, western secularism is often rather superficial and in many respects hypocritical. Formal ties between religion and the state still occur in some countries such as the UK and some Nordic countries. Other countries discriminate between religions by designating less powerful religions as sects, and by establishing organizational and membership criteria for state recognition (Stinnett 2005). Secularism is also undermined in the political process, with varying degrees of explicit and informal influence (Maddox 2005). In Australia, for instance, we still have parliamentary prayers and church services, observances which on the whole reinforce Christian symbolism and rhetoric in a governmental setting and are indefensible in a religiously plural and partly atheistic democracy.[6] Several efforts to abandon or modify the prayers to accommodate parliamentarians and represent community members who are not religious or not Christian have been unsuccessful.[7] And there are serious questions to be asked about the extent to which public money and tax concessions ought to be used to support institutions which are exempt from provisions of fundamental human rights instruments such as anti-discrimination legislation.[8] Religious organizations in Australia hold tax-exempt status even for their business activities, a feature of the taxation system which has recently been reviewed (Wallace 2008).[9]

A third, more conceptual, problem for secularism relates to the difficulty of separating religion from both culture and the deep structure of our political systems. The notion of secularism forecloses at the outset any thought that brings religion fully into contact with the polity. But this foreclosure only serves to mask the fact that Christianity is woven into the cultural and political fabric of the west (where 'west' is understood both as a

geopolitical location and as an ideology translated into other contexts). To give a mundane example: are observances like Easter and Christmas religious or cultural (Davies 2008: 80, 85)? Everyone knows that they have religious origins, pagan as well as Christian. Yet the observance of these 'holy' days is prevalent among the non-religious (albeit usually those of Christian heritage), and more associated with chocolate and presents than sacrifice and new life. It can hardly be doubted that such celebrations have moved into the cultural sphere and have themselves become – to a degree – secularized. There is no clear line demarcating a place where religion stops and the wider society begins. The interweaving of religion and culture – the mutual influence between cultures and religions – occurs not only at the level of obvious cultural rituals, but in the structures and values of societies and their political systems. Secularism itself, of course, crystallized from religious conflict and legal change in Europe: the neutrality of the state can therefore be seen as a religious construct, designed to prevent inter-religious conflict and religious freedom. In the movement from natural law to positive law, legal authority was transferred from the Christian God to Leviathan and then to the *demos* or the people. But the monotheistic and dogmatic singularism is still very evident.

Finally, at the micro-level of political and other forms of public decision-making, the impossibility of distinguishing between public and private, secular and religious forms of reasoning and normativity has become evident in renewed debate over so-called moral issues. Is it realistic to demand that a person can and should separate their religious beliefs from their publicized political views? Some have argued that secularism demands that policies, laws and values ultimately be based upon non-religious, secular, or 'public' reasons, rather than on purely religious reasons. Audi, for instance, says that 'in a free and democratic society, people who want to preserve religious and other liberties should not argue for or advocate laws or policies that restrict human conduct unless they offer (or at least have) adequate secular (nonreligious) reasons to support the law or policy in question' (Audi 1989: 278; Rawls 1997: 784). This view, however, raises some problems, not least of which is the difficulty and arguably impossibility of separating public and secular reasons from private ones. While reasons are voiced and disseminated in public, they are formed and motivated in private on the basis not only of logic, but also on the basis of personal values, desires, emotions and beliefs.[10] These internal motivations may be broadly based on religion or culture and are modified by a huge variety of conscious and unconscious factors (education, prejudice, a dogmatic attitude, experiences, and so forth). These private reasons may be fully articulated in public, or they may be disavowed and cloaked in the secular language of public discourse. For instance, politicians sometimes seem anxious to reaffirm publicly their Christian credentials while at other times religious belief is downplayed. To put the problem at its simplest, there is still a human with all of her or

his fragments, complexities and strange coherence, who crosses the alleged divide between secular and sacred.

Some of the critiques of secularism simply imply a lack of rigour in its pursuit. Secularism is still in process, still on its way forward, insufficiently practised and defended. A first response to these critiques is that we just have to do it better: we have to seek out the formal and informal expressions of religion in our political and legal institutions and demand – as far as practicable – that reasons expressed in the political arena can be reasonably held regardless of faith. From a feminist point of view, continuing to follow the path of secularization may yet hold promise. There is certainly much that can still be done in terms of insisting upon formal neutrality in the state's relationships with religion.

However, such a position assumes the *possibility* of secularism: it underestimates the entanglement of culture and religion, and the unavoidable fact that the public/private and secular/religious distinctions are undermined by the unseparated nature of the person. Western culture and politics are influenced by the structures, forms and values of Christianity, at the same time as a growing element of the culture rejects overt religious dogma. Trying to take the Christianity out of western secularism may be impossible, just as achieving a non-culturally biased, non-gendered, or non-racialized cultural positioning is impossible. The best we can do is to critique, listen and construct alternative stories designed to problematize the power of Christian normativity within so-called secular discourse. Therefore, a second approach appreciates the fundamental impossibility of secularism, but holds on to it as an aspirational objective. And a third approach suspends secularism, either in the interests of re-establishing its credentials as the only feasible political settlement, or in the interests of articulating alternatives. It is the possibility of an alternative construction of secularism which I wish to explore in a moment.

The risks of privatization

Mainstream secularism, like liberal thought, maintains a strong public/private distinction: religion is seen as an area of private freedom. It is perhaps here that there is a rupture in the homogeneity of liberalism and secularism. Liberal secularism traditionally resigns religious freedom to an arena of private choice and private or at least non-political action. And yet the liberal emphasis on equality of all subjects in the political and legal spheres leads to an obvious contradiction. Why should secularists and atheists have their world view reflected in the political structures, while those who reject secularism have their political voices marginalized (Bader 1999; Taylor 1998: 603)? Even if secularism can be, as liberal thinkers somewhat dubiously presume, a neutral political medium, it still favours certain types of political voice over others and is therefore partisan – perhaps not as blindly partisan as a theocracy, but nonetheless favouring

certain voices over others. Does this not undermine both equality and democracy?

Moreover, if secularism is a mask for a diluted but recognizably Christian ethos, the issue of bias seems even more problematic. The political space of secularism becomes a battleground between those who would try to cleanse secularism of its association with Christian normativity, and those who, intentionally or unintentionally, make use of repressed but nonetheless influential religious form and values. Or, as Marion Maddox argues, removal of religion from the public sphere may lead to oppositional and extremist politics:

> One result of officially excluding religion from public life is that its adherents feel increasingly alienated, and can eventually feel driven to increasingly extreme measures in order to be heard. Alternatively, religion can slip into power, scarcely noticed (here a prayer breakfast, there a lobby group; here a tweaking of the education system, there a diminution of legal protections for sinners). Once there, it assumes divine right, pushing other kinds of faith and non-faith to the margins.
>
> (Maddox 2005: 309)

From a feminist point of view there is another issue, which parallels and of necessity overlaps with the broader question of cultural recognition. The exclusion of religion from the definition of the political as such may have the effect of homogenizing, normalizing and reducing internal religious difference – at least when looked at from the dominant political perspective. Privatization or segregation of religion may in other words compartmentalize religions and reinforce the power exercised by religious leaders against dissidents, critics and reinterpreters, including feminists and other subversives of course, who are relegated by secularism to a position exclusively *within* a faith group. In other words, by excluding religion from political discourse, do we also silence those who would challenge dominant interpretations of their faith? One way this can occur is by virtue of the fact that political recognition and accommodation of religion may be mediated through religious hierarchies – those already with the power to define the meanings of their faith – who are generally not feminists or even women, much less sexual minorities. More generally, the gaze of the dominant culture is directed to the faith as a singular entity – as though it has clear boundaries and a distinct identity, which is rarely the case. Privatization of religious views provides an opportunity for a political hegemony to essentialize and normalize religions, in much the same way that cultures are essentialized, normalized and othered by an identitarian gaze. The effect may be stronger in the case of religion, however, because of the formal existence of religious 'leaders' who are designated as defenders of their particular faith. This in turn can lead to ignorance of intra-religious diversity.

In fact, the picture I have described here is more stark than the reality, at least in the western liberal societies. The fact of intra-religious difference and diversity does in fact enter the mainstream and secular consciousness, but its place is fragile and frequently counteracted by a much more hegemonic – and usually conservative – presentation of religion.

Pluralist secularism

The present form of western secularism therefore poses two problems. First, it is (of necessity) implanted in a cultural context which is basically Christian, and therefore struggles to fulfil its own ideals: a self-reflective secularism must resign itself to a level of contradiction and demand extra vigilance in promoting secularization as a process. Second, the action of relegating religion to private lives or private communities may enhance the conditions for suppression of alternative and subversive religious voices from the wider understanding of religion. For these reasons, liberal theory's recent efforts to reformulate secularism in tandem with cultural recognition are in my view inadequate (Barnhart 2004; Rawls 1989; Rawls 1993). The difficulty with unified models or universal frameworks for accommodating cultural and religious diversity is that, in order to ensure neutrality of treatment, the framework itself must be impartial, which is impossible in principle. Liberalism often envisages itself as a neutral medium, able to deal equally and impartially with all competing interests, but this is far from convincing. In addition, unified models often construct difference on the political scale as the difference between cultures or the difference between religions, without taking into consideration intersectional, hybridized and intercultural forms of difference. Invariably, the political locations of subjects are far more complex, shifting, and inessential than a universalized politics based on group identification can allow for.

Rather than delineate a single undifferentiated space of political action with a correspondingly single concept of law, therefore, it is far more productive to think about the *polis* as constituted of a multiplicity of interrelated publics. As James Bohman has argued, we need to see the political sphere as referring to *demoi*, not a single *demos*, peoples rather than the people (Bohmann 2005). 'Peoples' in this plural sense does not refer to a set of distinct groups, since this is just a variation on the singularity of 'the people'. Rather, 'peoples' have their heritage, their class, their religion, their alliances, and their sexuality, their boundaries, their frailties, and their emotional attachments, and are not politically reducible to a single public space.

For these reasons, I argue for a pluralized secularism. In keeping with my comments about the need for religious dissidents (feminists, sexual minorities and others) to achieve a political voice within a secular political order, it is important that any 'pluralism' be understood as a 'pluralist

pluralism', that is, a pluralism which acknowledges intra-group as well as inter-group diversity and dissent. The following principles provide a starting point (but not a unified model) for such a pluralized secularism:

- Institutional separation and non-discrimination must be strengthened and maintained in order to minimize official promotion of religion, in particular mainstream religions. Strengthening separation of religion and the state relies upon ongoing critical evaluation about the nature and meaning of political practices and policies which encourage or promote religion, such as parliamentary prayers or granting tax-exempt status to organizations which fail to sign on to community values as enshrined, for instance, in anti-discrimination law.
- The basic secular value that norms applying to all citizens should be based on non-religious grounds must be preserved. Because of the difficulty of drawing a clear distinction between culture and religion, such a principle also relies upon constant evaluation of the current (rather than historical) justifications for a particular norm.
- In an effort to minimize the motivations for disingenuously 'secularist' political discourse, space is needed across the public sphere for the whole spectrum of political speech, including diverse religious expression.
- Most importantly, this includes space for religious dissidents and those proposing an alternative interpretation of their religion.
- We need to find ways to flatten religious hierarchies in civil society and political discourse, meaning that the speech of all religious citizens (and not just undemocratically appointed religious leaders) is equally valued.
- Religious-based law-creation within limited communities should be considered.
- Secularism must be regarded as a process rather than a static state of affairs.

Conclusion

I do not mean to suggest by any of this that it is desirable to dilute secularism in either the legal or the political sphere. But I do believe that secularism as aspirational theory/practice can coexist with a public sphere in which a multiplicity of religious voices are heard and valued. The risks of thereby legitimizing conservative discourses which work against women are certainly real. On the other hand, the risks of excluding religious discourse and its diversity from public spaces include disempowering dissident voices, as well as providing a secular cover story for – frequently conservative – religiously motivated public actors.

Notes

1 This rough division of secularism and secularization into three domains – institutional, discursive, and individual – is influenced by but does not map onto Karel Dobbelaere's much more nuanced and sociologically grounded taxonomy of the macro (structural, formal), meso (subsystem, organizational) and micro (individual) levels of secularization. I have not adopted the terms of the sociological debate here because it is more complex than my discussion requires. Moreover, I focus here on legal and political dimensions of secularism and secularization (Dobbelaere 1999).
2 Jensen analyzes such arrangements in this volume.
3 See generally Ratzinger (2004), who rejects the idea that women's biology is their destiny: after all, if not mothers, women can be virgins – a role which 'refutes any attempt to enclose women in mere biological destiny' (Part III, para 13). Mary, of course, is alleged to be both mother and virgin therefore encapsulating both of women's roles.
4 For instance, by Catholics for Choice, a Catholic organization in favour of abortion choice and reproductive control www.catholicsforchoice.org.
5 Mohr makes a similar critique in this volume.
6 See e.g. Standing Order No. 50 of the Australian Senate and Standing and Sessional Order No. 38 of the Australian House of Representatives, which deal with the reading of prayers at the commencement of each sitting, including the Lord's Prayer. Similar provisions exist in the state parliaments, although not all specify the wording of the prayers (e.g. Western Australia).
7 Motions to abolish parliamentary prayers were lost in the New South Wales Legislative Council in September 2003, and in the Australian Senate in March 2006. On the former occasion, one member noted a degree of sectarian tension raised by the Christian prayer: 'It is not a particularly spiritually uplifting experience in this Chamber each day to hear Catholic members stop reciting the prayer at one point because they do not want to recite the Protestant part and, when we get to the Protestant bit, to hear some members reciting that part of the prayer more loudly. Indeed, one member refuses to say anything other than that Protestant bit at the end of the prayer to try to keep the volume consistent throughout the prayer' (the Hon. Tony Burke, Member of the NSW Legislative Council, Tuesday, 16 September 2003 (Legislative Council Hansard)). In contrast to defined prayers, business in the Australian Capital Territory Legislative Assembly commences with the Speaker asking members to pray or reflect silently on their responsibilities: the indigenous owners of the land are also acknowledged at the commencement of each session.
8 See, for instance, *Anti-Discrimination Act* 1977 (NSW) s 56, providing certain general exemptions to religious bodies. The provision has been considered in *OV v QZ (No 2)* [2008] NSWADT 115 (1 April 2008). In that case the exemption was held not to protect a religious body from the refusal by its foster care agency to consider a homosexual couple as foster parents.
9 Australia's Future Tax System Review, 2008–9 ('Henry Tax Review'). At the time of writing the review panel had delivered its report to the government, but it had not been publicly released. The terms of reference were broad, although they did not specifically mention the not-for-profit sector.
10 Jürgen Habermas comments that 'many religious citizens would not be able to undertake such an artificial division [i.e. between secular and religious justifications] within their own minds without jeopardizing their existence as pious persons' (2006: 8). At the same time, Habermas expects politicians and holders of public office to distinguish between secular and religious reason. For a religious perspective on the question, see George (2006).

Part II

Religion and speech in a pluralist society

4 Religion, multiculturalism and legal pluralism

Frank Brennan

I am a member of a religious ethnic group which used to be persecuted and discriminated against in the time of my ancestors in colonial Australia. I am a citizen who does not experience such persecution or discrimination. The treatment of Muslims in Australia especially since September 2001 provides opportunity to reflect on how best through law and public policy to protect the rights and dignity of all citizens in the modern multicultural Australia. I will put three arguments. There is scope for greater reliance on a minority's religious beliefs when resolving conflicts within the minority group who have multiple affiliations, not just to the state. Attempts to outlaw religious vilification have been misplaced, while the usual checks and balances of a state under the rule of law can help counter populist animus against a religious minority wanting to live out their religious faith in the public square.

The historical perspective of the Irish Catholic Australian

James Denney, a nineteenth-century Scottish Presbyterian theologian, described Australia as 'the most godless place under heaven'. The label is often taken as the starting point for discussing the religious sensibility of Australians who live in a markedly secular, materialistic society founded upon the dispossession of the Aborigines who had inhabited the land for up to 60,000 years. The British were the first Europeans to establish a permanent settlement on Australian soil. They erected a penal colony at Sydney Cove, asserting sovereignty in the name of the British Crown on 26 January 1788. No treaty was negotiated with the Aborigines. No compensation was paid for the state-authorized confiscation of their lands. It took until 1992 for the Australian courts to recognize that Aborigines had rights to land which survived the assertion of British sovereignty.

The first Australian Catholics were convicts, mostly Irish. For the first 15 years of settlement, they were denied sacraments in their own Church. It was a Church of laity. The first public mass was not celebrated until 15 May 1803 by James Dixon who was also a convict, having been deported for providing assistance to Irish rebels. Military officers were in attendance

at that first mass to ensure that the Irish did not use the sacrament as a foil for seditious conversations. In March 1804, 300 Irish convicts rebelled at Castle Hill on the outskirts of Sydney. Convinced that the Mass was being used as a cover for seditious gatherings, the authorities restricted Dixon's freedom to minister to his fellow Catholics.

The first official Catholic chaplains did not arrive until May 1820, so the Australian Catholic Church was virtually without clerical leadership for its first three decades. Priest shortages are nothing new in Australia, especially in the vast outback areas. These two official chaplains were the Irishmen Philip Connolly and John Joseph Therry. Therry developed an eye for real estate around Sydney, being able to leave fabulous bequests to the church, including the Jesuits. Governor Macquarie laid the foundation stone of St Mary's Cathedral, Sydney, on 29 October 1821.

In 1832, John Hubert Plunkett was appointed Solicitor General for the Colony of New South Wales – the first Catholic to be appointed to a significant position in any Australian colony. Later after the Myall Creek Massacre which claimed the lives of 28 Aborigines in 1838, Plunkett intervened to ensure that the white killers were duly tried, convicted and hanged for their wrongdoing – the first time whites went to the gallows for the murder of Aborigines. In that same year, an English Catholic convert Caroline Chisholm arrived in Australia and became a tireless worker for newly arrived migrants who had to make their way overland to remote bush locations. No bushranger dared to take her on. When she died, her tombstone carried the epithet: 'The emigrant's friend'.

The bishop of Mauritius who had jurisdiction 'over New Holland with the adjacent islands' appointed William Ullathorne, an English Benedictine, as his Australian Vicar General in 1833. Then two years later, another English Benedictine, John Bede Polding, was appointed Australia's first bishop. He was bishop for 42 years including the long years of the Irish famine and the exciting years of the Australian gold rushes. His dream of a Benedictine mission had to be replaced by a local church staffed by many Irish priests and diverse religious orders. The Passionists opened the first mission to Aborigines in 1843. In his 1856 pastoral letter, Polding wrote: 'Before all else we are Catholics; and next, but a name swallowing up all distinctions of origin, we are Australians'.

In 1866 Mary Mackillop, Australia's first saint, established the Sisters of St Joseph who were dedicated to the education of children in country towns. She was not afraid to take on the bishops. One bishop even excommunicated her briefly for insubordination in 1871. In the 1870s there was a very spirited debate about education in the Australian colonies. The state was committed to providing education which was compulsory, free and secular. The Catholic Church responded by setting up a comprehensive Catholic school system which was ultimately staffed by 13,000 sisters and 2,000 priests and brothers. Not until the 1960s would the battle for 'state aid' be won. Now the Catholic schools are staffed largely by the laity and

paid appropriate salaries with significant state funding assistance. The annual enrolment in Catholic schools is 691,000 students of whom 175,000 are non-Catholic.

When the six British colonies federated to form the Commonwealth of Australia on 1 January 1901, 850,000 of the 3.7 million inhabitants were Catholic. Catholics are now the largest religious grouping in Australian society – 26.6 per cent (5 million persons). Catholic hospitals have been built in all major cities. Catholic secondary schools receive students from the Catholic primary schools which are in most suburbs. There was no move to establish Catholic universities until the 1980s. There are now two Catholic universities.

In 1995, the Governor-General swore the oath of office in the presence of the Chief Justice, witnessed by the Prime Minister. All three had an Irish Catholic heritage. So I come from a religious and ethnic tradition which, once marginalized in the early days of the Australian colonies, is now mainstream insofar as any religious and ethnic tradition is mainstream in twenty-first-century Australia.

The debates are no longer about the unreliability of the Irish convicts, the seditious nature of Catholics, and the untoward influence of Rome in Australian politics. Now the focus is on the place of any religion in the public square, the relevance of any religious views in shaping law and public policy, the limits of Shari'a law for law-abiding Australian Muslims, the utility of religious vilification laws in fostering community harmony in an increasingly multicultural society, and how best to manage the diverse motivations of local communities wanting to limit the lawful activities of Muslim groups. Transcending my own history, religion and ethnicity, I offer some theoretical perspectives on these issues. As ever in Australia, the disputes often relate to real estate, the desire of the religious minority to educate their own, the extent to which the majority might ridicule and despise the religious minority, and the limits on the power of the religious authorities.

The theoretical perspective of the lawyer with religious affiliation and interest

The relevance of any religious views in shaping law and public policy – nationally and internationally

I concluded my recent book *Acting on Conscience* (2007) with a recollection of a mass celebrated in the Dili Cathedral in 2001 by Nobel Peace Prize winner Bishop Belo. As Director of the Jesuit Refugee Service, I was working in East Timor at the time and I accompanied Bishop Belo at the mass which was offered in thanks for the contribution by the departing Australian International Force for East Timor (INTERFET) forces. At the end of the mass, Major General Peter Cosgrove spoke. The burly

Australian commander was accompanied by a translator who was a petite Timorese religious sister in her pure white habit, replete with veil. Before them was the usual international media scrum which accompanies such events in countries overrun by the United Nations (UN) and international non-governmental organizations (NGOs). Cosgrove recalled his first visit to the cathedral three months earlier when he was so moved by the singing that he realized two things: the people of East Timor had not abandoned their God, and God had not abandoned the people of East Timor. His words surprised me, and I knew that this speech would not be reported back in Australia. We don't do religion in public this way. It was unimaginable that an Australian military leader would give such a speech back in Australia. If he were a US general, we would expect it. As I said in *Acting on Conscience*:

> Here in Australia, the public silence about things religious does not mean that religion does not animate and inspire many of us. It just has a less acknowledged place in the public forum. It marks its presence by the reverence of the silence. That is why we Australians need to be so attentive to keeping politics and religion in place. Each has its place and each must be kept in place for the good of us all, and for the good of our Commonwealth.
>
> (Brennan 2007: 231)

Many citizens wanting to contribute to the shaping of law, public policy, and conversation in the public square come to the task with their own comprehensive world view. For some, that view is shaped not just by their culture and intellectual peers but also by their religious tradition and beliefs. Just because they do not often talk about such tradition and beliefs outside their own circle of family and friends does not mean that these traditions and beliefs are left at home once the individual steps into the public square. Launching his new foundation on 'Faith and Globalisation', the recently retired British Prime Minister Tony Blair observed that his former press secretary, Alastair Campbell, was fond of saying: 'We don't do God'. Blair clarified that Campbell 'didn't mean that politicians shouldn't have faith, just that it was always a packet of trouble to talk about it'. In British culture, as here in Australia, Blair notes that 'to admit to having faith leads to a whole series of suppositions, none of which are very helpful to the practising politician'. He listed five suppositions:

> First, you may be considered weird. Normal people aren't supposed to 'do God'. Second, there is an assumption that before you take a decision, you engage in some slightly cultish interaction with your religion – 'So, God, tell me what you think of City Academies or Health Service Reform or nuclear power' i.e. people assume that your religion makes you act, as a leader, at the promptings of an inscrutable

> deity, free from reason rather than in accordance with it. Third, you want to impose your religious faith on others. Fourth, you are pretending to be better than the next person. And finally and worst of all, that you are somehow messianically trying to co-opt God to bestow a divine legitimacy on your politics.
>
> (Blair 2008)

Whether or not our comprehensive world view is shaped by religious influences, it informs the development of values which the individual expresses and lives out in their own specific cultural context. From those values, one is able to articulate principles which underpin informed and considered decision-making about laws, public policies and public deliberation on contested social questions.

I am writing this paper in Phnom Penh. I know that there will be a chasm of non-understanding between me and the average Cambodian about our respective values because I am an Australian Irish Catholic and they are Buddhist Khmer. But each of us, especially with persons sharing something of our religious and cultural backgrounds, would be able to articulate values, derive principles, and propose suitable laws, public policies and modes of public argument about contested social issues. We could practise politics, that art of compromise in the public square where laws and policies are determined in relation to the allocation of scarce resources or in relation to conflicts where there is no clear resolution either in principle or by the exercise of legitimate authority. Public policy would include the allocation of preferences by the state extended to individuals who can avail themselves of state benefits while avoiding state burdens. Laws would include the dictates of the state enforceable against individuals who fail to comply voluntarily.

Recently the Archbishop of Canterbury Rowan Williams gave an insightful address at the London School of Economics pointing out that rights and utility are the two concepts that resonate most readily in the public square today. But we need concepts to set limits on rights when they interfere with the common good or the public interest, or dare I say it, public morality – the concepts used by the UN when first formulating and limiting human rights 60 years ago. These concepts are no longer in vogue, at least under these titles. We also need concepts to set limits on utility when it interferes with the dignity of the most vulnerable and the liberty of the most despised in our community. Addressing the UN General Assembly to mark the anniversary of the *UN Declaration of Human Rights* (UNDHR), Pope Benedict XVI said:

> This document was the outcome of a convergence of different religious and cultural traditions, all of them motivated by the common desire to place the human person at the heart of institutions, laws and the workings of society, and to consider the human person essential

> for the world of culture, religion and science … [T]he universality, indivisibility and interdependence of human rights all serve as guarantees safeguarding human dignity.
>
> (Benedict XVI 2008)

It would be a serious mistake to view the UNDHR stipulation and limitation of rights as a western Judeo-Christian construct.

Mary Ann Glendon's *A World Made New* (2001) traces the remarkable contribution to that document by Eleanor Roosevelt and an international bevy of diplomats and academics whose backgrounds give the lie to the claim that any listing of human rights is a western, culturally biased catalogue of capitalist political aspirations. The Frenchman Rene Cassin, the Chilean Hernan Santa Cruz, the Christian Lebanese Adam Malik and the Chinese Confucian Peng-chun Chang were great contributors to this truly international undertaking. They consulted religious and philosophical greats such as Teilhard de Chardin and Mahatma Gandhi. Even Aldous Huxley made a contribution. It was the Jesuit palaeontologist Teilhard who counselled that the drafters should focus on 'man in society' rather than man as an individual (Glendon 2001: 76). The drafters knew that any catalogue of rights would need to include words of limitation. The Canadian John Humphrey who was the Director of the UN secretariat servicing the drafting committee prepared a first draft of 48 articles. The Australian member of the drafting committee Colonel Hodgson wanted to know the draft's underlying philosophy. Humphrey refused to answer, replying 'that the draft was not based on any particular philosophy; it included rights recognised by various national constitutions and also a number of suggestions that had been made for an international bill of rights'. In his memoirs, Humphrey recounts: 'I wasn't going to tell him that insofar as it reflected the views of its author – who had in any event to remain anonymous – the draft attempted to combine humanitarian liberalism with social democracy' (Humphrey 1984: 40). It is fascinating to track the different ways in which the committee dealt with the delimitation of rights. Humphrey proposed that an individual's rights be limited 'by the rights of others and by the just requirements of the State and of the United Nations' (art 2, Humphrey draft in Glendon 2001: 271). Cassin proposed only one limitation on a person's rights: 'The rights of all persons are limited by the rights of others' (art 4, Cassin draft in Glendon 2001: 276). The 1947 Human Rights Commission draft stayed with Cassin's one stated limitation on rights: 'In the exercise of his rights, everyone is limited by the rights of others' (art 4, Human Rights Commission draft, June 1947, in Glendon 2001: 281). By the time the draft reached Geneva for the third meeting of the Human Rights Commission in May 1948, there was a much broader panoply of limitation on individual rights introduced, taking into account man's social character and re-introducing Humphrey's notion of just requirements of the state: 'In the exercise of

his rights every one is limited by the rights of others and by the just requirements of the democratic state. The individual owes duties to society through which he is enabled to develop his spirit, mind and body in wider freedom' (art 4, Geneva draft in Glendon 2001: 289). The commission then reconvened for its last session at Lake Success in June 1948. They approved the draft declaration 12–0. Glendon notes: 'Pavlov, the Ukraine's Klekovkin, and Byelorussia's Stepanenko, in line with instructions issued before the meeting had begun, abstained and filed a minority report' (2001: 120). The commission moved the words of limitation to the end of the draft and married the limitation to a statement about duties. Article 27 (which ultimately became Article 29) provided:

> Everyone has duties to the community which enables him freely to develop his personality.
>
> In the exercise of his rights, everyone shall be subject only to such limitations as are necessary to secure due recognition and respect for the rights of others and the requirements of morality, public order and general welfare in a democratic society.

So here in the heart of the modern world's most espoused declaration of human rights came an acknowledgement that we all have duties and not just rights, duties to the community which, perhaps counter-intuitively, enable us to develop our personalities. I doubt that phrase was coined by Eleanor Roosevelt. At the commission, it was said that 'morality' and 'public order' were 'particularly necessary for the French text, since in English, "general welfare" included both morality and public order' (Daes 1983: 72). At one stage it was suggested that the term 'public order' was too broad, permitting the grossest breach of human rights by those committing arbitrary acts and crimes in the name of maintaining public order. The commission considered the substitution of 'security for all' for 'public order', similar to the twenty-eighth article of the American Declaration of the Rights and Duties of Man, but decided to stay with the more jurisprudentially certain European term 'public order' (Daes 1983: 72). But also we have the acknowledgement that individual rights might be limited not just for the preservation of public order and for the general welfare of persons in a democratic society, but also for morality – presumably to maintain, support, enhance or develop morality in a democratic society. Sixty years later, these words of limitation might not sit with us so readily in California.

The draft then went from the Human Rights Commission to the Third Committee of the UN General Assembly. The committee convened more than 80 meetings to debate the declaration which it renamed the *Universal Declaration of Human Rights* rather than International Declaration of Human Rights. The limitation clause was considered during three of those meetings. The limitation clause was further amended:

> Everyone has duties to the community *in which alone the free and full development of* his personality *is possible.*
>
> In the exercise of his rights *and freedoms*, everyone shall be subject only to such limitations *as are determined by law solely for the purpose of securing* due recognition and respect for the rights *and freedoms* of others and *of meeting* the *just* requirements of morality, public order and *the* general welfare in a democratic society.
>
> These rights and freedoms can in no case be exercised contrary to the purposes and principles of the United Nations.

Though there was much discussion of amendments to omit references to 'morality' and 'public order', the Third Committee decided to retain these terms as to delete the mention of them 'would be to base all limitations of the rights granted in the declaration on the requirements of general welfare in a democratic society and consequently to make them subject to the interpretation of the concept of democracy, on which there was the widest possible divergence of views' (Daes 1983: 74–75). As amended, this article was carried by 41 votes to none, with one abstention (Daes 1983: 75). The General Assembly then voted to adopt the universal declaration with 48 in favour, eight abstentions and none opposed.

The Australian government is now following the UK, Ireland and New Zealand with a commitment to social inclusion giving all Australians the opportunity to:

- secure a job;
- access services;
- connect with family, friends, work and their local community;
- deal with crises;
- have their voices heard.

It may be in this grey area between rights and utility that social inclusion has work to do – work that was previously distributed amongst concepts such as human dignity, the common good, the public interest and public morality. Regardless of religious affiliation, individuals and community groups living under law in the state are entitled equally to connect with their local community, to deal with crises in religiously and culturally appropriate ways, and to have their voices heard unfiltered by those media outlets that transmit only the secular.

In the legal academy there is presently a great evangelical fervour for bills of rights. This fervour manifests itself in florid espousals of the virtues of weak statutory bills of rights together with the assurance that one need not be afraid because such bills do not really change anything. It is a pleasant change for me to be cast in the role of the sceptical agnostic insisting that the promised parousia of enhanced human rights protection be backed by hard evidence of tangibly different outcomes. Those of us with

a pragmatic, evidentiary approach to the question are now well positioned given that two of Australia's nine jurisdictions (Victoria and the ACT) have now enacted such bills of rights with the double assurance that nothing has really changed and that things can now only get better. It will be interesting to hear an assessment of the socially inclusionary benefits of a bill of rights which provides lawyers and judges with greater access to the realm of policy and service delivery.

Once we investigate much of the contemporary discussion about human rights, we find that often the intended recipients of rights do not include all human beings but only those with certain capacities or those who share sufficient common attributes with the decision-makers. It is always at the edges that there is real work for human rights discourse to do. Here in Cambodia I met a woman concerned for the well-being of a handful of children who had both cerebral palsy and profound autism. There are more than enough needy children in Cambodia. It is not surprising that it is the religious person who has a keen eye for the neediest, not only espousing their rights but taking action for their well-being and human flourishing. Speaking at the London School of Economics on 'Religious Faith and Human Rights', Rowan Williams, the Archbishop of Canterbury, has boldly and correctly asserted:

> The question of foundations for the discourse of non-negotiable rights is not one that lends itself to simple resolution in secular terms; so it is not at all odd if diverse ways of framing this question in religious terms flourish so persistently. The uncomfortable truth is that a purely secular account of human rights is always going to be problematic if it attempts to establish a language of rights as a supreme and non-contestable governing concept in ethics.
>
> (Williams 2008a)

No one should pretend that the discourse about universal ethics and inalienable rights has a firmer foundation than it actually has. Williams concludes his lecture with this observation:

> As in other areas of political or social thinking, theology is one of those elements that continues to pose questions about the legitimacy of what is said and what is done in society, about the foundations of law itself. The secularist way may not have an answer and may not be convinced that the religious believer has an answer that can be generally accepted; but our discussion of social and political ethics will be a great deal poorer if we cannot acknowledge the force of the question.
>
> (Williams 2008a)

Once we abandon any religious sense that the human person is created in the image and likeness of God and that God has commissioned even the

powerful to act justly, love tenderly and walk humbly with their God, it may be very difficult to maintain a human rights commitment to the weakest and most despised in society. It may come down to the vote, moral sentiment or tribal affiliations. And that will not be enough to extend human rights universally. In the name of utility, the society spared religious influence will have one less impediment to limiting social inclusion to those like us, 'us' being the decision-makers who determine which common characteristics render embodied persons eligible for human rights protection. Nicholas Wolterstorff says: 'Our moral subculture of rights is as frail as it is remarkable. If the secularisation thesis proves true, we must expect that that subculture will have been a brief shining episode in the odyssey of human beings on earth' (Wolterstorff 2008: 393).

The limits of Shari'a law for law-abiding Australian Muslims

The recognition of universal human rights and the proper delimitation of such rights does not entail all persons being treated the same before the law of the state. Rowan Williams occasioned great controversy in his 2008 Address at the Law Courts of London entitled 'Civil and Religious Law in England: A Religious Perspective'. Much as Benedict later did at the UN, he set out the claim that universalist claims to human rights and human dignity are derived from comprehensive world views informed by religious tradition. More inclusive than Benedict, he broadened his attention from Christianity to include Judaism and Islam, observing:

> It never does any harm to be reminded that without certain themes consistently and strongly emphasised by the 'Abrahamic' faiths, themes to do with the unconditional possibility for every human subject to live in conscious relation with God and in free and constructive collaboration with others, there is no guarantee that a 'universalist' account of human dignity would ever have seemed plausible or even emerged with clarity.

But then he went on to deal with the issue of British Muslims being able to invoke Shari'a law:

> I have been arguing that a defence of an unqualified secular legal monopoly in terms of the need for a universalist doctrine of human right or dignity is to misunderstand the circumstances in which that doctrine emerged, and that the essential liberating (and religiously informed) vision it represents is not imperilled by a loosening of the monopolistic framework. At the moment, one of the most frequently noted problems in the law in this area is the reluctance of a dominant rights-based philosophy to acknowledge the liberty of conscientious opting-out from collaboration in procedures or practices that are in tension with the demands

> of particular religious groups: the assumption, in rather misleading shorthand, that if a right or liberty is granted there is a corresponding duty upon every individual to 'activate' this whenever called upon.
>
> (Williams 2008b)

Williams has no difficulty conceding that citizens can boast 'multiple affiliations' within the nation state. There are instances when a citizen ought to be entitled to resolve a conflict within his own ethnic community or according to the laws and tradition of her own religion.

Consider the case of traditional punishment in a remote Aboriginal community in contemporary Australia. If an Aboriginal person has caused injury to another Aboriginal person and both persons consider themselves bound by their local customary law, why shouldn't they be able to agree to resolve the conflict between them according to that local customary law? Why should they have recourse to the state-authorized courts only? The matter would be different if one of them were not a practitioner of the local customary law or even if one of them expressed a preference for dispute resolution before the state-authorized court. But if all parties affected by the injury and party to the injury agree to alternative dispute resolution according to local customary law, how could there be any undue interference with the rights and dignity of all parties? If the injury warranted a traditional punishment such as a spearing in the thigh, the accused may still prefer that punishment to months or years in detention in a jail situated well away from his traditional country and family. The European Australian who regards spearing as barbaric should at least concede that an Aboriginal Australian might regard long-term detention in a prison cell equally or more barbaric.

There is a need for some limits on when those with multiple affiliations might opt out of the state's regulatory regime. Though an old Aboriginal man might claim traditional marriage rights to a young girl whose family expresses no objection, the state still has an interest ensuring that the young girl's dignity is protected by banning marriage without informed consent and requiring court approval for any marriage of an under-age girl, regardless of the race of herself and suitor.

Citizens who are Jewish often exercise the option to have their marriage and commercial disputes resolved by the *beth din* rather than approaching the state courts. When a marriage has broken down, a Jewish couple might opt to have the rabbi or the *beth din* resolve conflicting claims. In principle, there can be no objection to a Muslim couple having recourse to Shari'a law to resolve such claims. Rowan Williams's lecture occasioned great controversy at the time of its delivery. Five months later Lord Phillips, Lord Chief Justice of England and Wales, who had chaired the Archbishop of Canterbury's lecture, gave his own endorsement:

> It was not very radical to advocate embracing Sharia Law in the context of family disputes, for example, and our system already goes a

> long way towards accommodating the Archbishop's suggestion. It is possible in this country for those who are entering into a contractual agreement to agree that the agreement shall be governed by a law other than English law. Those who, in this country, are in dispute as to their respective rights are free to subject that dispute to the mediation of a chosen person, or to agree that the dispute shall be resolved by a chosen arbitrator or arbitrators. There is no reason why principles of Sharia Law, or any other religious code should not be the basis for mediation or other forms of alternative dispute resolution. It must be recognised, however, that any sanctions for a failure to comply with the agreed terms of the mediation would be drawn from the laws of England and Wales. So far as aspects of matrimonial law are concerned, there is a limited precedent for English law to recognise aspects of religious laws, although when it comes to divorce this can only be effected in accordance with the civil law of this country.
>
> (Philips 2008)

The state can still insist on monogamy, prohibiting the contracting of more than one marriage and criminalizing bigamy. That is because the state has a legitimate interest in restricting marriage such that equal dignity and respect is accorded all parties to the marriage. There would be good reasons of public policy for the state to refuse to apply any sanction to a religious person wanting to enforce an agreement involving a polygamous marriage.

There is division within the Australian Muslim community about polygamy. On 26 June 2008, the National Imams Council issued a statement affirming that as:

> Australian Muslims we recognise that the *Marriage Act 1961* prohibits polygamy and we are not proposing any changes to this law. In our experience, relationships outside the legally recognised marriages among the Muslim community in Australia are neither a significant nor a widespread practice. The priority of the imams of Australia is to focus on strengthening existing marriages and encouraging harmony within the family unit. It is also our sincere wish to focus on issues that unify rather than those that create division and dispute within the Australian community.

Sydney imam Taj Din al-Hilali attacked the imams' council claiming that their statement 'contradicts the wisdom and teachings of God' (O'Brien 2008).

State recognition of monogamy and criminalization of bigamy are justified even when some citizens hold religious beliefs permitting bigamy. The civil law can properly override religious belief and practice when such belief or practice is counter to the fundamental equality of all citizens.

Religious individuals and organizations can make a good case for opting out of the state regime when there is no risk to the fundamental human rights or human dignity of any party affected by the action. There are sure to be borderline cases. For example, the UK has now decided to insist that all registered adoption agencies within the jurisdiction, including Catholic ones, provide a non-discriminatory service such that adoption would be as readily available to a same-sex couple as to a man and woman wanting to adopt a child into their family. It would be no interference with the rights or dignity of gay and lesbian couples if some religious adoption agencies acting on their religious beliefs gave preference to married heterosexual couples when determining adoptive parents for a child, provided always that the agency was acting in the best interests of the child. This is a case of legislative overreach by the state insisting on uniformity of policy contrary to the religious beliefs of some without the demonstration of a countering public interest such as the protection of the fundamental rights and the equal recognition of the human dignity of all citizens.

The utility of religious vilification laws in fostering community harmony in an increasingly multicultural society

It is now commonplace in multicultural societies to have laws which prohibit racial discrimination, with many states having ratified the *International Convention on the Elimination of all forms of Racial Discrimination* (ICERD). Some jurisdictions have supplemented their anti-discrimination measures with racial vilification laws which make it unlawful to engage in conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of a person on the ground of their race. It can even be a criminal offence punishable with imprisonment if the offender intentionally engages in the conduct knowing that the conduct is likely to result in such vilification. Supporters of such legislation have always accepted that the law would be administered in a less than even-handed fashion. It is assumed that the law is directed primarily at offenders from the majority race who are targeting members of a racial minority. The law though applicable is not primarily intended to apply to members of a racial minority vilifying members of the majority race. For example, in Australia, we have had some spirited debates about Aboriginal native title rights during which Aboriginal leaders have labelled politicians and public servants racist scum using their word processors as the modern equivalent of strychnine to kill off Aboriginal people and culture. Racial tolerance and political resolution of the dispute at hand would be hardly enhanced by police authorities stepping in to preclude such political rhetoric when tempers are running high in the public forum. Those of the majority race are expected to roll with the punches. Neither is the law often if ever applied to inter-racial disputes between warring racial minorities. In multicultural Australia, minorities from overseas are encouraged to leave their

inter-racial disputes offshore. But when tempers do flare there is little to be gained by an even-handed application of racial vilification laws to resolve Greek–Macedonian or Serbian–Croatian disputes on the streets of Melbourne. When a Palestinian tries to invoke vilification laws to have a state instrumentality prohibit the use of a Jewish logo with an inaccurate map of Israel, the Equal Opportunity Commission is able to rule the complaint inadmissible on the grounds that it is frivolous, vexatious, misconceived and lacking in substance. Even when appealing to a tribunal, the complainant suffers summary dismissal of the complaint.

Three Australian states (Queensland, Tasmania and Victoria) have extended vilification laws to cover religious vilification. Once again the presumption is that these laws will be administered to protect the practitioners of minority religions from vilification by the (Christian) majority. It is not envisaged that they will apply to disputes between religious minorities. Unlike the situation in the UK, these laws are not restricted to criminal prosecution for serious vilification with prosecution having to be instigated by the Attorney-General. For example, in Victoria complaints can be dealt with by the Victorian Equal Opportunity and Human Rights Commission. If the complainant gets no satisfaction there, they can bring proceedings in the Victorian Civil and Administrative Tribunal (VCAT). Originally such proceedings could be instituted without leave of the tribunal. Robin Fletcher, a long-time prisoner claiming to be a witch, instituted proceedings against the Salvation Army claiming that the Salvos' evangelization in prisons amounted to vilification of witches.[1] His case highlighted that the commission's and tribunal's resources could be depleted by considering fairly spurious claims. One is left with the impression that religious vilification laws are so broadly drawn that it is necessary for decision-makers to distinguish between good and bad believers, or at least between moderate and outrageous believers. It is one thing to incite hatred, contempt, revulsion or ridicule on the ground of an objectively identifiable characteristic, namely race. It is another to do it on the ground of the individual's belief or activity. There may be some witches whose religious beliefs are so outrageous to others who are not witches at all, or at least not witches of that type, that very little would be needed to incite others to revulsion or ridicule of their views.

The Victorians have learnt from bitter experience that religious vilification laws are very unwieldy once you attempt to apply them. It is arguable whether they have an educative effect if they are not administered at all or administered only very sparingly. The *Catch the Fire* litigation was a very expensive finger-burning exercise for all parties. After September 2001, the Catch the Fire Ministry of the Assembly of God launched a website on Islam, published newsletters, and offered a series of seminars. The Victorian commission had hired a Muslim staff member who organized for three Muslims to attend one of the seminars in March 2002. They took extensive notes of what the presenters said. When the matter could not be

resolved by the commission in mediation, proceedings were commenced by the Islamic Council of Victoria in the VCAT in October 2003. There were more than 40 days of hearing. The Islamic Council was represented by senior counsel. While the proceedings were on foot, Peter Costello gave an address at a National Day of Thanksgiving service at the Scots Church, Melbourne. In the lead-up to the service, *The Age* had reported criticism of Costello's pending appearance by the Islamic Council of Victoria. Costello took the opportunity to express his strong opinion about the conduct of the *Catch the Fire* litigation and the associated media campaign:

> According to the President of that Council by speaking here tonight I could be giving legitimacy to parties that the Islamic Council is suing under Victoria's *Racial and Religious Tolerance Act* 2001 (the Act).
>
> It is not my intention to influence those proceedings. But nor will I be deterred from attending a service of Christian Thanksgiving. Since the issue has been raised I will state my view. I do not think that we should resolve differences about religious views in our community with lawsuits between the different religions. Nor do I think that the object of religious harmony will be promoted by organizing witnesses to go along to the meetings of other religions to collect evidence for the purpose of later litigation.
>
> I think religious leaders should be free to express their doctrines and their comparative view of other doctrines. It is different if a religious leader wants to advocate violence or terrorism. That should be an offence – the offence of inciting violence, or an offence under our terrorism laws. That should be investigated by the law enforcement authorities who are trained to collect evidence and bring proceedings. But differing views on religion should not be resolved through civil law suits.
>
> (Costello 2004)

Judge Higgins delivered his reasons for decision in the VCAT in December 2004. In a 72,000 word judgement, he upheld the complaint of the Islamic Council. After further discussions between the parties, he then proposed a remedy. Catch the Fire Ministries Inc, and the offending Assembly of God (AOG) ministers Pastor Daniel Nalliah and Pastor Daniel Scot, were to pay for and publish a detailed statement in the mainstream media in these terms:

> This statement is made pursuant to an order of the Victorian Civil and Administrative Tribunal ('VCAT'). In November 2002 the Equal Opportunity Commission of Victoria referred a complaint by the Islamic Council of Victoria against Catch The Fire Ministers Inc, Pastor Daniel Nalliah and Pastor Daniel Scot to the VCAT. On 17 December 2004, the VCAT found the complaint was proven and that

each of the respondents had breached s. 8 of the Victorian *Racial and Religious Tolerance Act* 2001, and further that none of the defences under the Act had been made out. The complaint concerned statements made by Pastor Daniel Scot in a seminar organised by Catch The Fire Ministries and held on 9 March 2002 in Surrey Hills, articles written by Pastor Daniel Nalliah in the Newsletters of Catch The Fire Ministries Inc and an article written by an American called Richard Braidich published on Catch The Fire's website in 2001. The VCAT found the seminar was not a balanced discussion, that Pastor Scot presented the seminar in a way that was essentially hostile, demeaning and derogatory of all Muslim people, their God, their prophet Mohammed and in general Muslim beliefs and practices, that Pastor Scot was not a credible witness and that he did not act reasonably and in good faith. The VCAT found the statements by Pastor Nalliah in the newsletter were likely to incite hatred towards Muslims and sought to create fear against Muslims, that Pastor Nalliah was not a credible witness and did not act reasonably and in good faith. Finally, the VCAT found that the statement by Mr Braidich made no attempt to distinguish between mainstream and extremist Muslims, and incited hatred and contempt towards people who are Muslims, that Pastor Nalliah performed an act inciting hatred and contempt against Muslims by placing this article on the website and that Pastor Nalliah did not act reasonably and in good faith in doing so. Each of the respondents acknowledges the findings of the VCAT that the statements breached the *Racial and Religious Tolerance Act* 2001 (Vic) and will in future refrain from making, publishing or distributing (including on the internet) any statements, suggestions or implications to the same or similar effect.[2]

A year later the Court of Appeal spent two days hearing an appeal against this decision and order. Three months after the hearing, the Court of Appeal unanimously allowed the appeal. Justice Nettle had cause to correct Judge Higgins many times over his findings on the evidence that had led him to the conclusion that Pastor Scot had 'presented the seminar in a way that was essentially hostile, demeaning and derogatory of all Muslim people, their God, their prophet Mohammed and in general Muslim beliefs and practices, that Pastor Scot was not a credible witness and that he did not act reasonably and in good faith'. Justice Nettle painstakingly set out the evidence stating:

Pastor Scot did not say at T4 that that the Qur'an promotes violence and killing.

Pastor Scot did not say at T4–5 that 'Muslim scholars misrepresent what the Qur'an says by varying the emphasis, depending upon the audience'.

> Pastor Scot did not say at T10 that that Allah is not merciful.
>
> Pastor Scot did not say at T10–11 that 'Muslims lie for the sake of Islam and that it is "all right", they have to hide the truth'.
>
> Pastor Scot did not say at T13–14 that Muslims are demons.
>
> Pastor Scot did not say at T14–17 that the practice of abrogation was the cancellation of words from the Qur'an and Hadiths solely to fit some particular purpose or personal need.
>
> Pastor Scot did speak of the concept of Silent Six Jihad, some of which are use of business connections – T16; using money to induce people to convert to Islam – T17; and training of Muslims in Madrassahs [*sic*]. He did not, however, imply that they were a threat to Australia.
>
> Pastor Scot did say at T19 that: 'So when people read that [the Hadith], they study that for six year, seven year, they become true Muslim. And we call them terrorist, but actually they are true Muslim because they have read the Qur'an, they have understood it, and now they are practising it'. But he did not say that that is the connection between Islam and terrorism.
>
> Nor did Pastor Scot say at T23 that Muslims intend to take over Australia and declare it an Islamic nation.[3]

Justice Nettle said:

> [E]ach of the problems to which I have now referred is reflected one way or another in the manner in which the Tribunal dealt with the effect of Pastor Scot's exhortations to his audience to love Muslims despite what he perceived to be the shortcomings of Islam, and to strive to turn Muslims from Islam to Christianity as he conceived of it.

There was much material in the seminar, in the newsletters and on the website which was anything but religious vilification. For example, Justice Nettle quoted the following extract from one of the newsletters:

> We need to love Muslims with all our heart, however difficult it may be. I love them so much – even though I almost lost my life and my family trying to preach to them about Jesus in Saudi Arabia. As I travel and minister I have met many Muslim's [*sic*] who have turned to Jesus from countries such as Iran, Iraq, Saudi Arabia, Afghanistan, Pakistan, Ethiopia, Indonesia, Malaysia, Sudan. Many of them turned to Christ because they met Jesus personally or some Christian dared to tell them that Jesus loves them. Let's love the Muslim, let's reach them to Christ [*sic*] . . .

Father Patrick McInerney, a Catholic priest, who had studied the entire transcript of Pastor Scot's seminar presentation and given expert evidence

about Islam in the tribunal proceedings, finds Justice Nettle's appreciative quoting of Pastor Scot's injunction to love Muslims 'rather odd'. McInerney says: 'Love in its most elementary form is surely the acceptance of the other as they are. However, from the entire context of the seminar it is evident that the preacher's exhortations to love Muslims is not about acceptance at all, but about them becoming something other than what they are; it is about their becoming Christians. I hardly find that a very loving attitude' (McInerney 2008). He is also at a loss 'as to how Justice Nettle came to some of his conclusions'. Appeal judges are not necessarily the ones most expert in determining the theological niceties of what does or does not constitute a fair interpretation of religious beliefs and practices.

The Court of Appeal ordered that the matter be referred back to the VCAT to be determined by another judge without the need to hear the evidence again. It would be necessary for the tribunal to distinguish between the vilification of persons who are Muslims and the expression of strong disagreement and even revulsion, ridicule and contempt for some of the teachings of Islam which are fundamentally inconsistent with the teachings and beliefs of others. The tribunal would need to determine whether the actual audience addressed by an inciter was in fact incited to hatred, contempt, revulsion or ridicule of persons who are Muslim, and precisely because they are Muslim. It is not sufficient or even relevant to determine whether the inciter's remarks are likely to make a reasonable person react adversely to the teachings of Islam even though they might be expected and urged to remain respectful and loving towards those who are Muslim.

After the matter had been remitted to the VCAT, the parties ultimately reached a confidential settlement on 22 June 2007 – five years and three months after the offending seminar, four years and four months after the VCAT proceedings had first commenced, and with legal bills presumably run up to millions of dollars. The VCAT published this agreed statement by the parties:

> Joint Statement of the Islamic Council of Victoria Inc, Catch The Fire Ministries Inc, Daniel Nalliah and Daniel Scot
>
> The Islamic Council of Victoria (the ICV) has reached an agreement with Catch the Fire Ministries, Pastor Daniel Scot and Pastor Daniel Nalliah about the complaint the ICV brought in the VCAT, concerning what it alleged were acts of religious vilification in contravention of s 8 of the Racial and Religious Tolerance Act 2001 (Vic).
>
> Although some of the terms of that agreement are confidential, the parties have agreed to make this joint public statement.
>
> Notwithstanding their differing views about the merits of the complaint made by the ICV, each of the ICV, Catch The Fire Ministries, Pastor Scot and Pastor Nalliah affirm and recognise the following:

1 the dignity and worth of every human being, irrespective of their religious faith, or the absence of religious faith;
2 the rights of each other, their communities, and all persons, to adhere to and express their own religious beliefs and to conduct their lives consistently with those beliefs;
3 the rights of each other, their communities and all persons, within the limits provided for by law, to robustly debate religion, including the right to criticise the religious belief of another, in a free, open and democratic society;
4 the value of friendship, respect and co-operation between Christians, Muslims and all people of other faiths;
5 the Racial and Religious Tolerance Act forms part of the law of Victoria to which the rights referred to in paragraph 3 above are subject.

A welcome statement of principle about religious tolerance, this statement highlights the futility of the years of litigation over religious vilification. There are no grounds for thinking that such litigation does anything to foster greater religious understanding and tolerance, nor to provide greater protection and dignity for the practitioners of minority religions. There will be many Australians who carry a sense of grievance that these two religious pastors have been subjected to the full weight of the law, having to expend much time and resources, only to have the complainants come away with a laudable joint statement about respect and difference.

Fortunately the Court of Appeal decision clarifies that religious vilification laws are not an invitation to legal tribunals to investigate and arbitrate on the teachings of one religious group about the teachings of another religious group. After a comprehensive review of Australia's religious vilification laws, Professor Patrick Parkinson has rightly concluded:

> Australian religious vilification laws in particular, are poorly designed to achieve their goals. They have proven to be controversial and divisive. There has been much opposition to them from people of faith who are law-abiding citizens. There is a real question as to whether the benefits outweigh the costs.
>
> (Parkinson 2007: 966)

While the *Catch the Fire* litigation was playing itself out south of the Murray River, there were moves to introduce similar legislation in New South Wales. Premier Bob Carr strenuously opposed the moves and told Parliament:

> Religious vilification laws are difficult because just about anyone can have resort to them and because determining what is or is not a religious belief is difficult. It can be defined as just about anything. It is

> subjective. It is a personal question. As they are used in practice religious vilification laws can undermine the very freedom they seek to protect – freedom of thought, conscience and belief.
>
> (Carr 2005)

Carr then quoted Victorian church leaders who had expressed reservations about the Victorian law. The Anglican archbishop Peter Watson said he did not want 'the law of the land intruding into places where it has no proper role'. Sue Gormann, the Uniting Church Moderator, said the heads of churches were in agreement and that 'We agreed to have a look at whether this legislation is doing its job. It's clear that in some cases it may not be. The point is not to stop freedom of speech but to ensure safety. We are open to amendments'. Most telling was the observation of Amir Butler, Executive Director of the Australian Muslim Public Affairs Committee, who thought the Victorian law had 'served only to undermine the very religious freedoms' it was supposed to protect. Butler said:

> If we believe our religion is the only way to heaven, then we must also affirm that all other paths lead to hell … yet this is exactly what this law serves to outlaw and curtail: the right of believers to passionately argue against or warn against the beliefs of another.

Even if one were to accept the utility and desirability of racial vilification laws, there is a strong case for stopping short of religious vilification laws or for at least enacting such laws only for prosecution at the behest of the Attorney-General. While it is inherently racist for a person to claim membership of the best race, it is no bad thing for a religious person to claim membership of the one true religion. That is the very point of religious belief. That is what religious people do. Within the great religious traditions, there are strands which urge universal respect and love for all persons regardless of their religious affiliation. But the state overreaches itself when it adapts laws prohibiting vilification on the grounds of a physical characteristic premised on absolute equality of all persons regardless of that physical characteristic to laws prohibiting vilification on the grounds of religious belief when there is no presumption by believers that all religions are equally good and true. How are officers of the secular state to distinguish between the religious belief which might be robustly criticized and some of whose fanatical practitioners might be rightly reviled from those other practitioners who are to be respected regardless of the errancy of their beliefs or the potential of their beliefs to be misconstrued by others for destructive purposes?

Patrick McInerney, though a strong advocate for workable religious vilification laws, concedes from his involvement in the *Catch the Fire* litigation that 'the process and outcome in the case were not satisfactory'. He identifies the core issue which remains unresolved in those jurisdictions without

religious vilification laws and in those jurisdictions where the law results in protracted court battles like the *Catch the Fire* litigation as being the need for laws to protect religious groups from public misrepresentation of their beliefs and activities when such misrepresentation is inaccurate, misleading and derogatory. He continues to see a place for the law reining in the likes of Pastor Scot. Reflecting on the *Catch the Fire* litigation, he says:

> Where I believe the pastor stepped over the line and made himself liable to prosecution, is that he claimed that his presentation was 'true Islam', that if Muslims disagreed with his presentation, then they were either lying (to cover up what they knew to be the truth of Islam until such time as it could be imposed on society, by violence if necessary), or they were ignorant of 'true Islam' and simply did not know their own religion. And he maintained his version of 'true Islam' while also admitting that most Muslims around the world did not conform to it but practised a more conciliatory approach to religion and life.
>
> (McInerney 2008)

Even if there are strong religious tensions and religious misunderstandings in a multicultural society, those tensions will not be resolved, the misunderstandings will not be cleared up, and the adverse effects of the tensions will not be avoided by laws which can be administered by the state arranging for religious practitioners to report on each other, with state tribunals then attempting to arbitrate what is a reasonable portrayal of one religion by the believers of another. There are some places the law should not tread.

The legal channelling of the diverse motivations of local communities wanting to limit the lawful activities of Muslim groups

There have been two interesting case studies on Muslim groups on the outskirts of Sydney seeking planning approval for their religious activities. A comparison of the two cases highlights the benefits of the separation of powers and the utility of planning processes which include professional assessments, democratic consideration, and appeals based on legal criteria other than popular endorsement for a proposed land use.

In 2002, a Muslim group submitted a planning application for a prayer centre in Annangrove. The council planning officer studied the plan and recommended approval. Five thousand, one hundred and eighty-one submissions from 532 households were received, with 5,170 objecting to the proposed development and only 11 in support. The council voted by 10–12 to reject the application. Diana Bain of the Annangrove Progress Association applauded the council's decision:

> The zoning and the majority of the people have chosen to live like this and the majority have spoken and this is a democracy. And I'm really

> pleased that the council took notice of what the majority of the people wanted.
>
> (ABCTV 2002)

John Griffiths, the mayor, explained: 'I have no fear of the Muslims. I have no problem with it. It seems to be that the women in our community that have a problem with it'. He said the outcome could have been different if the Muslim applicants had wanted to start with a small centre primarily for local Muslim residents:

> If they'd been living in a community, if they'd had a little house church first, which is permissible in the shire, and they'd built on that house church and built up and they were in the community it might have been different. But to come from within the shire, but to come to an area where they don't actually live, I just felt that people felt – it was wrong.

The applicants then appealed to the Land and Environment Court. Judge Lloyd concluded 'that the proposed development would be compatible with the rural residential character of the area and would not have an adverse impact on the amenity of the area, including social impact. While I recognise that there is strong community opposition to the proposal and that the residents have *real fears*, these fears must have foundation and a rational basis, which in this case is absent'.[4]

The prayer centre was built. Six years on the owners applied for an extension of the opening hours of the prayer centre. Only four objections were received. The ABC returned to Annangrove to report on the community's reaction to the centre. A typical response came from one of the workers at the local shopping centre two doors away:

> Look I think some people don't like having the prayer house here, but as far as the shopping centre goes they have not disrupted us in any way. They were always very polite, they waited their turn, there was three women working in this shop and never once did they say one nasty word to us. So going by that alone, I've got nothing against them.
>
> (ABCRN 2008)

Meanwhile at Camden a Muslim planning application for the construction of a school for 1,200 students was causing international media attention. This time the council planning office opposed the application on planning grounds. Camden is a rural pocket surrounded by the sprawl of western Sydney. The development pressures on the remaining agricultural land in Camden are immense as the state authorities prepare to increase its population from 50,000 to 300,000 in the next 30 years. The council

published the planning application in October 2007 and received 3,042 responses to the plan, with only 23 in favour. Rallies and protest meetings were convened. The council received letters expressing some concerns about aspects of the proposal from the police, the Roads and Traffic Authority and the Department of Primary Industries. The council voted to reject the proposal purportedly for very technical planning reasons having no connection with the religious affiliation of the applicants nor of the students likely to attend the school were it to be constructed.[5]

The applicants can now appeal to the Land and Environment Court where they will be able to test the validity of the non-religious grounds invoked by the council for the rejection of the application. Meanwhile tempers have calmed. In this case, there would presumably be greater difficulty in convincing the court to overturn the council decision than in the Annangrove case given that this council (unlike the Baulkham Hills Council in the Annangrove case) acted in accordance with the recommendations of the professional council town planners and consistent with the reservations expressed by state instrumentalities not directly accountable to the local council. Camden Mayor Chris Patterson has welcomed the prospect of an appeal claiming the decision was made on planning grounds alone: 'I'm extremely convinced that Camden has made the right decision for this site' (Wilson 2008).

Some people in public life were not quite so convinced about the transparency of the Camden Council decision. Parliamentary Secretary for Multicultural Affairs Laurie Ferguson said: 'You've got a community there with very few Muslims in the immediate area. There's lack of knowledge, lack of interface connection and basic ignorance coming into it. What happened out there does show we need to work with this council to erode this kind of bigotry in that community' (Karvelas 2008). Cardinal Pell when asked to comment on the council decision said: 'Everybody in Australia has the right to a fair go, so do the Muslims. We certainly believe in religious schools' (AAP 2008).

The social impact of a new religious minority in a neighbourhood is one of those issues relevant to democratic resolution of conflict about town planning issues. It is wrong for decision-makers to give added weight to factors mitigating against a planning proposal as a foil for wanting to avoid the new social impact. The social impact is not an irrelevant consideration. But like all considerations it should be treated on its own merits. Once a democratically elected council has made a decision purportedly on town planning grounds unrelated to the social impact of a new religious minority, that minority can be assured that their application will be dealt with by the planning court on the basis that the social impact has no more relevance than explicitly stated or noted by the council.

It would be regrettable if members of the public concerned about the presence of new religious minorities felt they were not given a hearing by

their local councils. It would be even more regrettable if councils responded to local concerns about the same by distorting the application of other standard town planning criteria when determining applications. The check and balance of court review minimizes that prospect and enhances the prospects that even the new religious minority will be given a fair go when it comes to planning approvals for their activities.

Conclusion

Since 11 September 2001, Australians have displayed an increased sensitivity to the demands of Muslim Australians that their perspective on pressing social and political questions be heeded. There is little public sympathy for incorporating Shari'a law into the Australian legal system. But there is no reason in principle why Muslim citizens wanting to resolve their disputes among themselves should not have recourse to Shari'a law with the state providing sanctions for non-compliance with binding decisions provided only that the dispute does not relate to a matter contrary to public morality and the general welfare. Australians are interested in hearing their fellow Muslim citizens explain their aspirations for living a full religious life in the Australian community while continuing to honour the laws and policies of the nation state. There is in place legal machinery which can find the appropriate balance on town planning issues between the social impact of persons of a new religious minority and the disruption caused by any new influx of population to an area not yet developed to its full potential of human occupancy. Religious vilification laws are yet to prove useful in promoting religious and social harmony. In principle, I cannot see how they ever could be useful, even if racial vilification laws are thought justifiable. I note that even the evangelical Equal Opportunity Commission of Victoria saw no role for vilification laws in dealing with the consternation over the 2006 'Muhammad cartoons'. The commission thought it unlikely that the cartoons could be considered vilifying as 'vilification involve[s] serious behaviour that incite[s] hatred towards others and that causing offence through jokes or stereotypical comments [is] generally not serious enough to be considered vilifying' (EOCV 2005–6: 16). The *Catch the Fire* litigation should put a stop to religious vilification laws in Australia. They cannot be administered with sufficient transparency and neutrality and they have yielded no useful outcomes.

There continues to be much room for misunderstanding. Attorney-General Philip Ruddock upset some of the worshippers at the Lakemba mosque when he addressed them on the first day of Eid al-Adha in 2006 in the wake of the Cronulla riots. Quite unexceptionably, he said: 'I think it is important to acknowledge that when you are Australian, as all Australians, you have a responsibility to uphold the laws of this country. If we are able to live in a tolerant society, we have to offer tolerance to others' (Ruddock 2006). Even these measured remarks were interpreted as con-

tempt for Muslim Australians. Keysar Trad, the founder of the Islamic Friendship Association of Australia, was not publicly contradicted by other Muslim leaders when he replied that Ruddock's comments indicated that 'he doesn't have as much respect for Australians of a Muslim background as he should'.

While there are citizens of diverse religious beliefs in a democratic state, there will always be a place for diverse religious arguments and positions in the public forum. Like their fellow citizens they should be free to advocate peacefully their preferred policy positions as competently or foolishly as they are able or as they wish. They should be free to resolve their internal disputes with state sanction provided only that the disputes do not include matters contrary to public morality or the general welfare or inimical to the fundamental human rights and dignity of all persons. They should have confidence that the separation of powers ensures that their own legitimate interests are not overridden by local populist pressures. They should expect to gain little from seeking application of overbroad religious vilification laws which may turn out to be counterproductive. In time they will win the same acceptance and security within the nation state as my religious and ethnic forbears came to enjoy in what many still consider the most godless place under heaven.

Notes

1 *Fletcher v Salvation Army Australia (Anti-Discrimination)* [2005] VCAT 1523.
2 *Islamic Council of Victoria* v *Catch the Fire Ministries Inc (Anti Discrimination – Remedy)* [2005] VCAT 1159, Annexure.
3 *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* [2006] VSCA 284.
4 *New Century Developments Pty Limited v Baulkham Hills Shire Council* [2003] NSWLEC 154, para 71 (30 July 2003).
5 The motion carried by the council:

> ORD01 EDUCATIONAL ESTABLISHMENT AT NO 10 (LOT 1 DP 579345) BURRAGORANG ROAD, CAWDOR
>
> Resolution: Moved Councillor Johnson, Seconded Councillor Funnell that that Development Application DA 895/2007 be refused for the following reasons:
>
> i The proposal is not consistent with the objectives of the zone and special provisions pursuant to Camden Local Environmental Plan No. 48 (Section 79C (a)(i)).
> ii The proposal is not consistent with the provisions of State Environmental Planning Policy (SEPP) 55 – Remediation of Land (Section 79C (a)(i)).
> iii The proposal is not consistent with the general planning consideration of Sydney Regional Environmental Plan No. 20 – Hawkesbury Nepean River (No. 2) (Section 79C (a)(i)).
> iv The proposal is not consistent with the State Government's Metropolitan Strategy and the South West Subregion Draft Subregional Strategy (Section 79C 1(a)(i) and (ii)).
> v The proposal is not consistent with the aims and the planning objectives of Draft State Environmental Planning Policy No. 66 – Integration of Land Use and Transport (Section 79C (a)(ii)).

vi The proposal is not consistent with the objectives and controls of Camden Development Control Plan 2006 (Section 79C (a) (iii)).
vii The development is likely to impact of the natural, built and economic environment of the locality (Section 79C (a) (b)).
viii The site is not suitable for the development (Section 79C (a) (c)).

THE MOTION ON BEING PUT WAS CARRIED

5 Religion and freedom of speech in Australia[1]

Katharine Gelber

Introduction

The question of freedom of speech in relation to religion raises the issue of whether, and to what extent, religious expression is a protected freedom. This can mean both the freedom to express one's religion and freedom from denigration and misrepresentation of one's religious beliefs by others. The most relevant part of the law that deals with this is anti-vilification law, and I will first provide an overview of anti-vilification laws in Australia. This leads to a consideration of the grounds of 'race' and 'religion', which provide incomplete coverage for vilification on the grounds of religious belief. I will explain how religion is a protected ground explicitly in some jurisdictions, and interpretively in others, an analysis that demonstrates that protection to be far from comprehensive.

I then turn to the broader normative consideration of whether religious anti-vilification laws ought to form part of the anti-vilification framework in the contemporary Australian context. This involves outlining an important complaint lodged under Victorian religious anti-vilification legislation. From this arise two central issues to be taken into consideration when considering whether, and the extent to which, religious anti-vilification laws are able to provide assistance to religious identities in preventing or deterring vilification. I argue that these issues present greater difficulties for religious identities wishing to utilize anti-vilification laws to their benefit than other identities, such as racial or sexual minorities. This challenges the usefulness and efficacy of attempting to utilize anti-vilification laws to seek redress for vilification on the ground of religion. The first problem is that in religious discourse it is typical to argue along the lines of 'love the sinner, hate the sin'. The explicit juxtaposition of love and hate in religious discourse can make such discourse difficult to target with anti-vilification laws. Secondly, Australian anti-vilification laws are typically directed at the kinds of negative stereotyping of members of groups that demonstrate an (at least minimal or in-principle) susceptibility to cognition and a rational, educative response. By contrast, proselytizing – preaching with the specific aim of converting others to one's religion – displays a

characteristic unique to religious discourse, namely that of resting in faith. This raises specific challenges for a reliance on anti-vilification laws, because it is not the role of the state to intervene in faith-based discussions to the extent of arguing that a particular belief or faith is wrong. Thus, I argue that vilification based on religion faces particular problems when dealt with in the form of anti-vilification laws, problems that do not always, or as clearly, arise on other grounds.

Anti-vilification laws in Australia: an overview

Australia has a wide-ranging regime of anti-vilification laws, but they do not provide comprehensive protection for vilification on the ground of religion. Anti-vilification laws exist in every state,[2] the Australian Capital Territory,[3] and federally.[4] Similar provisions have existed and continue to exist in comparable jurisdictions internationally. The UK, for example, first introduced anti-vilification laws with the enactment of the *Race Relations Act* in 1965 and Canada has had criminal anti-vilification provisions since 1970 (McNamara, Luke 2007: 167, 188). In Australia, anti-vilifications laws are generally considered compatible with the extant common law protection of freedom of expression, and with the doctrine of an implied constitutional freedom of political communication as developed by the High Court of Australia since 1992 (Gelber 2007: 3–4). This means they have not to date successfully been challenged on the grounds that they are incompatible with either constitutional or statutory free speech protections. This stands in stark contrast to the well-known and singular protections afforded freedom of speech in the United States by the First Amendment (Schauer 2005), which have generally precluded the successful enactment of anti-vilification laws there (Weinstein 2009).

The grounds on which a complaint of vilification may be lodged in Australia differ across jurisdictions, and include the categories of 'race', religion, HIV/AIDS status, transgender or gender identity, sexuality, homosexuality and disability. The forms and penalties that the laws take differ considerably. Federally and in Tasmania only civil provisions have been enacted, whereas in Western Australia only criminal provisions are in force. In all other states and in the Australian Capital Territory (ACT) both civil and criminal provisions apply.

In most jurisdictions the wording of the civil offence is that it is an offence to 'incite hatred towards, serious contempt for, or severe ridicule of a person or group of persons' on the specified ground(s).[5] Federally the wording of the civil offence is that it is unlawful to do an act if the act is reasonably likely to 'offend, insult, humiliate or intimidate another person or group of people' on a specified ground.[6] Additionally, in Tasmania an as-yet insufficiently tested provision in the *Anti-Discrimination Act* appears to enlarge the concept and application of anti-vilification laws in relation to conduct which 'offends, humiliates, insults or ridicules' a

person on the ground of gender, marital status, relationship status, pregnancy, breastfeeding, parental status or family responsibilities.[7]

The civil procedures tend to provide for complainants to lodge a complaint under anti-discrimination mechanisms, which result in assessment of the claim by an anti-discrimination authority and, if it is substantiated, mediation of a remedy which might include an apology, a commitment to desist, or publication of a retraction. Cases which are substantiated but which cannot be resolved at mediation proceed to a tribunal, or in the case of complaints under Commonwealth law to the Federal Court, for determination. Possible remedies include an order to apologize or retract, or a fine. In South Australia a complainant can lodge a tort action for damages. The emphasis in Australia on civil provisions distinguishes it from some other jurisdictions which rely on criminal provisions, including Germany[8] and the UK,[9] but is not unique. In Canada in some provinces, federally civil anti-vilification provisions exist in a variety of forms (McNamara, Luke 2007: 190–92).

Criminal provisions in Australia have an understandably higher threshold than their civil counterparts and tend to require either a public act which incites, or an act with intention to incite, hatred, serious contempt or severe ridicule of a person on the specified ground by means which threaten physical harm to person(s) or property, or which incite others to threaten physical harm to person(s) or property,[10] or which constitute a threatening act.[11] The exception is Western Australia which has created two-tiered offences based on the existence or otherwise of intent. They include conduct intended to, or likely to, incite racial animosity or racial harassment; possession of material for dissemination with intent to, or likely to, incite racial animosity or racial harassment; conduct intended to, or likely to, racially harass, meaning to threaten, seriously and substantially abuse or severely ridicule; and possession of material for display with intent to, or likely to, racially harass.[12]

In over twenty years of criminal anti-vilification laws in Australia there has only been one instance of a successful prosecution. In Western Australia, following a high-profile graffiti attack in which swastikas and slogans including 'Hitler was right' and 'Asians out' were painted on a synagogue and Chinese restaurant in July 2004, five men were successfully prosecuted for criminal damage. One of the men, Damon Paul Blaxall, was also charged with possession of racist material. In 2005, Blaxall was convicted on both counts and sentenced to eight months' jail for criminal damage and four months for possession of the racist material (AAP 2005; Nott 2004; Rasdien 2005). This remarkably low utilization of the criminal provisions again renders Australia comparatively distinctive. In Germany, for example, the 2008 Annual Report of the Berlin Office for the Protection of the Constitution reported 703 propaganda offences and 139 vilification offences (Senatsverwaltung für Inneres und Sport 2009: 46–47). In Canada, prosecutions have been less frequent but still important, given

Table 5.1 Criminal and civil provisions in anti-vilification laws in Australian jurisdictions

Jurisdiction	*Civil*	*Court/tribunal*	*Criminal*	*Penalties*
Commonwealth	✓	Federal court	✗	
New South Wales	✓	Statutory tribunal	✓	Fines/6 months' imprisonment
Queensland	✓	Statutory tribunal	✓	Fines/6 months' imprisonment
South Australia	✓	Tort action available in civil court system, can award damages up to $40,000	✓	Fines/3 years' imprisonment
Tasmania	✓	Statutory tribunal	✗	
Victoria	✓	Statutory tribunal	✓	Fines/6 months' imprisonment
Western Australia	✗		✓	Fines/max up to 14 years' imprisonment, depending on type of offence
Australian Capital Territory	✓	Statutory tribunal	✓	Fines/no option of imprisonment

Source: Amended from Gelber 2007: 7.

the *Keegstra*[13] ruling that the relevant criminal and civil prohibitions were constitutionally valid (McNamara, Luke 2007: 194–201).

The interpretation of 'race' as a protected ground

In Australia, the ground of 'race' applies in every jurisdiction with anti-vilification laws. This ground has provided some coverage for vilification on the ground of religion in some circumstances, but the protection it provides is not comprehensive, nor was it intended to be.

The concept of 'race' in federal anti-discrimination law was derived from the *International Convention on the Elimination of All Forms of Racial Discrimination*, which gave rise to the *Race Discrimination Act 1975* (Cth) (RDA) to implement its terms domestically in Australia. The convention uses the phrase 'race, colour, descent, or national or ethnic origin' to explicate the ground. Thus it does not, and was not intended to, include 'religion' as a protected category (HREOC 2004: 28). In the RDA the phrase used to describe the anti-vilification ground is identical to the convention. This nomenclature raises two related issues: consistency across jurisdictions within Australia, and the interpretation of 'race' to be inclusive of some complaints where race and religion intersect.

In relation to the first issue, the terminology used to describe 'race' is different across jurisdictions. This inconsistency potentially increases the confusion that can emerge in relation to the interpretation of 'race'. A list of the terminology appears below in Table 5.2.

In relation to the second issue, the interpretation of the meaning of 'race' has led to the protection afforded racial identities sometimes being extended to include some religious identities where there is an intersection between the racial and religious identity of the complainant. This has happened most expressly in New South Wales, which in 1994 amended the definition of 'race' in the *Anti-Discrimination Act 1977* (New South Wales (NSW)) to include 'ethno-religious' origin. This updated the statute to accord with decisions that had been made in the courts (McNamara 2002: 130) to include Jews and Sikhs. The term 'ethno-religious' is not defined in the Act, but in the Second Reading Speech introducing the 1994 amendments the Attorney-General said that its effect was 'to clarify that ethno-religious groups, such as Jews, Muslims and Sikhs have access to the racial vilification and discrimination provisions of the Act' (NSWPD

Table 5.2 A list of terminology to describe 'race' in Australian jurisdictions

Jurisdiction	*Term(s) used*	*Race defined as (in relevant statute, and section):*
Cth		race, colour, descent or national or ethnic origin (*Racial Discrimination Act 1975* (Cth) s 18C))
NSW	race, ss 20C, 20D	colour, nationality, descent and ethnic, ethno-religious or national origin (*Anti-Discrimination Act 1977*, s 4: Definitions)
Qld	race, ss 124A, 131A	colour, descent or ancestry, ethnicity or ethnic origin and nationality or national origin (*Anti-Discrimination Act 1991*, Schedule Dictionary)
SA	race (*RVA* s 4, *CLA* s 73)	nationality, country of origin, colour or ethnic origin (*Racial Vilification Act 1996*, s 3: Interpretation; *Civil Liability Act 1936*, s 73)
Vic	race (ss 7, 24)	colour, descent or ancestry, nationality or national origin, ethnicity or ethnic origin (*Racial and Religious Tolerance Act 2001*, s 3: Definitions)
Tas	race (s 19)	colour, nationality, descent, ethnic, ethno-religious or national origin, status of being or having been an immigrant (*Anti-Discrimination Act 1998*, s 3: Interpretation)
WA	racial group (ss 77–80D)	any group of persons defined by reference to race, colour, or ethnic or national origins (*Criminal Code*, s 76)
ACT	race (ss 66, 67)	colour, descent, ethnic and national origin and nationality (*Discrimination Act 1991*, Dictionary)

1994: 827). However, in 1999 the New South Wales Law Reform Commission, in its review of the *Anti-Discrimination Act 1977* (NSW), described the 1994 inclusion of 'ethno-religious origin' in the definition of race as 'almost certainly unnecessary' and thought that its scope was 'confusing'. It recommended that the term 'ethno-religious origin' be removed from the definition of race and that a new ground of discrimination on the ground of religion be introduced (NSWLRC 1999: [5.12]–[5.15]), but this has not occurred for reasons that are explained below. This interpretive, and later textual, inclusion of some religious groups under the rubric of 'race' is consistent with the interpretation of similar, previously existing provisions under the *Public Order Act 1986* in the UK, in which race had been interpreted to include some religious denominations where they were able to be described as 'ethnic groups'. This also led to the inclusion of Jews and Sikhs, but not of Muslims, Hindus or Christians (Hare 2009: 294).

The term 'ethno-religious origin' has been considered in a number of discrimination cases brought before the New South Wales Administrative Decisions Tribunal, but with mixed results. In *A obo V & A v Department of School Education*,[14] the tribunal clarified that the purpose of including the term 'ethno-religious' in the definition of race was to qualify certain ethno-religious groups as a race, not to enable members of those groups to lodge complaints in respect of discrimination on the ground of religion.[15] In that case the tribunal dismissed a claim that two Jewish children in a public school had been discriminated against on the ground of race by the holding of Christmas and Easter activities and the reciting of a school prayer. The tribunal ruled that the alleged discrimination was religious, and not racial, in nature.[16] In *Khan v Commissioner, Department of Corrective Services*,[17] it was ruled that, where an applicant seeks to establish a complaint under the ethno-religious ground, it will be insufficient for them merely to assert their faith. In this case a Muslim complainant had alleged that the Junee Correctional Centre's refusal to provide him with halal food constituted racial discrimination. The NSW Administrative Decisions Tribunal ruled that the applicant's Muslim faith, in itself, did not bring him within the statutory definition of 'ethno-religious'; there also needed to be evidence of the existence of 'a close tie between that faith and his race, nationality or ethnic origin'.[18] The tribunal said that the term 'ethno-religious' signified 'a strong association between a person's or a group's nationality or ethnicity, culture, history and his, her or its religious beliefs and practices' (HREOC 2004: 33).[19]

On the other hand, in *Abdulrahman v Toll Pty Ltd trading as Toll Express*,[20] a Muslim complainant successfully sustained a complaint of discrimination on the ground of ethno-religious origin. The NSW Administrative Decisions Tribunal found that various racially based taunts directed against the complainant by his supervisor, a union delegate and fellow employees, including comments about his wife's headscarf and addressing

him as 'Osama bin Laden', constituted racial discrimination. This finding was upheld on appeal.[21] The tribunal found that the remarks made against the complainant were ethno-religiously based as they 'relate to the Applicant's middle-eastern background and his religion … as a Muslim', and that the alleged discriminatory behaviour therefore fell within the definition of race in the *Anti-Discrimination Act 1977* (NSW).[22]

One other jurisdiction utilizes the term 'ethno-religious' in its anti-vilification law: Tasmania. However, since the Tasmanian anti-vilification laws expressly cover the ground of religion, the inclusion of the term 'ethno-religious' in the category of race is unlikely to be of significance in terms of expanding the potential application of racial anti-vilification provisions to vilification on the ground of religion. In the other jurisdictions in which the term 'ethno-religious' does not appear, the NSW experience implies that in some cases it may be possible for vilification on the ground of religion, where it intersects with racial aspects of the target's identity, to be covered by the racial anti-vilification provisions. However, this is far from definitive, and is not comprehensive in terms of providing protection from vilification on religious grounds.

For example, at the Commonwealth level when the *Racial Hatred Act 1995* (Cth) amended the RDA to include racial anti-vilification provisions, the Explanatory Memorandum to the Bill specified that the intention of the new legislation was to be inclusive of groups such as Sikhs, Jews and Muslims under the nomenclature of 'ethnic origin' (AHRC 2010; O'Neill *et al.* 2004: 485–87). On the other hand the application of this interpretation is up to the courts and a test case has not yet occurred. Moreover the mixed success outlined above in NSW indicates a less than straightforward inclusion of religious identities in protections designed for racial groups. The HREOC has concluded that 'if a person feels they have been discriminated against solely because they are of the Islamic faith then, on the basis of the current case law, it is unlikely that they are covered by the grounds in the RDA' (HREOC 2004: 28–30). Similarly, in its 2003 report *Islamophobia – is it racism?*, the Human Rights and Equal Opportunity Commission concluded that Muslims are unlikely to be protected by the federal RDA when experiencing discrimination on the ground of religion (HREOC 2004: 37).

Extending protection to 'religion' in anti-vilification legislation

Internationally some jurisdictions are moving to include religion as an expressly protected ground in anti-vilification legislation. In the UK, for example, one of the reasons given for the introduction of the *Racial and Religious Hatred Act 2006*, which included religion as an explicit category in contrast to the pre-existing provisions in the *Public Order Act 1986* related only to race, was the 'gap' in that legislation for conduct that was not

racially motivated (Goodall 2007: 92).[23] In the new legislation, important differences exist between the two provisions, including that a complaint on the ground of religion requires the demonstration of intent and the use of threatening words, behaviour or material (and not just abusive or insulting) (Goodall 2007: 90; Hare 2009: 296).

In Australia religion is *not* universally an expressly protected ground in anti-vilification laws. Many Australian jurisdictions conscientiously and deliberately have decided not to do so. Federally, the Human Rights and Equal Opportunity Commission's 1998 report *Article 18: Freedom of Religion and Belief* recommended the enactment of new federal laws to prohibit religious vilification, but none has thus far been enacted (HREOC 2004: 37). At a state level, NSW, South Australia and Western Australia have each rejected proposals to introduce specific religious anti-vilification legislation. In 2002, the South Australia Attorney-General's Department released a discussion paper which outlined proposals for reform in relation to religious discrimination and vilification (SAAGD 2002), but to date no legislation has been introduced. In August 2004 the Western Australia Equal Opportunity Commission released a consultation paper on racial and religious vilification that sought public input on various options for legislative reform (WAEOC 2004). Although reforms to racial vilification laws resulted (Gelber 2007: 7–9), to date no religious vilification law has been enacted (Blake 2007: 396). On 15 September 2005, Peter Breen introduced into the New South Wales Legislative Council the *Anti-Discrimination Amendment (Religious Tolerance) Bill*, which sought to make religious vilification unlawful. The Bill was debated by council members but the motion to read the Bill a second time was defeated (NSWPD 2006: 20779). Previously, in June 2005, then Premier Bob Carr had opposed the introduction of religious vilification laws in New South Wales, arguing in Parliament that, in practice, such laws 'can undermine the very freedom they seek to protect' (NSWPD 2005: 17086).

By contrast, religion *is* an explicitly protected ground in anti-vilification laws in three jurisdictions, reflecting the fluidity of legal developments in this area: Queensland, Tasmania and Victoria. Queensland prohibits vilification on the ground of 'religion' and has enacted both civil and criminal provisions,[24] Victoria prohibits vilification on the ground of 'religious belief or activity' and has enacted both civil and criminal provisions,[25] and Tasmania prohibits vilification on the ground of 'religious belief or affiliation or religious activity' and has enacted only civil provisions.[26]

The Victorian legislation is the most comprehensive. The civil provisions of the *Racial and Religious Tolerance Act 2001* (Vic) prohibit a person 'on the ground of the religious belief or activity of another person or class of persons' from engaging in 'conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons'.[27] A person's motive for engaging in the prohibited conduct is irrelevant.[28] Also, it is irrelevant whether or not the religious belief or

activity is the only or dominant ground for the prohibited conduct, so long as it is a substantial ground.[29] The Act specifies certain exceptions for conduct that is engaged in reasonably and in good faith, including conduct that is engaged in for any genuine academic, artistic, religious or scientific purpose, or for any purpose that is in the public interest.[30] A feature unique to the Victorian regime is the absence of a requirement that the prohibited conduct be done by a public act. Instead, the Victorian Act provides an exception for private conduct – that is, for conduct that is engaged 'in circumstances that may reasonably be taken to indicate that the parties to the conduct desire it to be heard or seen only by themselves', unless the conduct is done in circumstances in which the parties 'ought reasonably to expect that it may be heard or seen by someone else'.[31] In 2006 the Victorian legislature inserted section 11(2) to clarify that religious purpose includes 'conveying or teaching a religion or proselytising'.[32] When introducing the amendments, then Premier Bracks stated:

> The proposed amendments will provide clarity to the issue of religious proselytising and reduce the risk of costly legal proceedings on unmeritorious racial and religious vilification complaints. Overall, they strengthen the *Racial and Religious Tolerance Act* … The proposed amendment … will clarify the meaning of 'religious purpose' to include 'conveying, teaching or proselytising of a religion'. There is a safety mechanism against abuse in that 'religious purpose' would still remain subject to the requirement of reasonableness and good faith.
>
> (VPD 2006: 1029–30)

He added that the amendments reinforced the judicial observation in *Fletcher v Salvation Army Australia*[33] that the legislation does not prohibit proselytizing. Rather, the Act is 'reserved for extreme circumstances'.[34] This amendment limits the Act in a manner that is consistent with the approach to religious vilification in the *Racial and Religious Hatred Act 2006* in the UK, which prevents its application to 'discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions … or proselytising' (Hare 2009: 296). Such disclaimers are perhaps indicative of the particular difficulties of regulating speech of this nature, a matter to which I will return below.

In Queensland, the civil provisions of the *Anti-Discrimination Act 1991* (Qld) make it unlawful for a person, by a public act, to 'incite hatred towards, serious contempt for, or severe ridicule of' a person or group of persons on the ground of the religion of the person or the members of the group.[35] Conduct that incites hatred will be lawful if it falls within one of three exceptions, including one which provides for protection of public acts 'done reasonably and in good faith, for academic, artistic, scientific or research purposes or for other purposes in the public interest, including

public discussion or debate about, and expositions of, any act or matter'.[36] In the case of *Deen*, the Queensland Anti-Discrimination Tribunal held that an objective test is to be applied when deciding whether a publication is unlawful under section 124(1).[37]

In Tasmania, the *Anti-Discrimination Act 1998* (Tas) makes it unlawful for a person, by a public act, to 'incite hatred towards, serious contempt for, or severe ridicule of' a person or a group of persons on the ground of the religious belief or affiliation or religious activity of the person or any member of the group.[38] It is also unlawful for a person to publish or display matter that promotes such conduct.[39] The Act provides a number of exceptions, including for conduct which is done in good faith for academic, artistic, scientific or research purposes, or any purpose in the public interest.[40]

The extent to which these laws are able to, or ought to, provide protection from vilification on the ground of religion is unclear, and the existence of the legislation does raise questions. How effective is the legislation in responding to vilification? What is the effect of the exceptions? Is anti-vilification legislation on the ground of religion likely to be of assistance in combating the promulgation of extreme, stereotyped and negative views about religious identities? Some of these issues were exemplified in a Victorian complaint.

The *Catch the Fire Ministries* Case

In 2007, a vilification complaint which had been brought in 2002 by the Islamic Council of Victoria (ICV) against Catch the Fire Ministries (CTFM), an evangelistic Christian group, was finally resolved. The complaint had initially been successful in the Victorian Civil and Administrative Tribunal (VCAT)[41] in 2004, and in 2005 the CTFM was ordered to refrain from making further statements and to apologize,[42] but in 2006 the Victorian Court of Appeal[43] upheld an appeal by the CTFM and sent the matter back to the VCAT for redetermination. Mediation then resolved the matter (McNamara, Lawrence 2007: 148).[44]

The complaint centred around a seminar, a newsletter and an article which included statements to the effect that Muslims were prone to violence, including domestic violence, that Muslims were liars, that Muslims in Australia were organizing a 'silent jihad' which threatened Australia, that Muslims planned to overthrow western democracy and impose their views by force, and that Islam was inherently violent (McNamara, Lawrence 2007: 152–53). At the Court of Appeal it was also noted that the CTFM had also advocated the beliefs that 'we … love Muslims', that their aim was to help Muslims 'see the truth' and that 'Muslims are not our enemy' (McNamara, Lawrence 2007: 157).

In allowing the appeal, the Victorian Court of Appeal held that the VCAT had made two errors of law in its construction of the legislation:

seeing religion as the ground animating the person to incite, rather than the ground on which the audience was incited; and assessing the effect of the expression on an 'ordinary reasonable reader' rather than the actual audience to which the person was speaking.[45] The court argued that determining whether the conduct would incite hatred requires considering the characteristics of the audience that was addressed, as well as the historical and social context within which the expression occurred.[46]

After the case was resolved via mediation, a joint statement was released in which the complainants and respondents affirmed and recognized 'the dignity and worth of every human being, irrespective of their faith', 'the rights of … all persons to … express their own religious beliefs', 'the rights of … all persons, within the limits provided for by law, to robustly debate religion, including the right to criticize the religious belief of another, in a free, open and democratic society', and 'the value of friendship, respect and cooperation between Christians, Muslims and all people of other faiths'. The statement also recognized that the law of Victoria included the *Racial and Religious Tolerance Act*, which qualified the right to 'robustly debate religion' (VCAT 2007). The specific terms of the mediation are confidential, and thus it is not known what they constituted and how the matter was resolved although it is possible to engage in conjecture that some of the usual mechanisms for resolution were adopted, namely the issuing of a commitment by the CTFM to use, or desist from using, specific phraseology to express their views about Islam and Muslims.

How useful is anti-vilification on the ground of religion?

How useful is anti-vilification law on the ground of religion? Arguably, this case highlights real potential problems with religious anti-vilification legislation in two ways.[47] First, it demonstrates that additional problems arise in responding to discussions over religious differences, which may feature thinking along the lines of, 'love the sinner, hate the sin'. That is to say, even when vehement differences of opinion occur, religious leaders can and often do profess their love for those people whose beliefs they are criticizing. This complicates the issue. Secondly, the *CTFM* case demonstrates the difficulty of tackling expression that lies at the core of genuine religious belief and faith, rather than crude face-to-face vilification. It simultaneously raises the question of faith, in so far as most religions when proselytizing claim to represent the one true faith and it is not possible for an observer, and not appropriate for the state, to say that they are wrong. This is in contradistinction to, for example, racial vilification where observers have rational grounds on which unequivocally to argue that the vilifiers' views are wrong.

In discussing these two issues, I will focus on the phenomenology of vilification and not on the law per se. There are important differences. Phenomenologically, vilification is 'speech or expression which is capable of

instilling or inciting hatred of, or prejudice towards, a person or group of people on a specified ground' (Gelber and Stone 2007b: xiii). It is thus characterizable as the harmful expression of prejudice. Vilification's core *telos* is that it is speech which harms identified targets and the community to which those targets are perceived to belong, by ascribing negative stereotypes to all perceived members of that community. In doing so, it does more than offend its targets; it harms them in tangible ways and is thus a discursive manifestation of prejudice. Vilification enacts (racist or other) discrimination through its expression. This means that vilification is directed at a person (or a group of people) who is characteristically a member of a group facing prejudice, such as a racial or sexual minority. This is not to imply that non-minority individuals might not attempt to use anti-vilification *laws* to their benefit. Indeed, there is some evidence that they do, for example in the relatively high proportion of people of Anglo-Celtic origin lodging complaints under NSW legislation, although their success at having their complaints substantiated is relatively low (Gelber 2000: 16; McNamara 2002: 148–50, 161). Nor is it to contradict the fact that legal provisions in Australia use 'neutral terms' so as to permit non-minority individuals to attempt to use anti-vilification laws to their benefit (O'Neill *et al.* 2004: 517). But it is to argue that phenomenologically there is an intrinsic relationship between the prejudice that a vilifier holds against the identity of the community to which they perceive their target to belong, and the ability to characterize their utterance as vilifying rather than simply offensive (see also Zanghellini 2003).[48] Patricia Williams has described the expression of racist ideas as 'an offense so deeply painful and assaultive as to constitute … "spirit-murder"' (Williams 1987: 129). Mari Matsuda, in discussing the 'violence of the word' argues that '[r]acist hate messages, threats, slurs, epithets and disparagement all hit the gut of those in the target group' (Matsuda 1989: 2332). This perspective is integral to my argument.

The first problem raised by the discussion here of religious vilification legislation in practice is that discussions over religious differences can, and in many cases routinely do, feature thinking along the lines of 'love the sinner, hate the sin'. That is to say, even when vehement differences of opinion occur, religious leaders often may profess their love for those whose beliefs they are criticizing. This appears to ameliorate the nature of their comments as vilifying – in the *CTFM* case, the respondents claimed to love Muslims, even while making grossly stereotyped, negative assertions about their practices and beliefs.

Religious vilification is not the only ground on which discourses of hate can utilize positive emotional language, nor is the use of positive language a new phenomenon. Gail Mason has shown through research of 21 white supremacist organizations in the UK, the United States and Australia (Mason 2007) that such discursive manipulation has a long history. White supremacist organizations, she shows, utilize a language of 'care' and

'love' as a mechanism by which to deny their hatred, either because they do not want to be labelled 'racist' (or 'islamophobic') and want to be seen as decent, humane people, or in order to avoid specific legal consequences in the form of hate speech or hate crime legislation (Mason 2007: 40–43).[49] This means that 'white supremacist ideology is increasingly conveyed through civil and respectable language that is palatable to a wider range of people'. An additional consequence of this language adaptation by racist extremists is that the language of 'God's love' (for white Christians) is not just a cloak for their hatred, but also a genuine component of the beliefs of white supremacists, beliefs that ultimately justify racism (Mason 2007: 51–52).

Thus saying 'we love Muslims' while making the kinds of comments that the respondents in the *CTFM* case made does not render their comments non-vilifying in a phenomenological sense. It can, however, and as we have seen, make those comments much more difficult to address with legislation. In the Court of Appeal the fact that the CTFM had said they loved Muslims was germane to the success of the appeal; it changed the assessment of the nature of the conduct in question (McNamara, Lawrence 2007: 157). With respect, it seems the Court of Appeal got it wrong on this question. It is entirely possible to express virulent hatred of a vilifying nature towards people whom one simultaneously claims to 'love'. As noted above, Mason argues that love and hate can and do coexist in prejudicial thinking, and that the presence of care or love does not cancel out the hate (Mason 2007: 36–37). Not only can love and hate coexist, in some senses love is a prerequisite for the development of vehement hatred in so far as it marks attachment to that which the hater wishes to preserve from the Other. In religious vilification we are likely to see these kinds of issues magnified because it is arguably a more typical feature of religious discourse that the person whose views are being criticized or demonized is a person the speaker wishes to 'save', to convert or to profess love for. Yet, if the *CTFM* case is taken as an example, it appears the intertwining of a language of love with a language of hate could significantly reduce the prospects of a complaint being upheld, and a remedy being ordered.

Additionally, the Court of Appeal made a distinction between vilifying a belief and vilifying believers. Justice of Appeal Neave argued that the legislation requires assessing whether statements incite hatred against a person or class of persons, and that an attack on a religious belief may not always constitute an attack on a person or class of persons, that is, the followers of that religious belief.[50] Justice of Appeal Nettle argued that in failing to draw this distinction Justice Higgins had, in the VCAT judgment, erred because one cannot assume that incitement to hatred of beliefs amounts to incitement to hatred of those who hold those beliefs.[51] Similarly, in *Fletcher v Salvation Army Australia*, Justice Morris argued that, 'criticism of a religion or religious practice is not a breach of the Act; the Act is concerned with inciting hatred of *people* on the basis of race or religion'.[52]

Given the discussion above about the possibility of intertwining a language of love with a language of hate in vilifying comments, the distinction required by the VCAT and the Court of Appeal between vilification of believers and vilification of a belief may only compound the difficulty of securing a remedy for a complaint when vilification is alleged to occur on the ground of religion. Indeed, the requirement for a distinction between believers and belief could make it less likely that religious vilification complaints will be upheld. That is to say, religious discourse might be more likely than comments on other grounds (racist or homophobic comments, for example) to make this differentiation, on the basis that to do so would conform with the religious maxim to 'love the sinner' but 'hate the sin'. The legal distinction is likely to shore up the difficulty of securing a remedy through anti-discrimination mechanisms for vilification on the ground of religion.

The second issue raised by the *CTFM* case is that it demonstrates the difficulty of tackling expression that lies at the core of genuine religious belief and faith, rather than crude face-to-face vilification. If a person were to shout something vilifying to their neighbour, or in the supermarket, or at an outdoor event, they would be engaging in the type of crude exchange that anti-vilification laws were designed to tackle. Such episodes are susceptible to cognition and a rational, educative response (although such a response need not always or necessarily be successful for a claim to susceptibility to be valid). This is the case in the sense that the reason for Australia's wide adoption of civil anti-vilification laws is to permit and encourage a response that at its core is educative and conciliatory. The civil complaints mechanism supports this. If an incident is reported to an anti-discrimination authority, it is investigated and if the authority concludes that there are grounds for the complaint to be substantiated it tries to mediate a resolution. This may involve an apology, an agreement to desist or, in the case of vilification at a workplace, the organizing of an education and awareness campaign.

In this sense, the legislation aims to achieve a rational, educative response. Underlying this approach is a tacit belief that the conduct at which the remedy is directed is susceptible to change, that racist attitudes can be challenged on rational, argued grounds. There is an assumption that if it is pointed out to someone that their views can be considered vilifying, there is a correlative possibility that the respondent might realize what vilification is, and could potentially agree to change their behaviour and attitudes. Similarly, an educative campaign within a workplace is designed to tackle widely held assumptions or prejudices which might, even inadvertently, give rise to vilifying behaviour. It is both the attitudes of the vilifier and those of her or his audience that are assumed to be susceptible to cognition and change. By contrast, religious beliefs are not as directly susceptible to such cognition, nor should it be the role of the state to seek to challenge religious beliefs in a cognitive, rational sense. This is

not to say that all aspects of a person's faith are not susceptible to cognition and rational debate. Within many religions debates have taken place that have resulted in important changes in the beliefs and positions of those faiths on a range of issues, including social justice issues, over time. But at their core, religious beliefs rely on faith and it is not useful for, nor is it the role of, the state to challenge faith.

A counter-argument to this might be that not all religious discourse displays characteristics of vilification. It could be argued in support of the legislation's applicability that in order to succeed in a complaint, an expression considered to be 'religious' could be disaggregated between expressions of religious belief on the one hand (considered outside the realm of beliefs which the state has an appropriate role in cognitively challenging), and vilifying expressions towards believers on the other (considered within the realm of beliefs which the state has an appropriate role in cognitively challenging). Yet the task of disaggregating these things seems extraordinarily difficult, if not impossible. The difficulty of disaggregating those parts of religious discourse which might appropriately be considered susceptible to state-led cognitive challenge and those which might not is likely again to reduce the applicability and usefulness of religious anti-vilification legislation in comparison with anti-vilification legislation on other grounds.

In this context, the *CTFM* case also raises the question of the content of proselytizing. Most religions claim to represent the one true faith. In so doing, it is not possible for an observer to say they are wrong.[53] When that observer is the state it is also not appropriate. By contrast, it is possible and indeed desirable for a state that has multicultural and anti-discrimination policies to state unequivocally that vilification on the ground of race is wrong. It is possible and appropriate for the state, on all the grounds covered by anti-vilification laws except religion, to argue against the truth of the vilifier, to say that they are wrong. However, where the beliefs of the vilifier are based on faith, the situation becomes more complex. As in the previous point, in order to say what is wrong the state must attempt to disaggregate the vilifying expression from the faith-based views. This is a fraught task, one that again renders religious anti-vilification laws particularly susceptible to charges of lack of usefulness for their targeted group.

Concluding remarks

There is certainly a need to combat vilification on the ground of religion in the Australian community. Studies have shown significant levels of vilification, faced in particular by Muslims but also by Jews and other faiths. This needs to be addressed and government ought to play a role in this.

Anti-vilification laws face obstacles as a mechanism for doing this. First, there is a reluctance on the part of some policy makers to enact anti-vilification laws specifically on the ground of religion. Second, where courts and tribunals have interpreted 'race' broadly to include

ethno-religious identities the protection thus afforded religious identities is far from comprehensive. Third, even where religious anti-vilification legislation has been enacted we have seen that particular issues arise in concluding the cases that arise under that legislation which reduce the legislation's effectiveness in responding appropriately to instances of vilification when it occurs in the context of religious expression. The adjudication of complaints of vilification based on religion faces particular problems which do not arise on other grounds.

This means that it is likely religious groups should seek to encourage and implement other ways of combating and challenging community prejudice, vilification and discrimination on the ground of religion. It is likely that those concerned with religious vilification will need to find ways to combat it that reach beyond, and do not rely upon, anti-vilification laws.

Notes

1 The work for this article was funded by the Australian Research Council (DP 0663077), and I would like to thank the Gilbert + Tobin Centre of Public Law, Faculty of Law, University of New South Wales, which hosted me as a visiting fellow during its initial drafting.

2 *Anti-Discrimination Act 1977* (NSW) ss 20B–20D, 38R–38T, 49ZS–49ZTA, 49ZXA–49ZXC; *Anti-Discrimination Act 1991* (Qld) ss 124A, 131A; *Racial Vilification Act 1996* (SA); *Civil Liability Act 1936* (SA) s 73; *Anti-Discrimination Act 1998* (Tas) ss 17(1), 19; *Racial and Religious Tolerance Act 2001* (Vic); *Criminal Code* (WA) ss 76–80H.

3 *Discrimination Act 1991* (ACT) ss 65–67.

4 *Racial Discrimination Act 1975* (Cth) ss 18B–18F.

5 *Anti-Discrimination Act 1977* (NSW) s 20C, *Anti-Discrimination Act 1991* (Qld) s 124A, *Civil Liability Act 1936* (SA) s 73, *Anti-Discrimination Act 1998* (Tas) s 19, *Racial and Religious Tolerance Act 2001* (Vic) s 7, *Discrimination Act 1991* (ACT) s 66.

6 *Racial Discrimination Act 1975* (Cth) s 18C.

7 *Anti-Discrimination Act 1998* (Tas) s 17(1).

8 *Criminal Code* §86 (*Kennzeichens*); §86A (*Propagandamitteln*); §130 (*Volksverhetzung*).

9 *Racial and Religious Hatred Act 2006.*

10 *Anti-Discrimination Act 1977* (NSW) s 20D, *Anti-Discrimination Act 1991* (Qld) s 131A, *Racial Vilification Act 1996* (SA) s 4, *Civil Liability Act 1936* (SA) s 73, *Racial and Religious Tolerance Act 2001* (Vic) ss 24–25.

11 *Discrimination Act 1991* (ACT) s 67.

12 *Criminal Code* (WA) ss 76–80.

13 *R v Keegstra* (1990) 3 SCR 697.

14 [1999] NSWADT 120.

15 *A obo V & A v Department of School Education* [1999] NSWADT 120 [60].

16 *A obo V & A v Department of School Education* [1999] NSWADT 120 [51]–[60].

17 [2002] NSWADT 131.

18 *Khan v Commissioner, Department of Corrective Services* [2002] NSWADT 131 [21].

19 *Khan v Commissioner, Department of Corrective Services* [2002] NSWADT 131 [20], [22].

20 [2006] NSWADT 221.

21 *Toll Pty Ltd trading as Toll Express v Abdulrahman* [2007] NSWADTAP 70.

22 *Abdulrahman v Toll Pty Ltd trading as Toll Express* [2006] NSWADT 221 [88].

23 See Goodall's argument that this 'gap' was not as broad as it was perceived to

be, and that the issue of nomenclature gained significance for other reasons unrelated to the coverage of the criminal law (Goodall 2007).

24 *Anti-Discrimination Act 1991* (Qld) ss 124A, 131A.
25 *Racial and Religious Tolerance Act 2001* (Vic) ss 8, 25.
26 *Anti-Discrimination Act 1998* (Tas) s 19.
27 *Racial and Religious Tolerance Act 2001* (Vic) s 8(1).
28 *Racial and Religious Tolerance Act 2001* (Vic) s 9(1).
29 *Racial and Religious Tolerance Act 2001* (Vic) s 9(2).
30 *Racial and Religious Tolerance Act 2001* (Vic) s 11.
31 *Racial and Religious Tolerance Act 2001* (Vic) s 12. See also Chapman and Kelly (2005).
32 *Equal Opportunity and Tolerance Legislation (Amendment) Act 2006* (Vic) s 9.
33 [2005] VCAT 1523 [7].
34 *Fletcher v Salvation Army Australia* [2005] VCAT 1523 [1].
35 *Anti-Discrimination Act 1991* (Qld) s 124A(1).
36 *Anti-Discrimination Act 1991* (Qld) s 124A(2).
37 *Deen v Lamb* [2001] QADT 20, 2; see also discussion of this case in Blake (Blake 2007: 396).
38 *Anti-Discrimination Act 1998* (Tas) s 19(d).
39 *Anti-Discrimination Act 1998* (Tas) s 20(1).
40 *Anti-Discrimination Act 1998* (Tas) s 55.
41 *Islamic Council of Victoria v Catch the Fire Ministries Inc* [2004] VCAT 2510.
42 *Islamic Council of Victoria v Catch the Fire Ministries Inc* [2005] VCAT 1159.
43 *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* [2006] VSCA 284.
44 See also the chapter by Frank Brennan, 'Religion, multiculturalism and legal pluralism', in this volume.
45 *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* [2006] VSCA 284 [162] (Neave JA); see also [12]–[24] (Nettle JA) and [123]–[132] (Ashley JA).
46 *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* [2006] VSCA 284 [157]–[159] (Neave JA). The court considered a range of other matters in its judgement, including: the distinction between attacks on religious beliefs and attacks on persons adhering to those beliefs; the correct construction of s 11 of the Victorian Act, including the meaning of good faith and reasonableness; and the constitutional validity of s 8. For an in-depth discussion of these matters see McNamara, Lawrence (2007: 145–68) and Blake (2007).
47 In discussing these two issues in particular, I do not claim they are the only two obstacles to the efficacious application of hate speech laws to religion, rather that they are the two which arise from the *CTFM* case, a discussion of which makes a new contribution to the literature. For other problems see Barendt (2005: 189–92).
48 I concur with Zanghellini's conclusions but differ with the method by which those conclusions are reached in Gelber (2002).
49 There is a distinction here between hate speech (anti-vilification) legislation, which seeks to punish or deter expressive conduct and which can take civil or criminal form, and hate crime legislation, which typically imposes harsher penalties on already-existing crimes (such as assault or murder) if it can be proven the crime was motivated by prejudice or bias. Hate speech legislation that criminalizes some instances of speech can also be thought of as a type of hate crime legislation.
50 *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* [2006] VSCA 284 [177].
51 *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* [2006] VSCA 284 [32], [33].
52 *Fletcher v Salvation Army Australia* [2005] VCAT 1523 [14].
53 On these points Frank Brennan (see his chapter in this volume) and I are in agreement.

6 The reasonable audience of religious hatred

The semiotic ideology of anti-vilification laws in Australia[1]

Massimo Leone

Introduction: religion, violence, and rights

The history of the idea of 'human rights' spans several centuries (Flores 2008). The history of legal discourse seeking to bring about the conditions for the full exercise and protection of such rights is equally long. The inclusion of religion within the protective frame of the legal discourse on human rights is not recent either (Leone 2007a). Examples are plentiful. For instance, the 1310 Roman statutes already proclaimed: '*Judei sint et esse intelligantur cives Romani*', 'the Jews are and are to be considered as Roman citizens', in order to discourage discrimination against Jewish citizens in the pontifical state (Toaff 1996). In this as well as in other circumstances, the mere presence of a legal statement declaring the illegitimacy of discrimination based on religion indicated the necessity of such a statement: the citizenship of Roman Jews had to be affirmed *de jure* exactly because it was denied de facto.

Such irony characterizes the entire history of the legal discourse on human rights (Zizek 2006) and it is particularly evident in the religious domain: the urge to define and protect the exercise of the human right of religion has often been a consequence of historical periods in which religion has turned into ground for discrimination, violence, and even death (Leone 2007b). The history of human rights is inseparable from the history of human violence. By this, it is not meant that the legal discourse on human rights, including that on the human right to freedom of religion, should be discarded as an ironic, or even hypocritical, by-product of violence. It is meant, instead, that such legal discourse must be described, analyzed, and assessed in relation to the conditions of violence that determined its elaboration.

The most internationally widespread legal discourse on religion currently stems from the declarations of the United Nations on this domain (Taylor 2005). Although variously interpreted, in most 'western' countries these declarations inspire the national and regional legal frameworks concerning the status of religion in society. The 'conditions of violence' that triggered the elaboration of such international legal discourse

on religion were essentially brought about by the totalitarianisms of the twentieth century: on the one hand, the Nazi-Fascist genocide of European Jews was carried out on ethno–religious grounds; on the other hand, the human right to freedom of religion was systematically thwarted by political regimes inspired by the Marxist dismissal of the religious dimension.

If law is considered as a discourse that keeps memory of an occurrence of violence in the past and elaborates it in order to avoid its reoccurrence in the future, then this discourse must be considered biased because of the same violence that it seeks to avoid. This is the case also as regards the post-Second World War international legal framework on human rights and religion: deeply influenced by the conditions of violence that had brought it about, it conceived of the relation between religion, society, and law from the angle provided by such conditions.

Some of the biases that resulted from the violent genesis of the United Nations (UN) declarations on the human right to freedom of religion were soon identified and eliminated through their re-elaboration. For instance, it was soon evident that the 'human right to freedom of religion' – as it is expressed in article 18 of the *International Declaration of Human Rights* or in article 18 of the *International Covenant on Civil and Political Rights* – was not defined broadly enough to encompass and therefore protect individuals or groups suffering discrimination, violence, and even death exactly because they expressed their neutrality (agnosticism) or their contrariety (atheism) to the idea of a religious dimension (Scalabrino 2003). As a consequence, the international legal discourse on the human right to freedom of religion was rearticulated in the wider framework of the human right of belief: in 1993, the UN Commission on Human Rights adopted comment 22 on the abovementioned covenant, stating that it must be interpreted as extending to theistic, non-theistic, and atheistic beliefs.

Other biases of the predominant international legal framework on the human right to freedom of religion and belief were singled out as legal controversies about religion arose around the world. From the procedural point of view, this framework was elaborated by taking into account the relations of political and diplomatic force within the UN in the aftermath of the Second World War, and was adopted, signed, ratified, and implemented not only slowly, but also partially (not all the states have accepted the totality of such framework). Moreover, not all the elements of this framework are able to exert the same legal force (UN declarations, for instance, seem to be the expression of a series of intentions more than a framework of binding norms).

From the formal point of view, then, the legal instruments that compose the international legal framework on the human right of religion and belief seem to suffer from a certain lack of systematization and interdefinition, as well as from an excessive abstractedness. In particular, the

main terms on which the juridical discourse of this framework turns, 'religion' and 'belief', are not adequately defined. It is not clear, for instance, whether such discourse adopts an objective or a subjective perspective on religion.

An objective perspective typically claims to situate itself outside of religious phenomena in order to observe, describe, and analyse them, establish which of their characteristics are primary, which ones secondary, which features they share, which ones differentiate them from analogous phenomena, and determine whether they might be considered as properly 'religious'. On the contrary, a subjective perspective claims the right to define religious phenomena on the basis of the beliefs of those who are concerned by them.

This issue is neither a mere lexicological matter of definition, nor is it merely relevant to the field of religious studies: many of the most controversial situations affecting the religious domain in the present-day world stem from the difficulty to discern whether certain cultural manifestations might be classified as 'religious' (for instance, consider the uncertain religious status of Scientology in many countries, or that of Falun Gong in China, an uncertainty often laden with dramatic consequences).

Finally, the current predominant international legal framework on the human right of religion and belief is biased not only from a procedural and formal perspective, but also from a substantive point of view: the juridical imagination that conceived and elaborated this framework was inspired by an idea of religion that was influenced by the preponderant world religions (preponderant in terms of number of believers or political power of the countries in which these religions are predominant). Such bias is evident, for instance, in prescriptions about religion contained in international humanitarian law, and in particular in the four Conventions of Geneva and in their additional protocols.

Beyond a strictly juridical assessment of such prescriptions, it is evident to the scholar of religious studies that many of them, as well as the way in which they are formulated, are inspired by a conception of religiosity influenced by the main monotheistic religions, and especially by Christianity. Indeed, the text of the conventions, rewritten soon after the Second World War, was affected by the accumulated experiences of the violation and protection of the human right to freedom of religion during that conflict. The attempt of certain religious cultures to elaborate alternative conceptions of human rights, for instance, the Cairo Declaration of Human Rights in Islam, must be explained with reference to this third bias.

Rights of religion and legal ideologies

The present paper does not aim at detecting the procedural, formal, and substantive biases that characterize the current predominant international legal discourse on the human right to freedom of religion and belief. Nor

does it aim at analyzing the responses to this discourse set forward by alternative local or international juridical agencies. On the one hand, scholars of legal and religious studies as well as human rights policy makers are generally familiar with these biases, and are constantly offering interpretations and solutions so as to minimize their impact on the definition and protection of the human right to freedom of religion and belief. On the other hand, an increasing number of human rights experts are emphasizing the need that inter-religious dialogue also encompasses the juridical dimension in order to promote a fruitful comparative study and assessment of alternative conceptions of the relations between religion, society, and law.

The purpose of the present paper is, on the contrary, to draw attention to a characteristic of the present-day predominant international legal discourse on the human right to freedom of religion and belief that thus far has been overlooked by both scholars and policy makers. It is well known even to non-specialists that human rights are isolatable only in abstract terms, for instance, when the *International Covenant on Civil and Political Rights* (art 18, § 1) states:

> Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

However, as soon as human rights are considered as embedded in concrete social situations, it becomes evident that their conception, as well as the legal discourse about their definition and protection, must be considered together with the conception, definition, and protection of other human rights (Drinan 2005). That human rights are often in competition, and that the material and symbolical resources of this competition are often scarce, are banal remarks. The *International Covenant on Civil and Political Rights* (art 18, § 3) clearly voices this view when it affirms:

> Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

As a consequence, most local legal systems seek to reach a point of equilibrium among different human rights, frequently as a response to legal controversies in which such rights seem to be in competition for the symbolical and material resources of a society or a group. In many cases, these attempts at a legal compromise are effective, and contrive to eliminate or minimize occasions for social conflict.

However, the point that the present paper will seek to make is that such equilibrium among different and sometimes competing human rights is not neutral even when it manages to appease conflicting social agencies. On the contrary, a thorough analysis of the way in which local legal systems shape a compromise among competing human rights reveals that such a process is inspired by a hierarchical conception of individual and social values and their juridical expressions.

The concept of 'legal ideology', modelled after that of 'linguistic ideology', is suitable to describe the way in which societies and groups 'speak' the current predominant international language of human rights. The concept of 'linguistic ideology' was elaborated mainly by linguistic anthropologists, ethno-pragmatists, and ethno-, socio-, and cultural semioticians in order to account for the fact that different social groups not only often speak different languages, but also hold different ideas about the essence of language (Leone 2010). These are among the most credited definitions of 'linguistic ideology' to date:

1 'Sets of beliefs about language articulated by users as a rationalization or justification of perceived language structure and use' (Silverstein 1979: 193).
2 'Self-evident ideas and objectives a group holds concerning roles of language in the social experiences of members as they contribute to the expression of the group' (Heath 1989: 53).
3 'Cultural system of ideas about the social and linguistic relationship, together with their loading of moral and political interests' (Irvine 1989: 255).
4 'Shared bodies of commonsense notions about the nature of language in the world' (Rumsey 1990: 346).
5 'Representations, whether explicit or implicit, that construe the intersection of language and human beings in a social world are what we mean by "language ideology" ' (Woolard 1998: 3).

Analogously, the concept of 'legal ideology' should be introduced to emphasize the fact that legal systems differ not only in the way in which they reach a point of equilibrium between competing human rights, but also in the way they conceive the very notion of equilibrium.

The pressure of local legal ideologies on conceptions of compromise among competing or even conflicting human rights is particularly evident when the human right to freedom of religion and belief is involved in controversies concerning multicultural and multi-religious societies. To what extent should the religious dimension of the identity of an individual or a group be protected by the law? To what extent should this legal protection extend if it jeopardizes different dimensions of the identity of other individuals or groups, such as their freedom of expression?

One of the main challenges multicultural and multi-religious societies will have to face in the near future can be summarized by the following questions: can a society be truly multicultural without considering the multiplicity of legal ideologies that multiculturalism entails? Can it be truly multicultural without considering the different role that the human right to freedom of religion and belief plays in each of these legal ideologies? The next section of the paper will seek to tackle such questions through a socio-semiotic analysis of a famous Australian legal controversy.

Perplexities and biases on the rights of religion

In the aftermath of 9/11, in response to the increasing number of social tensions concerning Islamic minorities in predominantly non-Islamic 'western' countries, several local legal systems have interpreted the predominant international legal framework on the human right to freedom of religion and belief in order to elaborate, introduce, and implement anti-discrimination and anti-vilification laws primarily focusing on the religious dimension of the social life of individuals and groups (Jahangir 2006). The main principle underpinning these laws is that individuals and groups must be able to freely express the religious dimension of their social identity, without such expressions leading to their becoming the target of discrimination or vilification.

Anti-discrimination and anti-vilification laws focusing primarily on religion have been mostly modelled after pre-existing anti-discrimination and anti-vilification laws focusing primarily on other dimensions of the social identity of individuals and groups. The most common of these laws are probably those whose social rationale is to eliminate or at least curtail episodes of discrimination and vilification based on race.

However, as soon as the elaboration of anti-vilification laws focusing on religion occupied the political arena of 'western' countries, many commentators expressed their doubts or even their criticisms about the legitimacy of such elaboration. On 21 June 2005, for instance, the Hon. Bob Carr, Premier of New South Wales, explained in detail to Parliament the reasons for which he was opposed to the elaboration, introduction, and implementation of anti-vilification laws focusing on religion. Carr's arguments mostly turned on the following idea: since it is not possible to define religion and religious belief, anti-vilification laws on religion can be misused in order to thwart the citizens' right to freely express their beliefs not only in the religious domain but in general. This idea, albeit variously articulated, is at the basis of most criticisms concerning actual or potential anti-vilification laws focusing on religion (Parkinson 2007).

Furthermore, it is on the basis of this idea that the social rationale of anti-vilification laws focusing on religion is usually distinguished from that of anti-vilification laws focusing on race: since race is considered an objective human feature, which can therefore be singled out and defined,

anti-vilification laws focusing on this feature do not entail the same potential misuse that anti-vilification laws focusing on religion do (Brennan in this collection). A corollary of this differentiation is that whenever the religious identity of individuals or groups is inextricably connected with their ethnic identity, anti-vilification laws do not protect these individuals and groups qua religious but qua ethno-religious (as it is the case, for instance, with anti-Jewish discrimination and vilification).

However, the clear differentiation between anti-vilification laws focusing on religion and anti-vilification laws focusing on race – a differentiation offered by Carr and others as an argument to contrast the elaboration of the former – overlooks an important element of the current scholarly debate on race. The concept of 'race' is controversial in both biological and cultural studies. Most social scientists nowadays share the opinion that race is a social construct, and that discreet racial differentiations among individuals and groups do not have any objective basis.

Why then is the elaboration of anti-vilification laws focusing on race not a matter of political controversy as the elaboration of anti-vilification laws focusing on religion is? Why are politicians, legislators, and other commentators in Australia and other 'western' countries worried that anti-vilification laws focusing on religion might hinder the citizens' right to freely express their beliefs, whereas they are not as worried about anti-vilification laws focusing on race? In simpler terms, why is it easier to accept a series of prescriptions that, for instance, make it illegal for someone to affirm the superiority of the 'Caucasian race' and the necessity to expel from society the members of all the other races than to accept a series of laws that, for instance, make it illegal for someone to affirm the superiority of Christianity and the necessity to expel from society the members of all the other religions?

Most opinion-leaders in present-day 'western' societies, especially those where the 'secularity' of the public arena is traditionally strongly emphasized, would probably find both claims, that of the violent superiority of one race over the others, and that of the violent superiority of one religion over the others, equally despicable. Yet, most would much more easily accept limiting the freedom of expression of citizens in order to avoid the discrimination and vilification of races than to avoid the discrimination and vilification of religions. Why?

The predominant international legal discourse on human rights, and in particular that on the human right to freedom of religion and belief, is variously interpreted and 'translated' into local legal frameworks depending on the hierarchies of values that prevail in local societies. In societies where the public arena has been traditionally considered predominantly secular, such as the Australian one, for instance, most lay opinion-leaders consider it unthinkable that individuals and groups might refrain from freely expressing their beliefs on religion even if such expression is likely to create situations of discrimination and violence against those who adhere to such

religion. The risk of having the citizens' freedom of expression curtailed by the desire to protect the religious dimension of the identity of individuals and groups is considered greater than the risk of having individuals and groups being discriminated and/or vilified on the ground of their religion.

When the discrimination and the vilification of races is considered, instead, most present-day 'western' public arenas and legal systems often imagine a different hierarchy, and therefore a different equilibrium, among human rights: the racially motivated violence of the twentieth century has marked the public arena of most 'western' societies with such scars that no opinion-leader nowadays would claim that since race is a social construct, and since the citizens' right to freely express their beliefs on race must be protected, anti-discrimination and anti-vilification laws focusing on race must not be introduced.

Many religious opinion-leaders in Australia as well as in other 'western' societies have expressed their hostility toward the elaboration of anti-vilification laws focusing on religion. The main reason for this hostility is that such laws might curtail an essential feature of the religious discourse: on the one hand, through such discourse believers must be constantly persuaded of the truth of what they believe, also in order to avoid their religious defection toward other religions or toward agnosticism or atheism; on the other hand, through other expressions of the same discourse believers of other religions, atheists, and agnostics must be encouraged to defect from their faith (or from their absence of faith) in order to embrace the 'true' religion.

This is the main reason why religious leaders of traditionally proselytizing confessions have been particularly hostile to the introduction of anti-vilification laws focusing on religion: if a series of laws make it illegal for proselytizers to denounce the evilness of other religions, which arguments will they be able to use in order to encourage religious conversions? And to discourage their own believers from converting to other faiths? Furthermore, in religious groups as well as in other kinds of communities, expressing violent beliefs against outsiders is often the best way to create a strong cohesion within these groups. It is a feature of the rhetoric of religious discourse that few religious opinion-leaders would gladly relinquish.

It should be now clear to the reader of the present paper that, at least from the point of view of the author, criticisms against anti-discrimination and anti-vilification laws focusing on religion are often biased. As regards criticisms by lay opinion-leaders, they are frequently biased because although claiming to assess the opportunity of anti-discrimination and anti-vilification laws in the religious domain from a secular point of view, they bring about such assessment having in mind not a general idea of religion (that which a scholar of religious studies might have), but a specific idea of religion, which substantially coincides with the Christian, and particularly with the Protestant, conception of religion characterizing most present-day 'western' societies.

According to this conception, the religious identity of an individual or a group is not comparable with other dimensions of their identity, such as the racial one, for instance – which on the contrary deserves the protection of anti-discrimination and anti-vilification laws – because the former is not as intrinsic as the latter. According to this conception, although every individual has a religious identity – even if it merely consists in the fact of not adhering to any religion – such religious identity is not so intrinsically part of the individual that she cannot be conceived independently from it.

This is the reason for which, according to this conception, although being vilified as a black person is as despicable as being vilified as a Muslim, it is more acceptable that laws concerning the first vilification limit the citizens' right to freedom of expression than laws concerning the second vilification. However, anti-vilification legislation in a multicultural and multi-religious society should take into account that different religious individuals and groups 'wear' their religious identity in different ways: for some, their religious identity is like a suit that can be worn on certain occasions and removed thereafter; for others, it is like a tattoo that can never be removed from one's skin; and yet for others it is exactly like skin: removing it is tantamount to skinning oneself.

Admitting that the religious dimension might have a different weight in defining the identity of individuals and groups in a multicultural and multi-religious society is like conceding that the hierarchy of values defined by a society and transposed in its interpretation of the international legal discourse of human rights might vary in order to accommodate the needs of different conceptions of religion and the correspondent legal ideologies.

As regards criticisms by religious opinion-leaders against anti-discrimination and anti-vilification laws in the religious domain, their bias is probably less unconscious than the bias of lay opinion-leaders is. As it was pointed out above, religious opinion-leaders are understandably against any prescription that might limit their capacity to spread their version of the religious truth and to counter the spreading of alternative versions. Although secular and postmodern thinkers, including the author of the present paper, might have more sympathy for religious leaders with a more relativistic conception of religious truth, one cannot expect religious leaders to self-censor their enthusiasm for what they believe to be the absolute religious truth. Rejecting religious people's longing for an absolute truth is tantamount to rejecting one of the central features of the religious dimension.

However, legislators and policy makers in a multicultural and multi-religious society, although respecting the way in which religious individuals and groups affirm the absolute truth of their religion and, as a consequence, the absolute falseness of any other faith, should not tolerate that an overly enthusiastic expression of one's religious truth by some

individuals or groups might cause discrimination, violence, or even death to individuals or groups with different religious beliefs. If the discourse of many religions and especially of those characterized by a strong proselytizing vocation essentially aims at the elimination, albeit without any resort to coercion, of any alternative version of religious truth, the discourse of multiculturalism must, by definition, contrast the manifestations of such religious discourse that might cause violent conflicts among different religious individuals or groups.

Furthermore, legislators and policy makers in a multicultural society should take into account that although in principle all religions have the same right to proselytize, in practice they do not all hold the same conception of proselytizing, and some of them are programmatically against such endeavour. Moreover, even religions that are equally devoted to proselytizing might have different access to the material and symbolical resources that are necessary to carry on such endeavour (for instance, religious minorities as compared with the religious majority of a society).

The Victorian *Racial and Religious Tolerance Act 2001*: a semiotic analysis

Several present-day multicultural states have interpreted the predominant international legal discourse on the human right of religion and belief in order to strike a balance capable of limiting the two biases analyzed above: on the one hand, the need to bring about a compromise among different human rights that might be satisfactory considering the diverse conceptions of religion and religious identity that characterize a multicultural society; on the other hand, the need to harmonize the religious tendency toward an absolute conception of truth with the necessity to avoid violent conflicts among individuals and groups with different religious beliefs (Blake 2007).

The anti-vilification laws about religion elaborated by the state of Victoria in Australia are particularly interesting. They constitute the legal framework within which the legal controversy, which is the main case study of the present paper, took place. As a response to the discussion paper entitled *Racial and Religious Tolerance Bill*, released in December 2000, the *Racial and Religious Tolerance Act 2001* (Vic) (from this point on, 'the Act') was enacted. This Act, which commenced on 1 January 2002 and has been subsequently amended, provides (section 8):

1 A person must not, on the ground of the religious belief or activity of another person or class of persons, engage in conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons.
Note: 'engage in conduct' includes use of the internet or e-mail to publish or transmit statements or other material.

2 For the purposes of sub-section (1), conduct:

   a may be constituted by a single occasion or by a number of occasions over a period of time; and
   b may occur in or outside Victoria.

Section 9(1) provides that a person's motive for engaging in the proscribed conduct is irrelevant. Section 9(2) provides that it is irrelevant whether or not the religious belief or activity of another person or class of persons is the only or dominant ground for the proscribed conduct, so long as it is a substantial ground. Section 11 provides for exceptions for public conduct:

1 A person does not contravene section 7 or 8 if the person establishes that the person's conduct was engaged in reasonably and in good faith:

   a in the performance, exhibition or distribution of an artistic work; or
   b in the course of any statement, publication, discussion or debate made or held, or any other conduct engaged in, for:
      i any genuine academic, artistic, religious or scientific purpose; or
      ii any purpose that is in the public interest; or
   c in making or publishing a fair and accurate report of any event or matter of public interest.

2 For the purpose of sub-section (1)(b)(i), a religious purpose includes, but is not limited to, conveying or teaching a religion or proselytizing.

Section 12 provides an exception for private conduct. Complaints of religious vilification are dealt with in the first instance by the Equal Opportunity Commission (ss 19–23). If the commission declines to entertain a complaint, then the Victorian Civil and Administrative Tribunal, where it has granted leave, will hear the complaint (s 23A). The tribunal has wide powers if the complaint is proved. No prosecution can be commenced without the written consent of the Director of Public Prosecutions (s 25).

As is quite evident from the way in which this anti-vilification law has been articulated, the legislator has sought to strike a balance between the need to protect the religious dimension of the social life of individuals and groups from violent behaviours and the need not to improperly hinder citizens' right to freely express their beliefs about religion. As is equally evident, the text of the law is not devoid of biases and is an expression of the hierarchy of values and human rights characterizing the present-day Victorian society as it is represented by its political opinion-leaders.

An in-depth analysis of the text indicates that the Act seeks to avoid that the religious dimension characterizing the identity of individuals or

groups might be the ground for four social attitudes: 1) hatred; 2) contempt; 3) revulsion; and 4) ridicule. The Act therefore declares that any conduct likely to bring about such attitudes is to be considered illegal. Why have these four words, and the social attitudes they designate, been chosen? Hatred, contempt, revulsion, and ridicule all share the characteristic of being extreme passions. Milder passions, such unfriendliness, antipathy, hostility, sarcasm, etc., are not mentioned by the Act.

The rationale behind this choice is quite clear: the Act is not meant to prevent citizens from expressing negative, and even radically negative, beliefs about other individuals or groups on the ground of the religious dimension of their identity. On the contrary, the law is meant to prevent citizens from bringing about conducts whose probable emotional consequences – hatred, contempt, revulsion, and ridicule – are in turn likely to be at the origin of violent behaviours toward those who are targeted by such social attitudes.

One of the most delicate issues in limiting the freedom of expression of individuals and groups in a society consists in the fact that the relation between symbolically expressing a negative social attitude toward someone and inciting other people to carry out some violent form of behaviour toward this person on the ground of such negative social attitude is not always clear. Whether the expression of one's negative social attitude might be inflammatory definitely depends on the context in which such expression takes place, but also depends on how negative the social attitude is. This is why the Act has singled out only extreme forms of negative attitude: extremely negative attitudes toward the religious dimension of the social identity of individuals and groups are considered likely to be able to trigger, more or less involuntarily, violent behaviours toward those who are targeted by such attitudes.

The Act therefore embodies a conception of causal connection between symbolical expressions, social attitudes, and violent behaviours that has been frequently observed, described, and analyzed by social scientists in specific contexts. When, especially after 9/11, some commentators depicted all Muslim citizens, without specifications, as individuals devoted to the violent destruction of 'western' societies, such depiction in certain contexts was likely to turn inflammatory, to spur extremely negative social attitudes toward Muslim citizens by non-Muslim citizens, and therefore to considerably increase the probability that violent behaviours might be carried out against the former by the latter (HREOC 2004).

However, the emphasis on the extreme character of the negative social attitudes singled out by the Act is not the only way in which this law seeks to bring about an equilibrium among human rights and the social values they embody, so that it might be resonant with the way in which these rights and values are hierarchically imagined by the mainstream legal ideology of contemporary Australia. Section 11 of the Act is explicit in limiting the extent of the Act by indicating a series of exceptions. From the

point of view of the semiotics of law, these exceptions are extremely relevant, since they indirectly reveal the way in which the present-day Australian society, or at least that part of it which is able to express a political majority and its representatives, conceives of the relation between rights, values, and discourses.

From this particular angle, section 11 of the Act is clearly the product of several centuries of 'western' history, characterized by countless prevarications of the religious discourse over the alternative – sometimes antagonist – discourses of scholarship, art, religion, and science. Section 11 of the Act is the legacy of Lorenzo Valla, Pier Paolo Pasolini, Giordano Bruno, Galileo Galilei (just to mention a few compatriots of the author) and all those who, over centuries of 'western' history, were censored in a more or less violent way exactly because their scholarly, artistic, religious, and scientific discourse was considered detrimental to the dignity of religion.

The Act seems to affirm that although it is necessary to protect the religious dimension of the social identity of individuals and groups from conducts that might spur extremely negative attitudes toward such dimension and, as a consequence, trigger violent behaviours against those who are targeted by such attitudes, the risk of admitting the presence of these conducts in society is considered lower than the risk of thwarting the scholarly, artistic, religious, and scientific freedom of expression of citizens. These four discourses and the values they embody are therefore granted a superior position in the hierarchy of values expressed by the Act and by its conception of the way in which social harmony should be ideally fostered in the present-day Australian society.

Two values are bestowed the same hierarchical position as scholarship, art, religion, and philosophy: first, the value of the interest of the state; second, the value of journalism. Limitations to the extent of the Act, indeed, include both reasons of 'public' and 'journalistic' interest. Finally, article 2 of section 11 reiterates the need not to (paradoxically) jeopardize the freedom of religious expression in order to avoid discrimination and vilification on religious grounds, and probably seeks to appease the critiques of religious opinion-leaders by specifying that the conduct of proselytizing is not considered likely to breach the Act.

However, the Act does not only introduce limitations to the extent of the Act. It also introduces limitations to the limitations. It carefully indicates that the Act must not be construed in a way that allows any kind of scholarly, artistic, religious, and scientific discourse, including the discourse of proselytizing, to be thwarted, but only insofar as they are engaged in 'reasonably and in good faith'.

The intent of such specification is clear and, at least from the point of view of the author of the present paper, noble: the legislator intuits that, especially in multicultural and multi-religious societies, different hierarchical conceptions of values and human rights, as well as different legal

ideologies, compete in order to bring about the legal framework that regulates social conflicts among these values and rights for material and symbolical resources. For instance, the Act suggests that artists must be free to express themselves through symbolical expressions of their choice, even if these are likely to incite hatred, contempt, revulsion, or ridicule toward certain individuals or groups on the ground of their religious identity. However, the Act also adds that artists who do so must engage in their artistic conducts 'reasonably and in good faith'.

Nevertheless, if the intent of such specification is clear, or at least can be guessed from the political context of the elaboration of the Act, the semantic content of this phrasing, 'reasonably and in good faith', is extremely vague. What does it mean, exactly, that an artist's conduct, for instance, is allowed to spur ridicule against certain people on the ground of their religious identity if, and only if, such conduct is engaged in 'reasonably and in good faith'?

The opinion of the author of the present paper is that the vagueness of the formulation of the Act, or at least of certain sections of it, does not result from the legislator's incapacity to word the Act in a less ambiguous manner, but rather from the fact that the ambiguity of the phrasing in the Act mirrors the ambiguity of the hierarchy of social values in present-day Australian society. In other words, the Act is not clear not because it is formulated in ambiguous language, but because such ambiguous language is nothing but a consequence of an intricate social reality. The language of the Act cannot be clear about the hierarchy of social values and human rights that it endorses because such hierarchy in present-day Australian society, as well as in many other more or less multicultural and multireligious 'western' societies, is not clear.

To give an example, in Australia as well as in many other 'western' societies, the position of the value of artistic freedom in the hierarchy of social values and human rights is currently debated and, as a consequence, renegotiated. The debate and the renegotiation are, at least for the moment, particularly intense in specific sections of the public arena, such as the academic and the artistic ones, but it is not excluded that conceptions elaborated in such specific sections might soon become mainstream (Coleman and White 2006).

Mainly thanks to contacts between 'western' legal ideologies and alternative legal frameworks, academics, intellectuals, and artists are currently realizing with increasing evidence that, from a certain angle, in many 'postmodern' societies, the artistic discourse has occupied the hierarchical position that the religious discourse held before the (at least partial) secularization of the 'western' world. Both artists and their art have been long considered as 'sacred', and therefore unaffected by any consideration on the social legitimacy of their expression. The value of artistic freedom has been thought as superior to any other value, with few exceptions. The outcry of most 'western' opinion-leaders vis-à-vis the Rushdie affair was

also a manifestation of the undisputed supremacy enjoyed by art in the hierarchy of values of the 'western' world (Asad 1990; Coleman and Fernandes-Dias 2008).

However, as calm reflection superseded inflamed passions, an increasing number of intellectuals, both in the 'west' and outside it, started to ponder the status of art in multicultural and multi-religious societies. Given that different cultures attach different importance to the artistic discourse and attribute to it a different position in the hierarchy of social values and, therefore, of human rights, is it still possible to maintain the sacredness of art, as well as the legal ideology that protects such sacredness from any compromise? Is it still possible to assure artists by saying that, no matter how badly their work might incite extremely negative social attitudes toward the religious dimension of the social identity of individuals and groups, they are free to engage in their artistic conducts as they please? Can artists in a multicultural and multi-religious society enjoy the same unconditional freedom of expression that they do in relatively monocultural and mono-religious societies?

The Act is a symptom of the fact that in some advanced multicultural and multi-religious societies such as the Australian one, opinion-leaders are, albeit timidly, starting to consider the opportunity that a mature multiculturalism might also entail the effort to bring about a compromise between different hierarchies of values, and different legal ideologies. This is the reason why it is indicated that artistic conducts, as well as those of scholarship, religion, or science, must be engaged in 'reasonably and in good faith'.

However, such indication is ambiguous because, as it was pointed out earlier, the interplay of different legal ideologies in multicultural and multi-religious societies is still a relatively unknown phenomenon. Opinion-leaders, including academics, artists, intellectuals, religious leaders, legislators, etc., intuit that in a multicultural and multi-religious society, values and human rights cannot be simply conceived as positioned within a permanent, pyramidal hierarchy but must be thought of as placed within a fluid, multi-layered architecture. Yet, they still lack the language to conceptualize the multicultural interplay of legal ideologies and to translate it into a coherent legal framework.

As it reads, the Act is a commendable attempt at regulating potential conflicts among human values and rights in the present-day Australian society, but it is still a perfectible attempt. The ambiguity with which the Act imagines the ideal interplay of legal ideologies in the current Australian society revealed itself in all evidence in one of the decisions taken on the basis of this legislation, *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* [2006] VSCA 284.

Catch the Fire: a semiotic point of view

The present paper will not aim at distributing rights and wrongs in this legal controversy, on which many more qualified commentators have already expressed their opinions (Gelber in this collection). More modestly, the paper will point out that this controversy can be considered as a juridical theatre where legal ideologies currently in competition in Australia (as well as in similar multicultural and multi-religious societies) were staged for a certain number of years with many reversals of fortune for the parties involved.

What matters in this controversy is exactly what matters in a theatrical play: not the triumph of a certain set of values over another, but the opportunity to realize that 1) different sets of values are presently in competition to shape the legal framework of the Australian society and, in general, of the 'west'; and that 2) striking a new, clean and operational balance among competing, sometimes conflicting, legal ideologies will be one of the major challenges in the administration of future multicultural and multi-religious societies.

In December 2004, the Islamic Council of Victoria brought proceedings in the Victorian Civil and Administrative Tribunal (VCAT) against Catch the Fire Ministries and Pastors Daniel Nalliah and Daniel Scot, both ministers with the Assembly of God, complaining that they had contravened section 8 of the Act by misrepresenting Islam in a seminar they held in early March 2002, as well as in a printed newsletter and in a website posting issued in the same period.

Upon the VCAT's decision that Catch the Fire Ministries, Mr Nalliah, and Mr Scot had contravened the provision above, they appealed to the Victorian Court of Appeal (VCA). The appeal was upheld mainly because the VCA found that the VCAT had committed six errors of law by (1) erroneously construing section 8 of the *Racial and Religious Tolerance Act*; (2) having regard to the evidence of Mr Thomas, Mr Eade and Ms Jackson – three Muslims who attended Pastors Daniel Nalliah's and Daniel Scot's seminar – in determining whether there had been a breach of section 8; (3) making a finding that the appellants breached section 8, which was against the weight of the evidence; (4) construing section 11 of the Act; (5) failing to find that section 8 is invalid because it breaches the freedom to communicate about political and governmental matters that is implied in the *Commonwealth Constitution*; and (6) making orders that were beyond the power of the tribunal, or invalid because they were insufficiently precise.

Error of law (1) is particularly interesting from the point of view of a semiotic analysis of the way in which the legal framework of present-day Australian society interprets and 'translates' the predominant international legal discourse on the human right of religion and belief. As it was pointed out above, the purpose of the present paper is not to provide

for a further, intellectual level of decision about *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc*, but to pinpoint the way in which divergences in the semantic construction of the Act by the Australian, and in particular by the Victorian, judicial system, can be considered a symptom of the transitional phase through which several 'western' multicultural and multi-religious societies currently go, a phase in which different hierarchies of values and human rights, as well as different legal ideologies, compete for shaping the legal system of such societies.

As regards error of law (1), Justices of Appeal Nettle, Ashley, and Neave found that the VCAT had misconstrued section 8 of the *Racial and Religious Tolerance Act* by excluding from consideration the nature of the audience to whom the conduct was directed. In other words, a conduct that might breach section 8 of the Act if directed at a certain audience might not breach it if directed at a different audience. According to Justices of Appeal Nettle, Ashley, and Neave, taking into consideration the nature of the audience of a conduct is paramount because section 8 of the Act cannot be correctly construed without correctly construing the notion of incitement.

Indeed, the Act is not meant to outlaw all conduct against the religious dimension of the social identity of individuals or groups, but only those conducts that are likely to incite extremely negative social attitudes vis-à-vis certain individuals or groups on the ground of the religious dimension of their social identity. However, in order to understand which conduct might be conducive to incitement of such extremely negative social attitudes, one should consider the nature of the audience at which the conduct is directed. It is only in relation to the nature of a specific audience that conducts are to be considered conducive to incitement of hatred, contempt, revulsion, or ridicule on the ground of religion.

In order to frame this construction of section 8 of the Act in legal terms, a construction at odds with that implicitly provided by the VCAT, Justices of Appeal Nettle, Ashley, and Neave introduced the notion of 'ordinary reasonable reader', which essentially belongs to the law of defamation. In order to ascertain whether a statement or any other expressive conduct might be defamatory, it is not sufficient to analyze the semantic structure of this statement or conduct in order to determine its meaning. It is also necessary to determine how an abstract 'ordinary reasonable reader' would interpret such statement or conduct and therefore construe its meaning and pragmatically react to it.

The notion of 'ordinary reasonable reader' closely resembles that of 'ideal reader' developed by contemporary semiotics, and in particular by the so-called interpretative semiotics mainly elaborated by Umberto Eco and his school (Eco 1979). In many of his works, Umberto Eco distinguishes between the *intentio auctoris* of a text, that is, the meaning which the author of the text meant to signify and communicate through the text; the *intentio lectoris* of a text, that is, the meaning that the reader of the text

attributes to it; and the *intentio operis*, that is, the meaning of the text itself. In elaborating the concept of *intentio operis*, Umberto Eco's aim was to avoid both the fallacy of strict philologists, according to whom the only meaning that can be attributed to a text is the meaning that its author meant to signify and communicate through it; and the fallacy of strict deconstructionists, according to whom the only meaning that can be attributed to a text is the meaning that its reader attributes to it.

But what is, exactly, the *intentio operis* of a text? The *intentio operis* of a text is composed of a series of semantic features through which the text predisposes and predetermines the attribution of meaning to the text not by a generic reader, for instance a reader who deliberately decides to misread, misconstrue, and misinterpret the text, but by an ideally cooperative reader, that is, by a reader who deliberately decides to play the semiolinguistic game proposed by the text. Therefore, the *intentio operis* of a text cannot be determined in relation to its empirical reader, that is, someone who attributes meaning to the text according to her own idiosyncratic hermeneutic style, but in relation to the ideal reader of the text, an abstract concept that designates a perfectly cooperative hermeneutic style.

Further developments in the definition of the concept of *intentio operis* and the related notion of ideal reader pointed out that it is practically impossible to define what an ideally cooperative reader is without relation to an inter-subjective conception of language and its meaning. All in all, an ideal reader – that is, a reader who is able to perfectly cooperate with the semantic structure of a text in order to detect its *intentio operis* – is a reader who abides by the construction of language shared by the semiolinguistic community in which the reader lives and acts as a semiotic agent. Although much controversy and debate have been spurred by this point – on which semioticians do not always agree – it is difficult to imagine the theoretical possibility to define the *intentio operis* of a text without reference to some notion of community, that is, without reference to the way in which meaning is construed as a social phenomenon.

However, this is exactly the *punctum dolens* of the notion of 'reasonable reader', which can be considered the legal equivalent of the notion of 'ideal reader'. The legislator can imagine the way in which a symbolic conduct will be conducive to emotional incitement, and therefore to incitement to action, in two different, perhaps opposite, ways.

On the one hand, the legislator can imagine that the meaning, and therefore the inflammatory potential, of a conduct should be construed in relation to a generic notion of reasonable reader, a notion impermeable to any idea of specific semio-linguistic community. In other words, in order to determine whether a conduct X was conducive to the incitement of a violent conduct of A against B, the judge should not consider the meaning that X might have for the class of readers to which A belongs, but the meaning that X has for a reasonable reader, independently from the specific class of readers to which A belongs. The reasonableness of the

reader is not measured in the frame of a specific class of human beings, but in relation to humanity considered as a whole (or, at least, in relation to a semio-linguistic community considered as a whole).

On the other hand, the legislator can imagine that the meaning, and therefore the inflammatory potential, of a conduct should be construed in relation to a specific notion of reasonable reader, a notion permeated by a specific semio-linguistic community. In other words, in order to determine whether a conduct X was conducive to the incitement of a violent conduct of A against B, the judge should not consider the meaning that X might have for a reasonable reader, independently from the specific class of readers to which A belongs, but the meaning that X is likely to have for the class of readers to which A belongs.

The divergence in construing section 8 of the Act between the VCAT and the VCA can be explained with reference to the opposition analyzed above. The VCAT construed section 8 of the Act without consideration for the specific nature of the audience to which Pastors Daniel Nalliah and Daniel Scot directed their seminar, whereas the VCA construed the same section taking the nature of the audience into account. The judicial result of the two options is diametrically different: on the one hand, the seminar was reputed as potentially inflammatory because it was capable of inciting the reasonable reader to extremely negative social attitudes; on the other hand, the same seminar was not reputed as potentially inflammatory because it was incapable of inciting to such attitudes the specific audience at which it was directed.

Once again, the purpose of the present paper is not to suggest that one of the two options exposed above is preferable in absolute terms. On the contrary, the paper would like to point out the way in which the two different, opposite options embody different, contrary legal ideologies.

On the one hand, the legal ideology behind the first option entails a notion of multicultural society in which the nature of the audience at which an expressive conduct is directed cannot be reasonably predetermined by the agent(s) of such conduct. Every time a conduct is brought about in the public arena, be it through a seminar or through an internet posting, the agent(s) of such conduct cannot precisely know in advance by which specific audience the conduct will be received, and with what semantic and pragmatic consequences. Although I might be a Christian pastor meant to direct a seminar to a Christian audience, I cannot be completely sure that the same seminar will not be received by a non-Christian audience, and interpreted with semantic and pragmatic consequences that are different from those that would come about if the empiric audience corresponded perfectly with the intended audience.

On the other hand, the legal ideology behind the second option entails a notion of multicultural society in which the nature of the audience to which an expressive conduct is directed can be reasonably predicted by the agent(s) of such conduct. Every time a conduct is brought about in

the public arena, be it through a seminar or through an internet posting, the agent(s) of such conduct can more or less precisely know in advance by which specific audience the conduct will be received, and with what semantic and pragmatic consequences. If I am a Christian pastor intending to direct a seminar to a Christian audience, I should not be bothered by the idea that my words might be received not only by such audience, but also by an audience which the seminar might incite to hatred, contempt, revulsion, and ridicule.

The personal opinion of the author of the present paper is that the second legal ideology embodies a conception of multicultural and multi-religious society that 1) embraces quite a monadic idea of multiculturalism and multi-religiosity and 2) does not take sufficiently into account the way in which the present-day communication media shapes the public arena in multicultural and multi-religious societies. As regards the first point, one might wonder whether the idea of 'reasonable reader of its class of readers' – implicitly endorsed by the second legal ideology – actually is a multicultural idea or whether its multicultural character is only apparent.

Is a society where the semantic and pragmatic consequences of expressive conducts are measured in relation to their intended audiences only, meaning their intended monocultural and monosocial audiences, really multicultural? Does the multicultural character of a society merely stem from the juxtaposition of different cultural discourses and audiences, or rather from (at least the theoretical possibility of) their 'contamination'?

Factual evidence seems to indicate that, at least in societies where practices of apartheid are not implemented, different sociocultural groups, including different religious groups, constantly share messages and audiences, to the extent that whoever produces an expressive conduct in a multicultural and multi-religious society does so knowing in advance that it might be received by readers with extremely various sociocultural backgrounds.

This is the reason for which the idea of a generic 'reasonable reader' cannot be eliminated from the legal ideology of multicultural and multi-religious societies: its elimination would be tantamount to affirming that a modicum of common sense, including a modicum of inter-subjective agreement about how conducts should be interpreted, is not shared by the members of these societies despite their extreme sociocultural variety. Furthermore, eliminating the idea of generic 'reasonable reader' would be tantamount to claiming that audiences in multicultural and multi-religious societies are so diverse that they cannot talk to each other, and therefore cannot offend each other either.

As a matter of fact, this is not true. Citizens in multicultural and multi-religious societies are increasingly exposed to expressive conducts primarily directed at citizens with different sociocultural backgrounds. However, this does not rule out the possibility that they interpret these conducts and

act consequently, and unfortunately it does not rule out either the possibility that such interpretations and actions might be violent.

As media analysts are showing with increasing evidence, the way in which the present-day media work contributes to the impossibility of conceiving different sociocultural audiences as monadic, and leads, on the contrary, toward the creation of a global audience in which each member of a multicultural and multi-religious society is potentially exposed to the messages of all the other members (Meyrowitz 1985).

Given the characteristics of messages, audiences, and communication in multicultural and multi-religious societies, a legal ideology that supports the notion of sociocultural-specific hermeneutics does not seem to be adequate, at least not to the author of the present paper. On the contrary, section 8 of the Act should be construed according to a legal ideology that supports the idea that a multicultural and multi-religious society should develop a commonly shared hermeneutic.

Will this result in citizens having less freedom in expressing their beliefs about the religion of other citizens? From a certain point of view, the answer is inevitably affirmative. Communicating in a multicultural and multi-religious society, where contemporary media increasingly erode the socioculturally specific barriers in the circulation of messages and in their reception by audiences, inevitably requires a surplus of attention. Predicting which expressive conducts might be inflammatory is much easier in relatively monocultural and mono-religious societies. On the contrary, in a multicultural and multi-religious society, the way in which a conduct might incite hatred or other extremely negative social attitudes must be measured in relation to a constantly changing amalgam of cultural sensibilities.

Conclusion: the social utility of legal controversies

All the educational agencies should encourage citizens to be fully aware of the variety of religious sensibilities of both the multicultural societies in which these citizens live and the global society brought about by present-day communication media: this is a banal suggestion. However, that which has been frequently overlooked by critiques of the Act or similar laws is the educational potential that legal controversies brought about by such laws entail. Judicial decisions stemming from these kinds of laws might require consistent symbolical and material resources, for instance, in terms of time and legal expenses. However, according to the author of the present paper, citizens in multicultural and multi-religious societies should not be afraid of legal controversies and their consequences. From a certain point of view, and especially according to the theatrical understanding of the legal discourse proposed above, it is also through these controversies that the hierarchies of values and human rights of a complex, multicultural and multi-religious society are constantly renegotiated in order to find a compromise that suits the largest possible amount of individuals

and groups. For instance, *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* was not, as most commentators have argued, a total waste of time and resources, but a wonderful occasion to reflect on the way in which our conception of human rights should change in order to accommodate the needs of hyper-diverse societies.

Perhaps in the future, education and the memory of past legal controversies will make the Victorian *Racial and Religious Tolerance Act* or similar laws obsolete. Citizens will know to what extent they can freely express their beliefs on the religious identity of other citizens without running the risk of exposing them to religious hatred and its violent consequences. For the moment, though, this idyllic future is still pure fantasy, and laws like the Victorian *Racial and Religious Tolerance Act* represent a necessary point of reference in order to stimulate the non-violent resolution of social tensions in multicultural and multi-religious societies.

Note

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Part III

Religion as a factor in legal processes and decisions

7 Religion and security

What's your motive?

Nadirsyah Hosen

Introduction

Religion kills. Throughout human history, people have killed in the name of their god. *Time* magazine has quoted a statement from a person named Marwan in Iraq. 'Yes, I am a terrorist,' he says. 'Write that down: I admit I am a terrorist. [The Qur'an] says it is the duty of Muslims to bring terror to the enemy, so being a terrorist makes me a good Muslim'. He quotes lines from the Holy Qur'an: 'Against them make ready your strength to the utmost of your power, including steeds of war, to strike terror into the enemy of Allah and your enemy'. 'The jihadis are more religious people,' he says. 'You ask them anything – anything – and they can instantly quote a relevant section from the Koran' (Ghosh 2005).

People like Marwan have used religious text as their inspiration and sources to commit violence. But Marwan is not alone. On 29 July 1994, Paul Hill approached a Pensacola, Florida abortion clinic with which he was familiar. When he spotted clinic doctor John Britton and his body-guard, James Barrett, outside, he shot them both at close range with a shotgun. Hill also wounded Barrett's wife, Joan. Following the shots, Hill laid his shotgun on the ground and waited to be arrested. In September 2003, Hill as America's first anti-abortion militant was put to death by the state of Florida. On the eve of his execution, Paul Hill was smiling and cheerful. 'I expect a great reward in heaven', he said. 'I am looking forward to glory. I don't feel remorse.' Hill, a former Presbyterian preacher, said he would die a martyr and inspire other abortion militants to kill on behalf of unborn children. He looked forward to death, where he said God would forgive him for the murders and offer him a great reward. Hill's action supported this desire: after the shooting Hill sat down on a curb and waited for the police to arrive and once charged, he made no attempt to appeal the death sentence. Hill told Jessica Stern only months before his execution: 'I would be willing to die to promote the truth … I'm not resisting their efforts to kill me … The heightened threat, the more difficulties forced on a Christian, the more joy I experience if I respond appropriately' (Stern 2003: 170).

One can always find scriptural verses to legitimate both the slaughter and the acceptance of the Other. The same Torah that contains the commands to slaughter the idolatrous nations inhabiting the Land of Israel also contains the commandment 'Thou shalt not oppress a stranger: for ye know the heart of a stranger, seeing ye were strangers in the land of Egypt' (Exodus 23:9). The same Gospel of Matthew that declares 'His blood be on us, and on our children' (27:25) also declares 'Love your enemies, bless them that curse you' (5:44). Similarly, the same Qur'an that states 'slay the idolaters wherever you find them' (9:5) also states 'Let there be no compulsion in religion' (2:256).

The fact that a holy text contains divine commands to despise or kill the Other does not mean that the believers in the sanctity of the text must actually be doing so. It is true that in every religion we can see the battle of interpretation. One reason that religions may have played a powerful role in history is that they often carry the symbols, stories, and world views through which people shape their identity, designate or assign their deepest questions of meaning, deal with problems of injustice and suffering, and develop codes of morality and conduct to meet the requirements of community life. Nevertheless people are often prepared to die in order to defend or uphold these symbols, meanings, and identity systems (Rapoport 1984).[1]

The suspicion that religion is a fundamental source of terrorism has been broadly examined since the 9/11 attacks. In fact, religious motive has became an essential part of defining terrorism in the UK and other jurisdictions including Australia and New Zealand, but has been resisted in others including the United States, Indonesia, and many countries in the Middle East, which define terrorism primarily by reference to the nature of the harm caused.

My article will illustrate the difficulties in examining 'secular' and 'religious' motives. First, I will use Rapoport's views on four waves of terrorism to provide the case for alleging links between religion and terrorism. Second, a brief overview of anti-terrorism law passed since 9/11 reveals how religion becomes one of the motive elements in the definition of a terrorist act. I examine how the inclusion of motivation in the definition promotes the impression that the state is punishing the religion of the accused as opposed to their having committed or planned to commit acts of violence. Third, the *Khawaja* case in Canada, along with Indonesian cases, demonstrates how the court is able to punish the terrorists even without examining their religious motive. Therefore, I will argue that the inclusion of religious motive as an essential element of a terrorist activity might encourage a process of religious profiling in which investigators paid undue attention to the religion of suspects or accused persons. I will argue that this not only puts religion on trial, but it also diminishes the effectiveness and value of the terrorism laws and, moreover, it encourages discrimination.

The four waves

According to David Rapoport, we have had four waves of terrorism since modern terror began in the 1870s. The anarchist wave lasted some 40 years. The anti-colonial wave began in the 1920s and ended in 1962, lasting as its predecessor did for 40 years. The third or new left wave began in the 1960s, reached its high point in the 1980s and is basically over, though a few organizations still survive in the twenty-first century, that is, in Peru, Columbia and Nepal. Now we are in the fourth or religious wave. Rapoport dates the fourth wave from three almost simultaneous events: the Iranian Islamic Revolution in 1979, the start of the fifteenth century in the Islamic *hijri* calendar, and the Soviet invasion of Afghanistan – when the violence really started (see Rapoport 2004).

Accordingly, each wave produced its own signature tactics. First-wave terrorists assassinated the most prominent political figures in government. The second wave rejected assassination and organized a more complicated undertaking. The third wave introduced airline hijacking and hostage-taking on a grand scale. The current or fourth wave rejected the third wave's inclination to kill from a distance and introduced self-martyrdom or suicide bombing assaults.

Rapoport's view is open for discussion. For instance, are the terrorist waves historically unique to each period? Don't we see some similarities between the anarchist terrorism (first wave) and today's terrorism? We may also ask: is it true that only religious groups use suicide attacks? How do we explain the situation in Iraq? Should we see it as the fourth wave (religious wave) or anti-colonial wave?

Ferguson (2001) compares Osama bin Laden with late nineteenth-century Russian terrorists, and makes a note of similarities in the political religion of their ideologies; the transnational nature of both sets of terrorists, as they often resided and planned attacks abroad, along with the similarity of global political economic conditions at the end of the nineteenth and twentieth centuries. Ferguson (2001: 115–41) has also compared the motives of the 1880s Sudanese revolt against the British Empire with Osama's campaign against the United States. Another scholar, Schweitzer (2002) is of the view that while nineteenth-century anarchist assassinations were often done by individuals, the acts were part of a larger contemporary movement of which the general public was fearful; it was much like present-day reactions to terrorism. Kennedy (2001) notes a similarity between the hatred of London as the financial centre of world capitalism at the end of the nineteenth century and the hatred by 'fanatical Muslims today' of the dominance of Wall Street and the Pentagon. Finally, Bergesen and Han (2005) observe that if Al Qaeda is a reaction to the American empire, then one could see parallels in pre-1914 terrorist groups attacking the empires of their day (the Serbian Black Hand versus the Austrian Empire, the Inner Macedonian Revolutionary Organization

versus the Ottoman Empire, and the Narodnaya Volya versus the Tsarist Russian Empire (Bergesen and Han 2005)). As can be seen, terrorism has similarities as violence of the powerless who feels victimized and humiliated by injustice of great power/empire.

The point is that sometimes it is true that history repeats itself. Although we can see some unique characteristics of each wave, we can also see some similarities. It seems that Rapoport is trying to draw a line between secular and religious terrorism. If this is the case, let us consider some interesting data here. In his book *Dying to Win: The Strategic Logic of Suicide Terrorism*, Robert Pape (2005) shows that most actual terrorist incidents are non-religious. It is based on a database he has compiled at the University of Chicago, where he directs the Chicago Project on Suicide Terrorism. The book's conclusions are based on data from 315 suicide terrorism campaigns around the world from 1980 through 2003 and 462 individual suicide terrorists. Some of his findings include: the leading instigators of suicide attacks are the Tamil Tigers in Sri Lanka, a Marxist–Leninist group whose members are from Hindu families, but who are adamantly opposed to religion; 95 per cent of the attacks could have their roots traced to large, coherent political or military campaigns; and 57 per cent of the attacks were secular and 43 per cent were religious (Pape 2005).

Despite the different views discussed above, Rapoport's view clearly highlights the idea of religious terrorism as the current wave. This brings us to Juergensmeyer's book, *Terror in the Mind of God* (2003). He examines the cases of a number of people who engage in, or somehow support, the use of violence for religious ends in different religious traditions. So basically he asks some difficult questions here: since religion was found in bed with terrorism, is this the fault of religion? Has its mask been ripped off and its murky side exposed – or has its innocence been abused? Is religion the problem or the victim?

According to Ranstorp (1996), despite having vastly different origins, doctrines, institutions, and practices, these religious extremists are unified in their justification for employing sacred violence either in efforts to defend, extend or revenge their own communities or for millenarian or messianic reasons.

This leads us to consider the motive behind such terror. The secular–religious dichotomy is often used to make distinctions between 'fanatics' and 'pragmatics' as if secular motives for murdering large numbers of innocent civilians are somehow more rational than religious ones. The reasoning follows that one can negotiate with pragmatic terrorists, but religious ones are so irrational that there is no possibility of compromise or negotiation. People are concerned that religious terrorist attacks are likely to be more deadly as they are less motivated by a desire to win over the people. This is owing to the fact that religious terrorists differ from their secular counterparts in motivation. Bruce Hoffman (1998) writes that

'whereas secular terrorists attempt to appeal to actual and potential sympathizers, religious terrorists appeal to no other constituency than themselves'. For Audrey Cronin (2002), religious terrorists act 'directly or indirectly to please the perceived commands of a deity'. This is why, for Hoffman and Cronin, religious terrorism is uniquely destructive and uniquely dangerous.

Such scholars dismiss any strategic motivation for terrorist tactics, and rather they assert that religious terrorism is caused by ideological obsession and fanaticism. However, is it true that religious terrorism is based on irrational decisions, no strategic motivation, and conducted by frustrated people?

One scholar has one possible answer:

> I collected data on more than 130 members of the Global Salafi Jihad … In terms of socio-economic status, two thirds came from solid upper or middle class backgrounds … They came from caring intact families … As a group, the terrorists were relatively well educated with over 60% having some college education … Most had good occupational training and only a quarter were considered unskilled with few prospects before them. Three quarters were married and the majority had children. I detected no mental illness in this group or any common psychological predisposition for terror.
>
> (Sageman 2004)

Therefore, the views that irrationality or mental illness is the main source of religious terrorism are questionable. I think we should try to see this main issue from a terrorist point of view: they see their actions as reasonable, and a calculated response to circumstances they face. What is perceived by outsiders as failure may not be perceived as such by terrorist groups; instead it may serve as a further justification of their tactics. For instance, in the three countries Stern visits, Islamist radicals have different views on what constitutes success. Most are focused on their local or regional conflict: Pakistani jihadist groups want to evict India from Kashmir; Hamas wants to push Israel out of the occupied territories; the Indonesian group, Laskar Jihad, began as a local paramilitary group designed to save Muslims from Christian persecution (Stern 2003). Although religion might inspire their violent acts, they also have other motives or goals which could be considered 'secular'.

In this context, Assaf Moghadam (2003) argues that Middle East bombers are driven by a combination of motivations that vary from person to person. He categorizes suicide bombers' motivations as religious, personal, nationalist, economic, or sociological. According to Moghadam, personal motives are probably the biggest driving force; they include a reward in the afterlife, elevated status of the bomber in society, revenge for the deaths of a friend or family member, spiritual benefits to the

bomber's family, and a restoration of dignity from the humiliation felt in Palestine.

Adam Dolnik and Keith M. Fitzgerald (2008) point out that even Aum Shinrikyo's sole hostage-taking incident (1995 hijacking of Nippon Airways flight 857) was motivated by a rational demand for the release of the cult's guru from prison. Aum's ideology was based on a 'cosmically scientific' mix of prophetic cultic practices that was difficult for most people to comprehend (Dolnik and Fitzgerald 2008: 139). They explain more:

> the 'new terrorists' in general are effectively very similar to their secular counterparts: they are individuals who fail to see alternative perspectives on the issues for which they are fighting, and who empathize with – or attempt to embody – the victimization of their own people, while exercising minimal empathy for their victims … It is still the perception of humiliation, victimization, and injustice that drives the so-called 'religious terrorist,' rather than a perceived command from God. The use of holy rhetoric by most groups commonly labelled 'religious' serves much more as a uniting and morale-boosting tool than as a justification for acts of unrestrained violence.
>
> (Dolnik and Fitzgerald 2008: 139)

I would argue that we need to reconsider whether the current wave is religious terrorism as it is difficult to determine a single motive or goal of such violence. What we see as religious terrorism might not be unique in history and the link between socio-political and economic structural factors, such as poverty, lack of economic opportunity, foreign occupation, and terrorism, should be taken into account. As I will discuss below, the difficulties of examining motives of religious terrorism have influenced the debate on the definition of terrorism itself.

Anti-terrorism law

Different countries, with differing political and legal traditions and systems, recognizing the particular threat posed by terrorism, have enacted a variety of measures to counter that threat.

Before 2002 terrorist acts in Australia would have been prosecuted as crimes such as murder, infliction of serious injury, assault, arson, possession of explosives, offences against aircraft or ships and so on. This position was radically changed by the *Security Legislation Amendment (Terrorism) Act 2002* (Cth), which introduced a definition of terrorism into Australian law and created a number of offences based on that definition (Divisions 101 and 103 of the *Criminal Code Act 1995* (Cth)). At the Commonwealth level there have been more than 30 pieces of 'anti-terror' legislation introduced since 2001. Each state and territory has introduced legislation to complement that of the Commonwealth. By way of example, the

Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003 (Cth) introduced a regime whereby 'questioning warrants' allowed for the detention and questioning of individuals. This legislation was replaced by the *ASIO Legislation Amendment Act 2006* (Cth), which consists of more extensive powers, including the detention of an individual for the purpose of questioning. Multiple warrants may be sought. Preventative detention was enacted in December 2005 by the *Anti-Terrorism Act (No 2) 2005* (Cth) which inserted Division 105 of the *Criminal Code Act 1995* (Cth) allowing, amongst other things, for the detention of an individual for up to 48 hours to prevent an imminent terrorist act occurring or to preserve evidence (Yehia 2008).

In the United States, on 25 October 2001, Congress passed the *USA PATRIOT Act 2001*. The Act prescribes up to 10 years of imprisonment to 'whoever harbors or conceals any person who he knows, or has reasonable grounds to believe, has committed, or is about to commit' offences associated with terrorism. Legislative counter-measures were reinforced by declaring war against terror since 'after the chaos and the carnage of September the 11th, it [was] not enough to serve [their] enemies with legal papers' (Bush 2004).

Indonesia enacted a new anti-terrorism law in 2002. The Act arguably confers excessive powers to investigators, public prosecutors and judges. A suspect can be detained for up to seven days during investigations based on preliminary evidence (article 28). If convicted, a person is liable to a period of imprisonment of up to 15 years, or the death penalty. However, political offences are excluded from the sweep of terrorist acts (article 5) (see Hosen 2010). Singapore and Malaysia have used the *Internal Security Act* (ISA), while in the Philippines, President Arroyo approved the *Human Security Act 2007* (see Hosen 2009).

Definition

While governments around the globe agree that terrorism is a threat, there is a lack of worldwide agreement on what terrorism is. The wide definition of 'terrorism' used in the post-9/11 attack legislation generates significant problems, as it potentially encompasses a very broad range of activity and activism.

Ben Saul, in his book *Defining Terrorism in International Law* (2006), proposes the following definition which, he argues, would reflect existing agreement on the wrongfulness of terrorism:

> (1) Any serious, violent, criminal act intended to cause death or serious bodily injury, or to endanger life, including by acts against property; (2) where committed outside an armed conflict; (3) for a political, ideological, religious, or ethnic purpose; and (4) where intended to create extreme fear in a person, group, or the general

> public, and: (a) seriously intimidate a population or part of a population, or (b) unduly compel a government or an international organization to do or to abstain from doing any act.
>
> (Saul 2006)

Furthermore, he suggests an explicit exception for acts of advocacy, protest, dissent or industrial action that are not intended to cause death, serious bodily harm or serious risk to public health or safety (Saul 2006: 65–66).

Other definitions usually include: 'the use or threat of action' where it endangers life, or poses a serious risk to health or to property, and is 'designed to influence the government or to intimidate the public or a section of the public', and where 'the use or threat is made for the purpose of advancing a political, religious or ideological cause'.[2] And yet, on each of these counts, the attempt to define terrorism is fraught with difficulties in distinguishing terrorism from what it is not such as legitimate state responses or counter-terrorism, national liberation struggles or freedom fighters, and ordinary criminal offences.

Laura Donohue (2005), for instance, observes that counter-terrorism shares so many qualities with terrorism. She explains:

> The definition, targets, and additional characteristics of terrorism and counterterrorism are intimately connected. In each of the five regions – the US, UK, Ireland, Israel and Turkey – there is a close relationship between the types of actions taken by state and non-state actors. Both incorporate violence, fear and a broader audience. They are purposive, political and (although denied in each case by the actor) affect non-combatants. And they are instrumental. Their targets range from the immediate and symbolic to a broader audience and demands. In addition, such actions are emotive and carry strong moral and religious overtones. While not all counter-terrorism involves violence, neither does all terrorism.
>
> (Donohue 2005: 35)

With regard to freedom fighters, one only needs to offer the examples of Yasser Arafat and Nelson Mandela. Nobel Prize winner Yasser Arafat has been charged in the cold-blooded assassination of US Ambassador Cleo Noel in the Sudan in 1973. His PLO (Palestine Liberation Organization) is an umbrella group embracing organizations for defending their lands. Nelson Mandela, another Nobel Peace Prize winner, did not get life imprisonment on Robben Island for sitting in at lunch counters but, if memory serves, for plotting terror to overthrow the regime. Is it then true that 'one man's terrorist is another man's freedom fighter'?

It is worth noting that half of all terrorist organizations have such 'liberation' aims. They wish to make an independent state for minority (the

Basque Fatherland and Liberty group, IRA, Kurdistan Worker's Party), independent Islamic state (Abu Sayyaf Group, Moro Islamic Liberation Front), or independent working class (Revolutionary People's Liberation Party/Front). Put simply, they struggle for the country's liberation. Are they terrorists or freedom fighters?

Another issue is how can we distinguish between a terrorist act and an ordinary crime? According to Victor Ramraj, to the extent that anti-terrorism offences are incorporated into the criminal law system, substantive and procedural criminal law concerns arise. Substantively, these concerns relate, for example, to the ways in which anti-terrorism laws depart from traditional criminal law norms. They might do so by, for instance, relaxing the mental element required for a conviction or by expanding criminal liability to those who facilitate acts of terrorism or even to third parties with no direct knowledge of the activity in question (by creating secondary offences relating to, say, the failure to monitor or report financial or property transactions). This tendency to fight terrorism by criminalizing conduct that might otherwise be harmless (say, allowing a customer to open a bank account without collecting detailed personal information) gives rise to concerns about privacy and overcriminalization (Ramraj 2005).

Most acts of terrorism could be regarded as particularly heinous crimes and prosecuted accordingly, yet there is a perceived need to treat terrorism as a *sui generis* offence. The temptation might be to distinguish terrorism from ordinary criminal offences by reference to the political, religious, or ideological *motive* with which the act is committed.

Two possible scenarios below might explain the difficulty in drawing a clear line between a terrorist act and a crime:

A Rambo with an M16 in his hands came to the class, and said clearly 'Allahu Akbar' before shooting everyone in the classroom.
B Rocky with an M16 in his hands came to the class, and said clearly 'Jennie, I love you' before shooting everyone, including Jennie, in the classroom.

The acts of Rambo and Rocky are the same, but the motive might be different. So which one is a terrorist and which one is a mass murderer? This illustration leads us to examine the problems with motive elements (reference to a political, religious or ideological purpose) in the definition of terrorism. On one hand, the adoption of motive elements assists us to differentiate terrorism from other kinds of serious violence which may also generate fear such as common assault, armed robbery, rape, or murder. On the other hand, such inclusion might encourage a process of religious profiling in which investigators and others paid undue attention to the politics or religion of suspects or accused persons. This could be seen as not only a departure from ordinary criminal law principles, but is also a prosecutorial and

political minefield. Giving motive (rather than the intention) primary legal significance leaves prosecutors and governments vulnerable to charges of profiling and discrimination against religious groups or unpopular political groups, further politicizing anti-terrorism prosecutions.

It is worth noting that the ordinary criminal law functioned under the traditional principle that motive was not relevant to a crime and that a political or religious motive could not excuse the commission of the crime. In contrast, the *Anti-Terrorism Act (No 2) 2005* (Cth) in Australia requires proof that terrorist crimes are committed for religious or political motives. In February 2006 the Commonwealth Department of Public Prosecutions (CDPP) and the Attorney-General's Department argued that this motivation element should be removed from the definition of 'terrorist act' on the grounds that the definition is too complicated and that motive should not be relevant to criminal culpability. The CDPP submission states that 'it is not in the public interest for a person to avoid criminal liability by showing that their acts were motivated by something other than politics, religion or ideology' (MacDonald and Williams 2007).

Professor Kent Roach of McGill University shares the views that the requirement of proving a political, religious or ideological motive is a threat to liberal principles:

> It means that police and prosecutors will be derelict in their duties if they do not collect evidence about a terrorist suspect's religion or politics. In my view, this presents a threat to liberal principles that democracies do not generally inquire into why a person committed a crime, but only whether he or she acted intentionally or without some other form of culpability. It also may have a chilling effect on those whose political or religious views are outside the mainstream and perhaps similar to those held by terrorists. Investigations into political and religious motives can inhibit dissent in a democracy.
>
> (Roach 2004; see also Roach 2007a: 41)

Similarly, Canada's Justice O'Connor in the first Arar Report noted that 'anti-terrorism investigations at present focus largely on members of the Muslim and Arab communities' leading to an 'increased risk of racial [or] religious profiling' (Maher Arar 2006: 356). On the other hand, while he acknowledges that motive is not traditionally relevant to criminal responsibility, Ben Saul presents a case for why motive should be included as an element of definition of 'terrorist act':

> In a sophisticated criminal justice system an element of motive can promote a more finely calibrated legal response to specific types of socially unacceptable behaviour. Where society decides that certain social, ethical, or political values are worth protecting, the requirement of a motive element can more accurately target reprehensible

> infringements of those values. There may be a powerful symbolic or moral value in condemning the motivation behind an act, quite separately from condemning the intentional physical act itself.
>
> (Saul 2007: 41)

In this sense, Alan Norrie has argued that ignoring the relevance of motive effectively ignores the social conditions in which individuals live. Norrie points out that the principle that motive is irrelevant to the question of criminal responsibility originated in a system where rules relating to property were imposed on all, despite the poor's motives of 'desperate social need and indignant claim of right' (Norrie 2001: 38–39). By ignoring the social conditions that led to crime, assigning criminal responsibility could be simplified.

According to Williams *et al.* (2006), the inclusion of the motive of advancing a political, religious or ideological cause is necessary as it is one of terrorism's distinguishing features. It is the intention of 'advancing a political, religious or ideological cause' that distinguishes terrorist acts from other forms of criminal conduct such as armed robbery, serial rape and mass murder (Williams *et al.* 2006). Such views have been supported by the HREOC (the Australian Human Rights and Equal Opportunity Commission) on the grounds that removing the motive elements would widen the breadth of the definition to the extent that the terrorism offences could be a disproportionate limitation on the rights to freedom of expression and association guaranteed under the *International Covenant on Civil and Political Rights* (ICCPR) (HREOC 2006).

By contrast, Justice Robert McDougall of the New South Wales Supreme Court offers his view that if the prosecution is able to establish that an act is undertaken with the intention of coercing, or influencing by intimidation, the government or intimidating the public or a section of the public, then the motive for the act should be irrelevant. That which is considered conceptually and morally distinctive about terrorism – that it aims to disrupt and coerce peaceful political process and interrupt society through violence – should form the focus of the law, not the underlying motive of the perpetrator (McDougall 2009).

Justice McDougall also explained that

> [i]n *R v Mallah*[3] there was evidence that the accused was motivated by a religious or ideological cause. However, there was also evidence that he may have been motivated by a desire for revenge or because of a grievance against a Government agency. Subsequently the accused was acquitted of two counts of preparing for or planning a terrorist act. Thus it seems that tactically, it may be easier for the Office of Public Prosecutions to charge individuals with pre-existing offences rather than make use of the terrorism legislation.
>
> (McDougall 2009)

Another concern is that if we still accept the motive elements, particularly religious ones, the motive requirement could also provide an accused with a possible platform to politicize the trial process by offering extensive evidence about the true meaning of often ambiguous religious beliefs. The battle of interpretation within religion will take place in the court. Do the courts have the capacity and ability to analyze the religious text and literature?

Once again this debate illustrates the difficulties we have in not only examining whether secular terrorists and religious terrorists have different motives but also whether we should put the motive elements as an essential part in defining terrorism. Further, what will be considered a political, religious or ideological cause may change over time.

If we accept motive elements, particularly religious motives, how do we explain the recent findings that from 2004 to 2008 only 15 per cent of the 3,010 victims were non-Muslims? During the most recent period studied the numbers skew even further. From 2006 to 2008, only 2 per cent (12 of 661 victims) are from the west, and the remaining 98 per cent are inhabitants of countries with Muslim majorities. During this period, a person of non-western origin was 54 times more likely to die in an Al Qaeda attack than an individual from the west. The overwhelming majority of Al Qaeda victims are Muslims living in Muslim countries, and many are citizens of Iraq, which suffered more Al Qaeda attacks than any other country courtesy of the Al Qaeda in Iraq (AQI) affiliate. The figures, drawn from exclusively Arabic news sources, show that the Muslims they claim to protect are much more likely to be the targets of Al Qaeda violence than the western powers they claim to fight (Helfstein *et al.* 2009).

At an international level, there is no consensus as to whether motive should be included within the definition of 'terrorist act'. Anti-terrorism legislation in the UK, New Zealand, and South Africa all require the prosecution to establish a political, religious or ideological motive. South Africa also includes philosophical motives. Conversely, the United States and the draft United Nations (UN) Comprehensive Convention on International Terrorism do not require such a motive (Golder and Williams 2004).

Simon Butt (2008) explains that in Indonesia the *Anti-Terrorism Law* does not define terrorism per se. Rather, article 1(1) simply states that '[t]he crime of terrorism is any act that fulfils the elements of a crime under this Interim Law'. These elements are set out in article 6. Article 6 provides a generally worded description of terrorism:

> any person who by intentionally using violence or threats of violence, creates a widespread atmosphere of terror/fear or causes mass casualties, by taking the liberty or lives and property of other people, or causing damage or destruction to strategic vital objects, the environment, public facilities or international facilities, faces the death

> penalty, or life imprisonment, or between 4 and 20 years' imprisonment.
>
> (Butt 2008)

As can be seen, motive elements are excluded. However, Indonesian courts have punished many terrorists such as the three Bali bombers. Two hundred and two people, including 88 Australians, 38 Indonesians and 24 Britons, died in the three explosions in the resort town of Kuta. They were carried out by an Indonesian cell of a South-East Asian militant group known as Jemaah Islamiyah. Amrozi, Ali Gufron and Imam Samudra were executed in 2008 after an Indonesian court rejected their appeal.

Another example comes from the *Khawaja* case in Canada.[4] Mohammad Momin Khawaja was the first man charged under the federal *Anti-Terrorism Act*. He was arrested on 29 March 2004, accused of participating in the activities of a terrorist group, and facilitating a terrorist activity. The officers raided Khawaja's house in Orleans, a suburb of Ottawa, and his workplace. The raid was part of an investigation involving Canada and Britain in which nine men of Pakistani heritage were arrested. Khawaja was the only person arrested in Canada.

The charges alleged that terrorist activities took place in London and Ottawa between November 2003 and 29 March 2004. Khawaja had made trips to London but his brother said it was to find a wife. Khawaja had been working on contract as a computer software operator for the Foreign Affairs Department, but authorities said he had no access to classified documents.

On 24 October 2006, an Ontario Superior Court judge ruling on Khawaja's case struck down the motive clause of the *Anti-Terrorism Act*, saying it violated the Charter of Rights and Freedoms. This clause defines a terrorist act as one committed 'for a political, religious or ideological purpose, objective or cause'. He held that the political or religious motive requirement was an unjustified violation of fundamental freedoms and should be severed from the other parts of the definition of terrorist activities.[5]

In the end, Justice Rutherford concluded 'that the focus on the essential ingredient of political, religious or ideological motive will chill freedom protected speech, religion, thought, belief, expression and association, and therefore, democratic life; and will promote fear and suspicion of targeted political or religious groups, and will result in racial or ethnic profiling by governmental authorities at many levels'. As Roach points out, 'the removal of the political and religious motive requirement is, of course, no guarantee that profiling or unfairness will not occur, but it is a step in the right direction' (Roach 2007b).

Although the judge struck down this part of the law, he said Khawaja's trial on the charges could go on. On 29 October 2008 Khawaja was found guilty of five charges of financing and facilitating terrorism and two *Criminal Code* offences related to building a remote-control device that could

trigger bombs. Five months later, Justice Rutherford of the Ontario Superior Court sentenced Khawaja to ten and a half years jail, calling him 'a willing and eager participant' in a terrorist scheme.

The *Khawaja* case suggests that, even without motive elements, Mr Khawaja could be convicted under anti-terrorism law.

Conclusion

By taking religion as motivating force behind the current wave of terrorism, some scholars tend to accept the motive elements as an essential part of the definition of terrorist activities. This leads those scholars to examine the motive of religious terrorism itself as compared with secular motives.

However, this chapter has examined the difficulties involved in drawing a clear line between the secular and religious motives of terrorist groups, and in putting the motive elements as an essential part in both defining and distinguishing terrorist acts from other forms of criminal conduct. The inclusion of religious motive opens the possibility that people who might share certain religious convictions could not help but fall under some sort of shadow which might lead to racial or ethnic profiling and prejudice in and beyond the investigative and prosecutorial process. The inevitable impact of the motive clause is to focus investigative and prosecutorial scrutiny on the beliefs, opinions, and expressions of a large number of people, producing an equally inevitable chilling effect on the exercise of freedoms of religion, expression, opinion, and association. This not only puts religion on trial, but it also diminishes the effectiveness and value of anti-terrorism laws and, moreover, encourages discrimination.

Canadian and Indonesian cases demonstrate that courts should be able to convict people of terrorism even when there is no religious motive requirement for the crime. The cases illustrate the arguments of this chapter that religious motive is not relevant to a terrorist act.

Notes

1 In this article, Rapoport examines three groups: the Thugs; the Assassins; and the Zealots-Sciari.
2 *Terrorism Act 2000* (UK) s 1.
3 [2005] NSWSC 317.
4 *R v Khawaja* [2006] OJ 4245.
5 *R v Khawaja* [2006] OJ 4245.

8 Religion and justice

Atonement as an element of justice in both western law and Christian thought

Cassandra Sharp

Introduction

In 2008 Ian McEwan's best-selling novel *Atonement* (2001) was adapted for film starring Kiera Knightly and James McAvoy. The cinematic treatment confrontingly brought to life the story of Briony Tallis and her destructive role in the lives of her older sister Cecilia and Robbie Turner (Cecilia's lover). As both the storyteller and a major character in the narrative, Briony expresses deep remorse about her ruinous acts as a 13-year-old girl and says that her novel, to which she gave an ending very different from the reality, is her 'atonement'. In this story, Briony seeks atonement through fiction – by reuniting the two lovers whose lives had been wrenched apart – in an imagined happy ending. Atonement is central to a Christian understanding of the world with the claim that God achieves it, not through fiction, but through the reality of Jesus Christ's death. This is a concept that reaches back thousands of years to Old Testament times and the film highlights the fact that the idea of atonement may yet be hard-wired into the human psyche regardless of religious belief. This article therefore seeks to capitalize on the return of the word 'atonement' to the more popular vernacular, by exploring how the Biblical concept of atonement may be detected and/or useful within formal western understandings of justice, and theories of punishment.

In exploring the relationship between atonement theology and ideas about punishment, this article acknowledges that this is not a new area, and indeed that many legal and theological scholars have sought to show that a Christian theology of the atonement should have a bearing on penal theory (see, eg, Tuomala 1993; Garvey 1999; Garvey 2003; Braithwaite 2003).[1] Such scholars have spent considerable time arguing that 'the role retributive ideas have played in atonement theology is largely a function of the close relationship between law and religion, which are equally concerned with the question of what it is that sustains a human community' (Forrester and Kee 1996). This article in particular seeks to explore the extent to which the biblical concept of atonement is present and visible within our western understanding of justice, and more specifically theories

of punishment. As such the present exploration has three parts: the first outlines the Biblical concepts of 'justice' and 'atonement' – what they are and how they work particularly from the perspective of restoration and retribution; the second part picks up on these two perspectives as the more prominent contemporary justifications for our criminal penal system. The last part to this paper invites an exploration into the ways in which the retributive and restorative elements of atonement are at play in a secular 'justice' system, and places this within the dichotomy of continuity and discontinuity.

The notion of atonement is central in the Christian faith and as a result its meaning is often 'as varied as theological systems are diverse' (Tuomala 1993: 222). However, views from all perspectives generally agree that the goal of Biblical atonement is the reconciliation of God and Man. More specifically, the concept of atonement in Christian doctrine encompasses the process by which sin can be forgiven by God, and emphasizes a duality of retribution and restoration, in order to achieve justice. The scope of this article is thus limited to a discussion of atonement as a different way of viewing traditional criminal justice, and is meant to be descriptive and conceptual in nature, rather than addressing or proposing any institutional reform. From a descriptive point of view, Biblical concepts are presented here as a stimulus pointing to the ways in which the Bible may have influenced our common law system of justice. Likewise from a normative perspective, the Biblical ideas are explored to help us 'critique existing legal rules and institutions and to guide us as to the kinds of rules and institutions we should have. In short, biblical concepts of justice can help us understand both what the law is and what the law ought to be' (Brauch and Woods 2001: 46). It is important to acknowledge at this juncture that, while the article is written from a Christian viewpoint, the arguments are not intended to be in any way sectarian.

Biblical concepts: justice and atonement

The significance of Christian theology in the advancement of western legal systems has been well documented and few would deny the influence it has had on the development of western criminal law, and in particular notions of justice (see Tuomala 1993 and Berman 1983):

> The common law is filled with examples of legal rules and institutions heavily influenced by expressly biblical concepts of justice. This is no accident. The common law's greatest judges and scholars expressly grounded their legal analysis in biblical thinking.
>
> (Brauch and Woods 2001: 47)

Indeed, one of the architects of the common law in its most formative period (*circa* thirteenth century) was Bracton, an itinerant judge who

travelled on circuit throughout English counties to hear royal pleas (Hogue 1985: xii), and he made clear that law and justice are completely intertwined and cannot be separated from each other, nor from the character of God: 'God is the author of justice, for justice is in the Creator, and accordingly right and law have the same signification' (De Bracton 1990 quoted in Brauch and Woods 2001: 47).[2]

Sir Edward Coke and William Blackstone, both influential judges, also viewed justice as having a foundation in Biblical ideas. To Blackstone:

> if human law contradicted eternal principles of justice – the law of God – it was not law at all. Blackstone argued that to understand this law of nature at all, Scripture was key. It was 'the law of nature, expressly declared to be so by God himself'.
>
> (Brauch and Woods 2001: 49, quoting Blackstone 1979: 41)

The idea of turning to the Bible to support an atonement model of justice is also not new. Medieval canon lawyers developed a retributive system of justice based largely on the theological teachings of Anselm (Brauch and Woods 2001: 67). Anselm was a lawyer born in 1033 CE and his position was that 'the just order of the universe, the … righteousness of God, requires that a price be paid' (Berman 1983: 179). The law grew out of this theology:

> The Western law of crimes emerged from a belief that justice in and of itself, justice *an sich*, requires that a violation of a law be paid for by a penalty, and that the penalty should be appropriate to the violation. The system of various prices to be paid for various violations – which exists in all societies – was thought to justify itself; it was justice – it was the very justice of God.
>
> (Berman 1983: 194)

Within the context of exploring criminal justice theories then, it is argued that conceptions of 'justice' today still may retain some elements of its inherited Biblical roots. It is this inheritance that I am garnishing to illustrate that the Christian expression of atonement may also have relevance and influence within a contemporary justice system. First though, we turn to an explanation of 'justice' in Biblical terms.

Biblical justice

It is important to understand that, from a Christian perspective, the concept of atonement is closely connected with the Biblical conception of justice, which in turn, is intimately allied with God's nature. In the Old Testament 'justice' describes God's punishment of sin – as God cannot remain indifferent to evil, His condemnation is just.

Although in the Bible, there is an aspect of 'human justice' which covers human 'rights' issues (particularly expressed in the Old Testament) whereby justice is not only giving to others their rights, but also involves the active duty of establishing their rights, it is a more ontological approach to God's justice that is on focus here. That is, the Biblical expression of justice is rooted in an examination of the character or essence of God Himself. The ideal is righteousness, not rights, and this is evident in the original Biblical languages. Both the Hebrew and Greek words for 'justice' are the same as those rendered 'righteousness' and this is important because it indicates the connectedness between God's immutable nature and his relation with the world.

The Christian understands that it is God's justice or righteousness that establishes and maintains the order by which all people can be in a relationship with Him. The main aspect of God's justice appears as retribution with the aim of restoration, and it is this joining together of wrath and mercy that is a unique and fundamental aspect of who God is. The Christian perspective therefore sees Biblical justice as built on retributive principles and as a characteristic action of God's mercy in order to bring restoration. This is evident in the Old Testament writings about Israel's history: He is 'a just God and a Saviour' (Isaiah 45:21).[3] 'I bring near my righteousness ["justice"] … and my salvation will not be delayed' (Isaiah 46:13). The 'righteous acts of Yahweh' refer to His deeds of deliverance (Judges 5:11).

In Biblical times the Israelite people viewed punishments brought on them for failure to abide by the law as 'just desert' for disobedience to the covenant and saw this system as a crucial aspect to the exercise of divine justice: 'In all that has happened to us, you have been just: you have acted faithfully, while we did wrong' (Neh 9:33; see also Psalm 106; Brauch and Woods 2001: 64). In this sense, judgement on the Israelites was always seen as retributive justice – desert for wrongdoing that had to be 'atoned for' – but always within the context of restoration. Indeed, from the time of the Judges, the Old Testament concept of justice consistently described God's acts as that which vindicated or delivered His people, and is seen in God's undeserved pardon and acceptance of sinners (see further Judges 5:11; 'Justice' 1989: 296).

Nor does the New Testament lack the idea of justice incorporating a simultaneous exercise of retribution and restoration. It not only apportions rights, it establishes righteousness. The New Testament continues to use justice to describe God's judgement of sin (Romans 3:25). By his grace, God's righteousness can be granted to the believer, whose natural righteousness is quite inadequate to please God (Isaiah 45:24, 64:6). The believer is made just by the imputed righteousness of Christ (Philippians 3:9). Furthermore, God's justice is not merely gracious, but redemptive. Indeed, it is Jesus himself who brings to mankind God's redemptive justice through the forgiveness of sins and imputes righteousness to those who

believe – this is the supreme task of justice. 'He is faithful and just to forgive us our sins, and to cleanse us from all unrighteousness' (1 John 1:9). The Bible teaches therefore that justice (perfected in the work of Jesus Christ), is in its very nature both retributive and restorative.

So what then is the role of atonement in this conception of Biblical justice?

Once it can be recognized that a basic account of Biblical justice involves the dual action of judgement and restoration, it is then possible to grasp the process of 'atonement' as seeking to reconcile the wrongdoer and the victim, and to reintegrate the wrongdoer back into good standing as a member of the community (Garvey 1999: 1804). In Biblical terms, the concept of atonement is said to refer to the process by which man is returned to the status of being 'at one' with God. That is, the focus of atonement in Biblical theology is the forgiveness of sins – it is the turning of God's wrath away from the sin of man and woman. The New Testament confirms Old Testament scripture that God's holiness or purity is such that it is impossible for Him to tolerate evil. He created people in order that He might have a relationship with them, but all human beings are sinful and fall short of God's standards of righteousness: 'for all have sinned and fall short of the glory of God' (Romans 3:23).

As a wrong against God therefore, this sin (which is made manifest through the transgression of God's law) is said to affront God and separate Him from the wrongdoer. In this way, the wrongdoer is no longer 'at one' with God. It might be asked: how then would one return to or be reconciled to God? How can atonement be made? As described above, justice is an immutable attribute of God's character and because He cannot ignore sin, He rather requires satisfaction of justice via punishment (Tuomala 1993: 223). The Bible clearly sets out the just desert for this sin or unrighteousness: 'the wages of sin is death' (Romans 6:23), and this means that God, as the lawmaker, requires that the wrongdoing or sin be dealt with via punitive measures.

The Christian understanding of the atonement is therefore that God seeks restoration with his people and has achieved this through retributive actions. Nobody is capable of dealing with his/her own sin, which is why God Himself has to take action. Atonement is the process by which God Himself deals with that sin and brings people back into relationship with him, all the while remaining just. These Biblical claims are supported by both the Old and New Testaments. In Old Testament Mosaic law, God Himself instituted the sacrificial system (and in particular the Day of Atonement) as a means by which wrongdoers could atone for their sins via animal sacrifices. In this case the innocent animal 'took on' the sins of the perpetrator. In the New Testament, the suffering and death of Jesus Christ is portrayed as fulfilment of the Day of Atonement ritual. At the heart of

this portrayal is the presentation of Christ as the sinless substitutionary saviour, who in his death atones for the sins of all.

In seeing the atonement as the accomplishment of both the remission of sins and the reconciliation of man to God, it is prudent to delve deeper into these Biblical claims to understand how this might work.

Old Testament law

In Old Testament Mosaic law, the process of atonement was ultimately concerned with the removal of that which offends God and brings down his wrath. It is not simply a matter of removing guilt by cleansing but 'of averting the wrath of God by offering the life of an animal substitute for the sinner' (Peterson 2001: 49). God Himself instituted the means (as part of God's legal system) by which sinners (wrongdoers) could atone for their sins – that is, repentance through sacrifice was required. The Old Testament justice system was therefore built upon the concept of sacrificial atonement: 'The means of atonement – the actual price paid as equivalent to the sin committed – was the sacrificial blood, the life laid down in death' (Douglas 1987: 109).

The book of Leviticus gives details of a complex system of rituals including animal sacrifices which are to be carried out in order that this atonement might be made. It requires an appeal to God for forgiveness, but also the need for a penalty to be made. In particular, Leviticus 16 describes the Day of Atonement as the one special day of the year, where the High Priest would enter the most holy place of the temple and offer a series of rituals for the purification of the temple, the Priest and the people. At this time, the 'scapegoat' is sent into the wilderness, with the sins of Israel on its head, to die (Leviticus 16:21). The provision of such a day emphasizes how seriously God considers sin, but also emphasizes God's mercy in providing restoration (atonement) by allowing a substitutionary sacrifice:

> Aaron shall offer the bull as a sin offering for himself and shall make atonement for himself and for his house … And Aaron shall lay both his hands on the head of the live goat, and confess over it all the iniquities of the people of Israel, and all their transgressions, all their sins. And he shall put them on the head of the goat and send it away into the wilderness … [And he shall] make atonement for himself and for the people.
>
> (Leviticus 16:6, 21, 24)

In Mosaic law, the animal sacrifices make atonement for the people of Israel by bearing their iniquities and suffering the punishment those sins deserve. In other parts of the Old Testament, the psalmists and the prophets also point to the 'maintenance of a relationship with God as the Lord's ultimate purpose in establishing the sacrificial system … [while,] at the

same time, they also identify God as the true and only source of atonement and redemption' (Peterson 2001: 23) and this is ultimately seen as given to be a symbol of the way God would bring this to effect in the future:

> Thus throughout Israel's history, as God unfolded His redemptive plan, He revealed the nature of justice – a retributive justice that demanded punishment as atonement for sins and crime.
>
> (Brauch and Woods 2001: 65)

It is, however, in the New Testament that we can see that the death of Jesus Christ is crucial to a Christian understanding of Biblical justice and atonement theory.

New Testament

In the New Testament, the focus of restoration between sinners and God rests squarely on the suffering and death of Jesus Christ whose one-time sacrifice atones for the sins of all. Jesus's death is seen as a substitutionary sacrifice. The New Testament claims that although animal sacrifices were useful as a preliminary practice, atonement can only be fully effected by the death of Christ (Heb 9:15, 10:34).[4] Anselm, in providing a legal interpretation of Biblical atonement, argued that Christ was a logical necessity since sin calls for payment 'greater than any existing thing besides God … Therefore only God can make this satisfaction' (Hopkins and Richardson 1976 quoted in Hall 1983: 282). His contribution to atonement theory *Cur Deus Homo* or *Why God Became Man* (Anselm 1903) argued that 'man's salvation is conditioned on demands of justice that only Christ's death could satisfy' (Tuomala 1993: 225). The book of Hebrews consistently portrays the atoning work of Christ as the fulfilment of the Day of Atonement ritual. 'At the heart of this portrayal is the presentation of Christ as the sinless saviour, who "bears the sins of many" in his death, and delivers those who are cleansed and sanctified by his "blood" from the judgement of God' (Peterson 2001: 55):

> One might think that a merciful God would respond to this hopeless state by simply forgiving all sins and absolving all sinners. But, according to scripture, He did not. What he did instead reveals the true nature of justice.
>
> (Brauch and Woods 2001: 66)

The cross vindicates God's judgement and emphasizes again that He does take sin seriously, yet concomitantly has justly restored the relationship. By sending His own son as a substitute to pay the penalty of death that was to fall on humankind, God showed that such a sacrifice was the only way He

could be both just and the means by which sinners were justified and restored. Romans 3:25–26 describes it thus:

> God presented him as a sacrifice of atonement, through faith in his blood. He did this to demonstrate his justice, because in his forbearance he had left the sins committed beforehand unpunished – he did it to demonstrate his justice at the present time, so as to be just and the one who justifies those who have faith in Jesus.

God is clearly the origin of the redemption accomplished in Christ as the ultimate atoning sacrifice. It was by the shedding of Jesus's blood that his death became the fulfilment of justice:

> God did not have to save man, but having chosen to do so, the only means compatible with justice was Christ's substitutionary atonement. He could not simply remit punishment nor accept less than full satisfaction without himself acting unjustly.
>
> (Tuomala 1993: 227)

John Calvin (1509–64) a Protestant student of both law and theology recognized this significance when he wrote of Jesus's sacrifice as the retributive means through which man was restored to God. He argued that as 'sin is a personal offense against God and not against an impersonal government, His judicial disposition toward sin is one of wrath and determination to exact justice' (Calvin 1536 bk 2, ch xvi, para 1 quoted in Tuomala 1993: 226). He further declared: 'our acquittal is in this: the guilt which made us liable to punishment was transferred to the head of the Son of God' thus making us now at one with God (Calvin 2008: 328). Christ's death is therefore atoning in the sense that for the sinner there is deliverance from the judgement of God by Christ experiencing retribution:

> Jesus' death, freed us from death, which is sin's penalty. And yet, at the same time, this retribution brings about the restoration of sinner and God, of wrong-doer and victim. Moreover, the penalty inflicted by God's justice and holiness is also a penalty inflicted by God's love and mercy, for salvation and new life. It is retribution that brings restoration and enables atonement. God's loving provision through the sacrifice of Christ enables us to be 'saved through him from the wrath of God'.
>
> (Peterson 2001: 39; see also Romans 5:8–10)

As has been demonstrated above, Biblical teaching emphasizes that justice is part of God's very nature. In combination, the Old and New Testaments claim that God seeks restoration with his people and has affected this

through retributive actions. In this way, the concept of atonement reflects God's justice and mercy because it deals with wrongdoing yet at the same time spares His people from the consequences of that wrongdoing. It is through retribution that God brings about restoration and enables atonement. But what difference does this actually make to people living in a modern, secular world? How can this impact our current criminal justice system? Interestingly, the dual aspects of retribution and restoration of the doctrine of atonement are two major justifications for our criminal penal system. Often held in opposition to one another, it will be argued below that these theories should instead be held in tension together – each as a necessary element of the other.

Theories of punishment – retribution and restoration

In the Australian criminal justice system, the question of guilt is paramount, together with the infliction of punishment upon the person found guilty of having transgressed the law. There is a vast literature on the moral and political philosophy of punishment, with the main justifications for punishment given as retribution, rehabilitation, deterrence and reparation. The High Court of Australia has stated that 'the purposes of criminal punishment are various … [they] overlap and none of them can be considered in isolation'.[5]

Yet, to state it in fairly simplistic terms, the two most prominent justifications for criminal punishment in contemporary theory have for several decades now been retribution and restoration. Although retribution was a popular purpose of sentencing in colonial Australia, by the mid-1970s it had been all but abandoned in favour of utilitarian purposes such as deterrence and rehabilitation. Lately however there has been a resurgence towards retributive theory as the foremost justification for punishment, where the purpose of punishment is to give the offender what he/she deserves (Braithwaite 2003; Garvey 2003). This is not surprising given that:

> the entire guilt finding process with its focus on mens rea is premised on the retributive presupposition that human beings are morally responsible … The retributive position gives the entire criminal process, from criminalisation to adjudication to punishment, a coherence.
>
> (Tuomala 1993: 229)

As a deontological theory, retributivism is a retrospective justification that links justice with desert, whereby offenders deserve to be punished with a punishment that is proportionate to the gravity of the offending conduct. With retribution, the point of punishment is to do justice. A wrongdoer deserves punishment because and only to the extent that he has done wrong. Retributive theory argues that the state has a right and duty to

punish the offender by virtue of their culpability for the offence and so, for retributivists, punishment is only justified if it is deserved (Garvey 1999: 1805) which rings of Kantian philosophy. In 1797 Kant wrote: 'He must first be found to be deserving of punishment before any consideration is given to the utility of this punishment for himself or for his fellow citizens' (Kant 1965). It is important to remember that a complete account of retribution must also explain what 'desert' means:

> By and large, retributivists agree that the extent to which an offender deserves to be punished should be some function of the wrong or harm he has caused (or tried or risked causing) and the culpability with which he caused it (or tried or risked causing it).
>
> (Garvey 1999: 1836 footnote 146; see also other refs there)

Although, as stated above, retribution's focus is retrospective, it does have the potential to be restorative in and of itself: 'by satisfying the demands of justice it restores victims and expiates guilt thereby establishing a basis for reconciliation of the offender to his victim, the community and himself' (Tuomala 1993: 233). Yet, restoration is too often perceived to be in opposition to retribution as a grand theory for punishment.

And so the teleological justification of restorative practices, or restorative justice, is portrayed as an alternative method of dealing with wrongdoing. In this theory, crime is seen as a harm to the social fabric which requires repair, and so restorative justice works to effect that repair by bringing together all the relevant parties (victim, offender, wider community) and gives them a role to play in the process of healing, or restoration. In this sense, having roots in a utilitarian framework, punishment is seen as a having a greater goal beyond itself: to 'restore', 'repair' and 'reconcile'. 'Restorative justice is a process of bringing together the individuals who have been affected by an offense and having them agree on how to repair the harm caused by the crime' (Braithwaite 1999: 1743). Restorative justice schemes are today mostly promoted with children and youth, and in relation to circle sentencing programmes with indigenous communities. The emphasis there is on the achievement of reconciliation between the offender and the victim, and quite obviously requires the repentance of the offender coupled with the willingness to forgive on the part of the victim.

Restorative justice has become attractive as an alternative theory to retribution because 'restorative initiatives are based on the rationale that those involved in, and affected by, criminal activity should be given a real opportunity to participate in the process by which the response to crime is decided' (ALRC 2005). Rather than viewing these two theories as opposites, it can be argued that, just as with atonement theory, they should be held in tension together. As a society we feel the need for justice, and will demand this justice for lawbreaking through punitive measures, but this

does not preclude the involvement of restorative practices within punitive measures. As Garvey argues, retributivism gives us punishment without atonement, while pure restorativism promises atonement without punishment (Garvey 1999: 1830). In this way, the Biblical account of atonement would seem to present a useful method for effectively fusing the two justifications.

Atonement theory and elements of continuity and discontinuity

As described above, atonement theory is neither purely retributive nor purely restorative, but instead a fusion of both:

> An atonement model provides punishment with an end – the atonement of the wrongdoer and his victim and the restoration of the relationship that existed between them before the wrong – but treats punishment as an intrinsically appropriate way in which to pursue and achieve that end. The ends and means of punishment are thus fused.
> (Garvey 1999: 1806)

Yet, to what extent is this fusion of retribution and restoration (or atonement theory) visible, or even possible, within the justice of our penal system? Having thus provided a basic foreground for understanding the retributive and restorative aspects of both atonement theory and punishment theory, I now turn to identify points of both continuity and discontinuity.

Continuity

It could be argued that current punishment theory is the judicial archetype of the way in which God deals with sin and crime, and in this way there is some continuity between atonement theory and secular justice (Tuomala 1993: 222). That is, it could be said that wrongdoing in the secular world is dealt with according to the same principles by which God deals with sin through the atonement – a transgression of the law (God's or society's) requires a penalty (God's wrath effecting our death or punishment/penal sanction). In this sense, the retributive element deals with the wrongdoing and reflects the justice of the lawmaker.

Lacey, a criminal law theorist, argues that penal sanctions are not about 'righting the wrong done in the compensatory sense of making good the loss to the particular victim … [but are principally about] a collective need to underpin, recognise and maintain the internalised commitments of many members of society to the … criminal law and to acknowledge the importance of those commitments to the existence and identity of the community' (Lacey 1988: 182–83). This is in line with the Biblical concept of

atonement – both law and religion in this sense recognize that punishment does not reverse the wrongdoing – we send murderers to gaol even though we know it will not bring the victim back; and God's substitutionary sacrifice does not mean that we have not affronted God with our sin. And it is not just about keeping people within social boundaries either; in essence it really is about the presence of some sort of social conscience – both society and Christian doctrine, consistent with atonement theory, acknowledge that lawless actions deserve a punishment. In this sense, punishment is conceived as a social practice that pursues shared social goals and values.

Importantly though, with some attempts towards restorative justice, there can also be seen some continuity between atonement and the penal system, via attempts to reconcile the relationship between offender and victim. Repentance and forgiveness are key elements of the atonement and also play a significant role in restorative initiatives. Reconciliation of sinners and God does not come about by simply the changing of attitude, but requires the repentance of the wrongdoer and the forgiveness of the victim. Restorative justice seeks to do just that – to prioritize the involvement of the key people – rather than a determination of an institution. Again, to view punishment within the social context of community means that restorative justice focuses not only on the repentance of the offender, but also the forgiveness of the victim and/or community. In this sense, we might symbolically connect the forgiveness of God with the equivalent forgiveness of society or state. Still, 'you'd think an approach to punishment that placed such heavy emphasis on the idea of restoration would be right at home with an approach that emphasised the idea of atonement. In fact, however … restorativists don't much care for punishment' (Garvey 1999: 1843). Yet, punishment is an inescapable part of atonement.

As such, restoration and retribution are not seen as contradictory but vital elements of a holistic community system. Consistent with Biblical atonement, retribution can be seen as one method of the satisfaction of justice, and that in combination with restorative practices, can help to facilitate the reconciliation between wrongdoer and victim. Despite these elements of continuity, it is clear that there are some aspects of the atonement theory that are not consistent with the way our penal system operates.

Discontinuity

When the Bible talks about atonement it emphasizes God's mercy in providing a substitute for the wrongdoer – this means that the sinner is no longer held liable to suffer the retributive penalty that is deserved for the transgression. In the Old Testament we saw that this substitution was an animal sacrifice, and in the New Testament we see that it is Jesus who takes up this substitutionary position. It is here we see a startling discontinuity with criminal retributive theory – that the innocent would stand in the

place of the guilty and make satisfaction for the wrongdoing of the guilty flies in the face of the notion of 'just deserts'. It would be completely unjust for the substitution to be made in secular criminal justice for the innocent to be punished while the guilty is freed. And yet, this is exactly the case of Christian atonement. 'The offer of a father to go to prison instead of his convicted son's doing so would be irrelevant, and is hardly conceivable in modern penal law' (Hall 1983: 279).

Taking this further, the Christian doctrine of atonement particularly emphasizes that it is God Himself (in the person of Jesus) who acts to free us from the penalty of sin. Again, this is of course inconsistent with expectations of criminal justice. It would seem outrageous to allow the *victim* to take on the punishment deserved by the offender, and yet again, this is the essence of the Biblical idea of atonement – the one who has been offended, who has been transgressed, is the atoning sacrifice by which the offender is forgiven and restored in relationship with the victim.

Conclusion

The writer CS Lewis in an impassioned argument claimed that justice requires punishment in the form of just deserts and posited that only then could the dignity of human beings be promoted:

> The concept of desert is the only connecting link between punishment and justice. It is only as deserved or undeserved that a sentence can be just or unjust. I do not contend here that the question 'is it deserved?' is the only one we can reasonably ask about a punishment. We may very likely ask whether it is likely to deter others and reform the criminal. But neither of these two last questions is a question about justice. There is no sense in talking about a 'just deterrent' or a 'just cure'. We demand of a deterrent not whether it is just, but whether it will deter. We demand of a cure, not whether it is just, but whether it succeeds. Thus when we cease to consider only what will cure him or deter others, we have tacitly removed from him the sphere of justice altogether; instead of a person, a subject of rights, we now have a mere object, a patient, a 'case'.
>
> (Hopper 1970: 287)

Lewis's concern is closely connected to the concept of Biblical atonement that I have presented here. Atonement is inextricably tied to both humankind's nature and the essence of God, which requires justice through retribution in order to restore. Punishment theory likewise can incorporate the twin aspects of retribution and restoration in order to achieve true atonement between the wrongdoer and the victim.

In the McEwan novel and film, the perpetrator of a grievous harm is left tortured with guilt and forced to turn to fantasy to find what is ultimately

an inadequate solace for her soul. True atonement it seems eludes her. The Christian vision on the other hand promises a radical 'washing' of past wrongs that is based not on fantasy, but the objective reality of the life, death and resurrection of Jesus Christ. Retribution and restoration are rolled into one within a miracle of divine grace and mercy. This article has sought to illustrate that, despite some aspects of discontinuity, there are aspects of the doctrine of atonement that resonate with our current primary justifications for criminal punishment theory. A possible way to advance discussion and further research on this subject is to accept the integration of Biblical theology and law as a useful endeavour and to view atonement theory from the standpoint of the wrongdoer. That is, Christianity, in line with most world religions, places much emphasis 'on the reform of wrongdoers, thought of as turning them from evil to goodness or as their advance in knowledge and understanding' (Hall 1983: 295). Perhaps then criminal theory could benefit from asking questions about how the wrongdoer can both 'pay' for the crime and make amends, thereby dealing with guilt and providing for restoration at the same time.

Notes

1 For a more complete listing in this area, see the Center for the Study of Law and Religion website at http://cslr.law.emory.edu.
2 Bracton's work was referred to as the 'flower and the crown of English jurisprudence' and he was seen as the judge who gave the common law its form and system (Brauch and Woods 2001: 47).
3 English Standard Version (ESV). All biblical references hereafter are quoted from this ESV.
4 Sins committed before this could only be forgiven because Jesus' death was already foreseen.
5 *Veen (No 2)* (1988) 164 CLR 465, 476.

9 Why should I do this?

Private property, climate change and Christian sacrifice

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Introduction

As agents of planetary change (Röling 2009), humans play a significant role 'in the reshaping of physical climates around the world' (Hulme 2009: xxv); indeed, our role may be leading much more rapidly to catastrophic consequences than had previously been thought (see Hansen 2009). Still, polls conducted in both the United States and Australia – two of the bigger greenhouse gas emitters (Baumert *et al.* 2005: 22 and 21–24) – show that while people see it as a serious problem, only a minority are willing to accept responsibility for anthropogenic (human-caused) climate change and to alter their behaviour (particularly if that means personal financial loss) in order to mitigate it.[1] Such public sentiment comes at precisely the moment when virtually all commentators who see it as a threat agree that combating anthropogenic climate change demands a two-pronged attack: the first involves increasing governmental regulation; the second a need for personal change in behaviour – in short, personal sacrifice (Stavang 2005: 209).

Calls for sacrifice come from many quarters. Nobel Laureate Al Gore speaks forcefully that rather than a legal or a political issue, climate change is also 'a moral and spiritual challenge' calling for sacrifice (Gore 2006: 11). Former United Nations (UN) Secretary-General Kofi Annan notes that such sacrifices constitute part of the emerging concept of 'climate justice' (see Global Humanitarian Forum 2009: i–iv, 58–65 and 77–81); pollution has a cost (Annan 2009: i, iii) that must be borne, personally, by those who do the polluting. Yet, while there is a great deal of literature on the first prong (regulation) (see Lyster 2008),[2] one finds very little on the second. This represents a significant gap, for as popular perceptions about our response to climate change shift, and as international reaction follows those leads, it becomes increasingly important to explain not only how governments react, but also how people might choose to sacrifice, and how they can justify that choice.

This chapter explores a justification for sacrifice. I suggest elsewhere that climate change is a private property problem (see Babie 2010)[3] – its liberal

conception comprises part of the normative and legal structures making it possible for humans to act as agents of change generally and climate change specifically (see Babie 2002).[4] In its modern liberal incarnation, private property places the individual in a privileged position as concerns choice about the control and use of goods and resources. Is the individual, though, free to say that private property in a thing means that one has absolute and unfettered choice about how to use that thing? Clearly not, although the popular understanding of the concept generally sees it as absolute freedom, prioritizing self-interested choice over obligation towards others and the community. And the liberal underpinnings of the concept do nothing to dispel that perception. Part II of this chapter argues that this liberal view, at once so pervasive in our world yet so impoverished, underpins those human activities that contribute to the production and emission of the greenhouse gases (GHGs) that in turn drive anthropogenic climate change.

While private property is choice, power, and authority about the control and use of goods and resources, relationship, too, is as an important dimension of that concept. Part III of the chapter argues that through creating, conferring and protecting choice in relation to the way things are used, private property, as both a concept and a legal institution, fundamentally concerns the way we relate to each other. At its core, private property is the product of a web of social relations between persons concerning the allocation and use of goods and resources. Relations both create the choices we have over the world around us and are important in fostering and building the communities in which we live. More alarmingly, though, private property not only depends for its existence on relationship, but also creates new ones. Through choices that it creates, confers, protects and allows, some people, other members of national and global communities, suffer consequences – what economists call 'externalities'. No better example of this can be found than anthropogenic climate change. Through the complex science of global warming, the choices about how to use resources produce human suffering.

Hope remains, however, in the idea of relationship, which comes alive in the telling of collective human stories, biographies, the human narrative; here we find means to respond to challenges like climate change. For those stories contain the rationale and the justification for the ways in which we treat or ought to treat others through private property. In short, narrative contains the justification for the personal sacrifice called for by climate change. And by identifying the ways in which people make choices, sacrifices, within the context of relationship, private property plays a role not only in creating, but also in solving problems. This may mean a loss of desired outcomes, a 'disappointment of our hopes for profit from time to time as an acceptable responsibility of [global] citizenship' (Radin 1993: 143).

While liberal sources exist for a narrative of sacrifice (see Purdy 2008; Purdy 2009a; Purdy 2009b; see also Rawls 1993: 170; March 2009: 12–13),

Part IV explores a specifically Christian one. Today, of course, the mere mention of religion as a possible source of solutions within the context of property raises eyebrows. Yet this is not so outlandish. We live in an era of religious revival (Twining 2009: 6, n 10, and see 125–26). As religion increasingly becomes 'deprivatized' it ceases to be a matter of concern only to the individual (Casanova 1994: 66) and blends into the political and legal structures of contemporary society (Turner and Kirsch 2009: 3). To secure not only legal but also democratic legitimacy, just as sacrifice within relationship needs to make sense from a secular perspective, it also needs to make sense to people of faith (Twining 2007). Liberal choice, in other words, allows for decisions made in furtherance of religious ends as much as secular. Stephen Carter argues that:

> virtuous adult citizens could believe quite rationally (pace Hume) that their religious faith is the appropriate source of values to guide both private and public actions, and that a theory of the state that implies that it isn't will neither win, nor deserve, their adherence.
>
> (Carter 2001: 25, 49)

After all:

> [w]hat is religion … but a narrative a people tells itself about its relationship with God … And if the narrative is truly about the meaning God assigns to the world … the follower of the religion, if truly faithful, can hardly select a different meaning simply because the state says so.
>
> (Carter 2001: 29–30)

In the case of private property, religion enjoys a long history of providing narratives of sacrifice (Pipes 1999: 3–63; Singer 2000a: 41–42). And while we might think that it has been a very long time, indeed, since Christianity was taken seriously in offering such a narrative, as recently as the turn of the last century, the then Bishop of Oxford, in the introduction to an intriguing collection of essays written by leading Oxford philosophers, clerics and legal academics of the day (while this might seem an eclectic group, possible only in the collegiate atmosphere of twentieth-century Oxford, the very origins of this chapter and this collection in the *Law and Religions Workshop* held at the University of Wollongong in the early twenty-first century happily demonstrates otherwise) wrote that:

> the individual [who], however deeply stirred in his conscience, however fully convinced that he must not conform himself to the ideas of property which happen to be current in society but must assert the Christian principle, finds himself in fact in the bonds of an organised system of property. By himself he can do very little. As a consumer,

> as a shareholder, as a tradesman, as an owner of land, as a shop assistant, as a clerk, as a workman, he finds himself paralysed by the system of which inevitably he forms a part. The system is not unalterable. It has altered profoundly in more directions than one within recent history, and is altering. But at every stage it holds the individual in its grasp. Not even by 'going out of the world' … can he get out of it. The clothes he wears, the food he eats, the railways he travels by, the books he buys, the State he belongs to, hold him in the grip of the system. What he cries out for, when his conscience is awakened, is not merely personal guidance, but also ideas which can be applied to society; not merely again schemes for law-making, but ideas such as must lie behind law-making and without which law-making is in vain. He wants an ideal of property, a principle of property, such as will tend to form a corporate conscience, at first among those who are consciously dissatisfied with things as they are and consciously in want of a theory, and then more widely in society as a whole.
>
> (Gore 1915: xi, xii)

How much this statement resonates with our own age. Part IV, then, drawing upon a modern reading of early Christian Patristic theology, suggests a relational ontology of the person which, in turn, demands of the Christian an exercise of liberal choice which places sacrifice and obligation to the community at its core. Rather than leaving responsibility for securing obligation to the state, this Christian narrative – which is not the only one that could be offered – puts sacrifice in the hands of the person who enjoys the protection of private property. Obligation becomes, according to this view, not a matter of state regulation but an individual matter of sacrifice through choice.

While the effort to justify sacrifice from a religious perspective is not new, global phenomena such as climate change, combined with a worldwide religious revival, gives it new urgency. Part V draws together the threads of the argument, demonstrating the applicability of this Christian narrative to the challenge of anthropogenic climate change.

Private property (choice)[5]

Liberalism[6]

While one searches in vain for a single theory of liberalism, there are a core set of assumptions about the individual, the role of the polity and the manner of constructing rules for both that are shared by all theories falling under the liberal banner. Of the variants, most agree that reason is prioritized over faith in the construction of public norms, individualism comes before others, and freedom is paramount in setting one's own conception of the good. This section is in no way intended as anything

remotely like a full account of these assumptions. Rather, it demonstrates the centrality of choice to the liberal core (Kahn 2005: 13–14).

In liberal theory, the individual constitutes the fundamental unit of social life. Typically, this means that 'a just society is one composed of free and equal individuals, each permitted to pursue his or her own view of the good life (so far as that does not interfere with other people's life-plans)' (Harris 2004: 281; see also Decoste 1993: 242–43). This normative individuation is posited to be so simply because it is a fact that we are separate or autonomous from one another (Decoste 1993: 243). Separation results from the fact that the life projects we choose are 'independent and often different from one another' (Decoste 1993: 243). Simply, liberal theory gives primacy to 'autonomous individuals who share a capacity for rational deliberation but do not necessarily share a common set of interests' (Kahn 2005: 14).

In choosing a life project, the autonomous individual enjoys the largely unfettered 'liberty that, by definition, stands defiant of objections and intervention on grounds of the substance of the project chosen' (Decoste 1993: 243). Whether this rests on equality or freedom (see Dworkin 1978 and Raz 1986, respectively), the value that lies at the core of autonomy is that 'people should be "free to *choose*" ' and society and its legal system should 'strive to design policies that maintain or increase freedom of *choice*' (Thaler and Sunstein 2008: 5 and 4–14). Stephen Carter concludes: '[c]hoice is the essence of freedom, and liberalism has done more than any political idea in history to promote and protect it' (Carter 2001: 48).

Yet, in taking autonomy (choice) as a foundational value, absent some other form of organization, there is nothing to prevent Hobbes's 'war … of every man against every man' in which life becomes 'solitary, poor, nasty, brutish, and short' (Hobbes 1651: pt 1, ch 13). Liberalism, in seeking to ensure order, through enshrining choice at its core, has the potential either to preserve individual autonomy through allowing the diminishment of others or to preserve order at the expense of autonomy (Decoste 1993: 244). Liberalism negotiates this seeming paradox through rights, which:

> cure the problem of disorder by protecting the autonomy of each individual *against* intrusion arising from the exercise of the autonomies of all other individuals. This they do first by enveloping each individual in a sphere of inviolability, and then – since inviolability does not, of course, entail invincibility – by providing for state enforcement of the sphere through remediation of intrusions.
>
> (Decoste 1993: 244–45)

Once a life project is chosen, there are myriad other choices made in the pursuit of that larger project which require goods and resources. Private property confers and protects the rights necessary for such choices.

Private property

Private property, a product of liberalism (Bentham 1802: vol 1, 113; see also Radin 1993: 121–23), achieves the promotion of autonomy (choice) through the creation and conferral of rights for the allocation, control and use of goods and resources (Singer 2008a: 7–11) among individuals (Waldron 1988: 31–40; see also Katz 2008: 57–66). While it may include others, at a minimum, a 'liberal triad' of use, exclusivity, and alienability (Radin 1993: 121–23)[7] characterizes the 'sophisticated', 'legal'[8] 'bundle of rights' (see Underkuffler 2003: 13) which together comprise the liberal conception of private property. The available rights in relation to a good or resource may be held exclusively by one individual or group (Singer 2008a: 7–11) or, more frequently, distributed among many individuals or groups (Singer 2000c: 8–10). Over the last century (Katz 2008: 1), this understanding of private property has come to dominate contemporary scholarship and judicial decision-making (Munzer 1990: 22–36; Heller 2000: 418–19, who cites Michelman 1982: 5) and is largely understood, at least in outline, by most people (Heller 1999: 1191–94).

Note the connection between choice and rights. Whatever they are, however they are bundled, and by whomever they are held, the rights that comprise liberal private property confer freedom of choice on their holders in the use and control of goods and resources (Moore 1978: 70). C Edwin Baker's 'decisionmaking authority' best captures the role of choice as the essence of the bundle metaphor:

> [private] property [i]s a claim that other people ought to accede to the will of the owner, which can be a person, a group, or some other entity. A specific property right amounts to the decisionmaking authority of the holder of that right.
> (Baker 1986: 742–43; see also Singer 1988: 655; Singer 2000b: 134–39)

Private property confers 'the special authority to set the agenda for a [good or] resource' (Katz 2008: 24) and to act upon that good or resource (Lametti 2003: 346) in any way the holder sees fit, in accord with an individual's chosen life project. The authority is, 'like a sovereign's, supreme' (Katz 2008: 32), meaning that the 'the rules of [a] property institution are premised on the assumption that, *prima facie*, [a] person is entirely free to do what he will with his own, whether by way of use, abuse, or transfer' (Harris 1996: 29). Known more commonly as 'preference-satisfaction', 'self-interest', 'self-seekingness', or 'self-regarding behaviour',[9] this supremacy allows any holder of private property 'within the terms of the relevant property institution, [to] defend any use or exercise of power by pointing out that, as owner, he was at liberty to suit himself' (Harris 1996: 31). Private property rights, then, confer on and secure to their holder an autonomous choice or decision-making authority, exercisable in any way

the holder sees fit, about how to use or not to use a good or resource. And therein lies the significance of saying that climate change is a private property problem.

Human choices and climate change

The decision-making authority (choice) conferred by the liberal conception of private property drives anthropogenic climate change. The science of climate change is well known (see IPCC 2007c; see also IPCC 2007b; Houghton 2004); what concerns us here, then, are the choices that lie behind the activities that produce GHG. We can best reveal these choices, the agendas we presently set for goods and resources, by looking at the things that we are increasingly told *not* to do in order to mitigate climate change.[10]

Agendas cover the gamut of our chosen life projects: where we live, what we do there, and how we travel from place to place. While some of our choices relate to the production of methane and nitrous oxide – largely in relation to what we eat – CO_2 is by far the largest part of our GHG emissions footprint. In the case of our homes, for instance, before we even move in, private property allows us to choose the type of structure we buy or build. Once in our home, what we do there and our personal lifestyle choices depend, ultimately, on the existence of choices created, conferred and protected by the holding of a conventional private property interest. And where we live determines partly how we get there – our transportation choices. Longer trips that involve air travel are also relevant to this calculus; commercial air travel contributes substantially to carbon emissions (*Time* 2007: 48, 50–52, 54 and 57–59).

Corporations also hold private property and they, too, set agendas in the marshalling of goods and resources (Harris 2004: 100–102); these agendas are important, for they structure the range of choice available to individuals in setting their own agendas, thus conferring on corporations the power to broaden or restrict the meaning of private property in the hands of individuals. Green energy (solar or wind power), for instance, remains unavailable to the individual consumer if no corporate energy provider is willing to produce it (*Time* 2007: 57).

Our choices do not end at the borders, physical or legal, of a good or resource; they are not made in a vacuum (Singer 2008a: 3). Rather, as foreshadowed, they take place within a web of social relationships. Others are affected by our choices. Relationship, therefore, is central not only to what private property is, but also to understanding its role in anthropogenic climate change.

Climate change (relationship)

Communitarian critique

The communitarian critique of the last twenty years (Harris 2004: 289)[11] takes aim at two aspects central to liberalism. First, at the atomistic, rights-bearing individual, arguing that the liberal understanding of society is fiction, for '[t]he only selves which have ever existed are human persons situated within, and at least partially constituted by, the communities in which they live' (Harris 2004: 289–90). As Kahn argues, '[i]ndividuals never appear for themselves alone, but are always already tied to "other" – family, friends, fellow citizens, or co-workers' (Kahn 2005: 39). Indeed, just below the veneer of justice covering the liberal project resides the necessity for this ever-present, but never-mentioned other, the correlative opposite to the liberal individual. For liberal economic, political and social theory, the *empowered* individual is formed out of, depends for its existence on, produces, implicates and excludes the *disempowered* other (Decoste 1993: 252–53).

Given this view of society, communitarians reject the 'blank slate' which asks 'what should I do?' in favour of 'for whom am I responsible?' (Kahn 2005: 39). We are part of a world, and there is no self apart from that world; we are each members of multiple communities substantially constitutive of who we are. Thus, as Kahn argues, the demands of moral deliberation are not those of pure reason, but those of individuals attached to others through love, friendship, trust and support: '[t]hat which is morally praiseworthy in the individual is not the product of reasonable choice, but of the community's power to move us in ways that are beyond reason' (Kahn 2005: 40).

Second, in its focus on the individual, liberalism misses biography or human narrative – the story of community and the relationships by which it is constituted. Narrative helps the community make sense of how it came to be in a particular place and time. It explains borders and history. Through narrative, the individual learns of oneself and of the others with whom one lives as part of a group. It is, in short, central to constructing self and society (Kahn 2005: 49–61). Kahn concludes that '[w]ithout narrative, there would be no self as a particular subject participating in communities of different geographical and historical scope: for example, family, church, nation' (Kahn 2005: 55). What is more, liberalism translates this worldview into law and, in so doing:

> both denies and denigrates difference. It denies difference by prohibiting discourse on the particularities of social being, and, in particular, on relations of race, class, and gender. And it denigrates these real differences by requiring those who come before the law to abandon their lived biographies – the realities of their subordination and connection

> and community – and to clothe themselves in the false subjectivity of the sovereign liberal subject.
>
> (Decoste 1993: 250–51)

Biography and narrative play an important role in understanding society and social being. To deny it silences difference and ignores the other.

Property theorists grouped loosely under the banner of 'property as social relations' bring at least part of this communitarian critique to bear specifically on understandings of private property. For them, relationship is both instantiated by and constitutive of private property. This in turn reveals that private property is not merely about rights and individual choice and power but also about duty and obligation and responsibility to and for the other.

Relationship

This Part has two objectives. First, it explains why the notion of relationship is central to understanding the concept of private property and how that identifies externalities – those circumstances where the choices of those who hold private property (the individual) have consequences for those who do not (the other). This we might call the 'legal–social relationship' of private property. Second, it applies this relational analysis to climate change, so as to reveal a 'physical–spatial' relationship, or what is called here the 'climate change relationship', instantiated by and dependent upon choice exercised in a global context (Twining 2009).[12]

Private property: a legal–social relationship

The liberal understanding of private property outlined in Part II is nothing more than 'a simple and *non-social*' beginning (Alexander 1997: 321, emphasis added). Upon any closer reflection, it is clear that the rights that constitute private property are exercised not in a vacuum but in a context of social relatedness; the community (the other) (see Lehavi 2009: 8) forms the background to private property choices.[13] Morris Cohen could argue, then, that private property confers a form of 'sovereignty' on rights-holders, creating a relationship between the person holding such sovereignty *and others* (Cohen 1927: 8, emphasis added), while Felix Cohen added that:

> [p]rivate property is a *relationship among human beings* such that the so-called owner can exclude others from certain activities or permit others to engage in those activities and in either case secure the assistance of the law in carrying out [that] decision.
>
> (Cohen 1954: 373, emphasis added)

Private property is a dynamic social construct, 'a cultural creation and a legal conclusion' (Baker 1986: 744) founded upon *relationships* between people (Singer 2005: 2, emphasis in the original). A product of relationship (Nedelsky 1993: 8), legal as well as social, private property includes both legally recognized private property interests – fees simple, leaseholds, easements, copyright, money, shares, and so forth – as well as the informal reliance and trust which many people regularly place in the positions taken by others (Singer 1988: 618–21, 751) to create social and legal entitlements (Singer 2000b: 56–139).

Failing to notice its relational character leads to a dangerous metaphor inherent to the liberal account of private property – that '[r]ights define boundaries others cannot cross and [that] it is those boundaries, enforced by the law, that ensure individual freedom and autonomy' (Nedelsky 1993: 7–8). This is a mistake, for not individualism but '*interdependence* is the foundational characteristic of free individuals'; people best function, in other words, within a web of social relationships that allow their own abilities to flourish (Singer 2000b: 131). The 'human interactions to be governed [by law should not be] seen primarily in terms of the clashing of rights and interests, but in terms of the way patterns of relationship can develop and sustain both an enriching collective life and the scope for genuine individual autonomy' (Singer 2000b: 131, citing Nedelsky 1993: 8). This is an entirely 'different concept of individual well-being and autonomy: one that recognizes the individual's need for freedom as well as the need for the development and expression of that freedom in the context of relatedness to others' (Underkuffler 1990: 129).

Far from being rigid and unyielding, these socially contingent boundaries between rights actually operate within a relational context involving mutual dependence and obligation (Singer 2000b: 131). Joseph William Singer argues that:

> [r]ather than understanding rights and autonomy as 'an effort to carve out a sphere into which the collective cannot intrude', we understand that because rights conflict, we must define them partially in terms of the relationships they instantiate. Property law can therefore be seen as 'a means of structuring the relations between individuals and the sources of collective power so that autonomy is fostered rather than undermined'.
>
> (Singer 2000b: 131, citing Nedelsky 1993: 8)

Thus, choice and relationship, rather than being two conflicting or mutually exclusive models, together form the totality of private property. Private property rights – choice – have their origins in, exist, operate, and are protected by law within a social context – relationship with the other (Singer 2008a: 3). Relationship means that private property rights overlap with the

rights, property or otherwise, of the other – property holders and non-property-holders (Singer 2000b: 6; Singer 2009: 139–40).

The overlapping of rights carries the potential, through liberal preference-satisfying choice, to harm the interests of the other. Few if any choices are ever truly self-regarding (in the sense that its effect is experienced only by the holder of the right); rather, they are much more likely to create an externality (in the sense that the consequence of the choice affects others) (see Singer 2008a). And 'explicitly recognizing th[is] tension … *as a part of the concept of property* … [allows us to] reaffirm [its] … importance … while recognizing the interdependence of the self and others' (Underkuffler 1990: 147–48, emphasis added). Overlap, in other words, 'takes for granted that owners have *obligations* as well as rights and that one purpose of property law is to regulate property use so as to protect the security of neighbouring owners and society as a whole' (Singer 2008a: 3, emphasis in the original).

Yet, if overlap is inherent to private property, how can a legal system prevent the disorder disdained by liberalism? Clearly, this necessitates some policing of the boundaries between individual and community. And law uses the police power, legislated regulation, to impose corresponding moral imperatives, duties and obligations on the holders of choice so as to allow not only for preference-satisfaction, but also to prevent outcomes inimical to the legitimate interests of others (Lametti 2003: 346–48; see also Lametti 2006; Lametti 1998). Thus, while '[private property] … initially appears to abhor obligation … on reflection we can see that it requires it. Indeed, it is the tension between [unfettered private property rights] and obligation that is the *essence* of [private] property' (Singer 2000b: 204, emphasis added). Singer summarizes overlap and regulation this way:

> there is no core of [private] property we can define that leaves owners free to ignore entirely the interests of others. Owners have obligations; they have always had obligations. We can argue about what those obligations should be, but no one can seriously argue that they should not exist.
>
> (Singer 2000b: 18)

In the final analysis, the liberal ideal for private property – the conferral and protection of choice – remains an accurate descriptive account. Understanding that it is also relational, however, adds to this simple image of private property the normative difficulty of externalities. Regulation may attempt to prevent negative outcomes for others, but it cannot eliminate them entirely. Choice will always take priority over regulation and so individuals will always have the opportunity to create externalities. Climate change starkly portrays this reality. In fact, as the next section argues, anthropogenic climate change is a physical–spatial relationship between

those who hold and exercise choice, power, over goods and resources and those who do not, the other, or the community, globally conceived.

Climate change: a physical–spatial relationship

The potential for externalities predicated upon the existence of choice enshrined in private property brings people into relationship at every level, local and global.[14] Indeed, as we have seen, private property makes possible the choices behind the GHGs that drive anthropogenic climate change. This section explores those consequences for the other, the human externalities visited upon the community, local and global, that follow from anthropogenic GHGs. This physical–spatial relationship we can call the 'climate change relationship'. Joseph William Singer summarizes such relationships this way:

> [private] property owners and the public are linked to each other through individual actions [choices] and laws affecting the use of [private] property (which can … be both beneficial and detrimental). From this perspective, we could conceive of [private] property as a type of ecosystem, with every private action and legislative mandate potentially affecting the interests of other organisms.
>
> (Singer 2006: 334, n 82)

In Part II we saw the environmental externalities.[15] The remainder of this Part focuses on the four primary human externalities – security, health, water, and food (Lonergan 2004: 51) – which complete the climate change relationship.

The first of these, security, refers to that which individuals and communities enjoy when they have: '[(i)] … the options necessary to end, mitigate, or adapt to threats to their human, environmental, and social rights; [(ii)] … the capacity and freedom to exercise these options; and [(iii)] [the ability] [a]ctively [to] participate in attaining these options' (Lonergan 2004: 51). 'Human security', therefore, encompasses many of the direct human consequences of global change – health, resource availability, vulnerability to hazards, and environmental degradation – and climate change *directly* affects each of these (Lonergan 2004: 51).

But climate change also *indirectly* affects human security, principally through displacing people and eroding political stability. Consider predicted coastal flooding. Sixty per cent of the human population lives within 100 km of the ocean, with the majority in small- and medium-sized settlements on land no more than 5 m above sea level. This is particularly so in places such as Southeast Asia, which is especially prone to coastal flooding (Lonergan 2004: 51–53). Even the modest sea level rises predicted for these places will result in a massive displacement of 'climate' or 'environmental refugees' (Northcott 2007: 29–31). In Egypt and

Bangladesh, for example, where a large percentage of both population and productive capacity is located less than one metre above sea level, the predicted rise in sea level of between 0.2 and 0.6 metres caused by a doubling of CO_2 levels would produce significant human displacement (Lonergan 2004: 51–53).

Political instability is being and will continue to be driven by the increasing frequency of extreme weather events and by periodic droughts in arid and semi-arid regions. Extreme weather events are difficult and costly to prepare for and cause significant social disruption. While examples abound, one suffices. Four years of fighting in the Darfur region of Sudan has killed more than 200,000 people and made two and a half million more into climate refugees. Typically characterized by the popular media as genocide waged by the Arab Janjaweed and their backers in the Sudanese government, evidence increasingly points to drought caused by climate change – resulting in a shrinking land base, evaporating water and dwindling food supply, and a lack of shelter – as the root source of the conflict (see Faris 2008).

Climate change also affects human health. While temperature change, floods, storms and sea-level rise indirectly cause a host of human health problems, including death, asthma, and physical trauma, direct consequences – changes in existing health risks – also warrant attention. These include the increased spread of infectious diseases; increases in mosquito-borne illnesses, such as malaria, dengue fever, and yellow fever; increased human incidences of hantavirus and West Nile virus; wildfires that can cause injuries, burns, respiratory illnesses, and deaths; illnesses affecting wildlife, livestock, crops, forests, and marine organisms, the resulting biologic impoverishment of which may have negative consequences for air, food, and water; and toxic algal blooms or 'red tides', creating hypoxic 'dead zones' (Epstein 2005: 1433–36; Lonergan 2004: 53–54).

The third human externality is water shortage or stress. Approximately two billion people, or one-third of the world's population, currently live in countries considered water-stressed, meaning that problems with the security of water quality and quantity already exist. The continued growth of the world's population and unabated climate change will further strain water supply – from over two dozen countries today exhibiting water stress or water scarcity, to 50 by 2025, and 54 in 2050, with a combined population of over four billion. Projections for Africa, the Mediterranean and Australia show less rainfall; because irrigation accounts for over 70 per cent of water use, higher demand for water from food production, loss of soil moisture, and the increase in evaporative demand will increase the stress (IPCC 2007a: 9–11; Lonergan 2004: 54–55).

Finally, each of the first three human externalities is related to the fourth: food shortage. Changes in crop yields due to climate change vary by region, depending on crop type, soil moisture, and other factors.

While small temperature increases drive positive or neutral consequences as farmers adapt to new conditions, changes above 2°C will likely result in negative consequences, including heat stress, decreased yields, increased prices, and increased severity of droughts. The ability of a region to adapt dictates the severity of impact. North America and Europe, for instance, might adjust planting dates, crops, and fertilization rates to minimize impact (Lonergan 2004: 52–56).

Who, then, suffers as a consequence of these human externalities? The short answer is everyone, although the poor and disadvantaged of the developing world disproportionately bear the brunt of the human consequences of climate change. The United Nations Intergovernmental Panel on Climate Change reports that '[t]he impacts of climate change will fall disproportionately upon developing countries and the poor persons within all countries, and thereby exacerbate inequities in health status and access to adequate food, clean water, and other resources' (IPCC 2007a: 7). A sobering thought when read with the knowledge that over one billion people already live in absolute poverty – the main cause of malnutrition – in the developing world, 64 per cent of them in Asia (Lonergan 2004: 52).

Consequences also tend to compound one another, producing a cascade effect. Thus, alternating drought and flood brought on by increased extreme weather events affect water supply and so the ability to produce food. This will occur at just the time that developed countries implement methods of ensuring sustained food production, depressing the price available for that which can be produced in the developing world (IPCC 2007a: 9–11; Lonergan 2004: 55–56).

As serious as these consequences are for the developing world, though, they do not discriminate against the developed. In 2005, Hurricane Katrina left hundreds of thousands homeless along the Gulf Coast of the United States. Still, even an event striking within the developed world, such as Katrina, seems disproportionately to affect the poor and the marginalized. (For a general account, see Brinkley 2006.)

How, though, given the reality of the climate change relationship, to make sense of the choice permitted by the liberal conception of private property? The next section offers an Orthodox Christian narrative to assist in making choices and so allow the Christian to be able to say: I have 'learn[ed] of myself and the others with whom I find myself living as part of a group' (Kahn 2005: 54). But here, too, a choice had to be made. Many possible religious narratives could have been chosen, Orthodox Christianity is but one of many proliferating and overlapping narratives (Kahn 2005: 58, and see 54–61), the lived biography – the 'realit[y] of … connection and community' (Decoste 1993: 251) – that allow one to make sense of the relations that constitute private property and how the choice that some have ought to be exercised so as to limit harm to others.

Christian sacrifice

Christianity and private property

Because it constructs a worldview which exalts not the individual but the connection to other humans and ultimately to a transcendent God, religion generally, and Christianity specifically, rejects the liberal edifice of unfettered and self-interested choice (Carter 2001: 47). Yet, what at first blush appears to be a weakness may, upon further reflection, represent a strength, for choice makes possible sacrifice, to choose for others, for the community. Thus, the fact of choice made possible by private property becomes the place for a Christian understanding of obligation and duty. While it is not the aim here to provide a full account of its treatment of private property (for that history see Pipes 1999: 3–63), before examining its teaching on the exercise of choice concerning possessions, it assists to pause briefly over Christianity's understanding of private property generally.

In its earliest form, due to its belief in the imminent end of the world and the inauguration of the Kingdom of God, Christianity focused primarily on the fact that private property would soon not matter. As time passed, though, this idealistic approach to possessions engendered by immanence gave way to the reality that the church was becoming a significant temporal power in its own right (Pipes 1999: 14). As a result, quite early in its history, Christianity reached a pragmatic reconciliation (that still stands today – see, eg, Harakas 1992: 140; Schweiker and Mathewes 2004) and accepted the prevailing understanding of private property found in the positive law of the state (Mitchell 2004; Oliphant and Babie 2006; Pelikan 2003; Pipes 1999: 15–16; Salsich Jr 2000: 21 and 36): '[t]he basic premise of Christian theologians held that property derived not from the Law of Nature but from conventional (positive) law and as such had to be respected' (Pipes 1999: 14). Even St John Chrysostom, the earliest and sharpest Christian critic of private property – who is most frequently held up as having argued for its abolition – in fact accepted its existence and necessity (Brändle 2004: 40–41).

The aim here, then, is to explore the early Christian narrative of sacrifice in the exercise of choice conferred by private property. The narrative begins not with private property, but with the person – pointedly *not* the liberal individual. This allows one to make sense of Christian (largely Biblical and the writings of the Patristic era – the first to eighth centuries CE) admonitions regarding the use of possessions (private property). This narrative allows a shift in the focus of liberal private property theorists and their social relations critics away from seeing relationship merely as constitutive of private property, merely as that which allows for human flourishing through liberty and autonomy, to one in which the choices one makes about goods and resources (the agendas one sets) are in fact constitutive of personal existence. Seen this way, the choices conferred by private

property must be exercised in certain ways, for in so doing there follow ontological implications.

Person[16]

As we saw in the foregoing discussion, liberal theory treats 'person' synonymously with 'individual' (Knight 2007; 'Personal Identity' 2005); so, too, does western Christian theology (Yannaras 1984: 22–24). Liberalism treats the individual – the empowered, atomistic, rights-bearing entity – as paramount to community. Although they may mutually complement one another, the individual remains separate from society; attempts to reconcile the two usually represent little more than re-conceptualizations of individual liberty as the flourishing of the individual within a network of social relationships. Yet one finds in Christianity, and especially a new reading of Patristic thought offered by John Zizioulas (1985: 27–65; 2006),[17] a tool for a reconciliation of the individual and the community achieved, paradoxically, by *separating* the meaning of 'person' from that of 'individual' (Knight 2007: 1–14).

It might help to begin with Zizioulas's conclusion: the Patristic synthesis of Christian theology and Greek philosophy conceives of the person as possible only *within* and capable of ontological existence only *through* relationship (Knight 2007: 2; Yannaras 1984: 22). This is not to deny the liberal project and its understanding of the person as an individuated entity, nor is it to say that persons are *only* relations with no substance (Knight 2007: 4–5). Rather, this conclusion stresses the relational nature of the individuated entity. Indeed, it stresses that the individuated entity can only *be* a person as a consequence of relationship.

Greek philosophy

According to Zizioulas, for Greek philosophy 'monism' – the idea that a human is concrete individuality – failed to endow human individuality with permanence; any differentiation away from indissoluble unity with the one being represented a tendency towards 'non-being' or a deterioration of or fall from being. While this allowed for a world of beauty and divinity, it also envisaged one in which it was impossible for the unforeseen to happen or, more significantly, for freedom to operate. This view rejected and condemned anything threatening cosmic harmony and unity – anything not explicable through reason. The ancient Greeks failed, then, to countenance a world of human freedom, for that would be a world of impermanence (Zizioulas 1985: 27–31).

Indeed, even the Greek word for 'person' – *prosopon* – referred to the mask used in Greek theatre – something temporary, to be used and then removed. This was no accident, Zizioulas tells us, for in the Greek tragedy one finds the conflict between human freedom and the rational necessity

of a unified and harmonious world. This maintained the circumscription of humanity's freedom, rendering it, in fact, non-existent. The notion of the person provided only a taste of freedom, of what it might be to exist as a free, unique and unrepeatable entity (Zizioulas 1985: 32–33); the shared use of *prosopon* 'constituted a reminder that this personal dimension is not and *ought* never to be identical with the essence of things, with the true being of man' (Zizioulas 1985: 35).

God

The Christian notion that One God could be Father, Son and Holy Spirit (Trinity) precipitated the shift from the constrained notion of person in Greek thought to an identification of the person with *being*, the ontology of human existence. The writers of the Patristic era, in what Zizioulas characterizes as a revolution in Greek philosophy hitherto unrecognized in the discipline, seized upon '*hypostasis*', the notion of substance, of concrete existence (well understood within Greek philosophy) and equated it with *prosopon*, or 'person'. This united the notion of the person, so ephemeral in its allusions to Greek theatre, with the very essence of being. This, Zizioulas argues, it achieved in two ways. First, using the Biblical doctrine of creation *ex nihilo*: rather than tracing the world's ontology to the world itself – the cosmological necessity of the world to existence – the Patristic writers traced it to God, breaking the closed circle of Greek ontology and thus making being, or the existence of the world, a product of God's freedom (Zizioulas 1985: 35–40).

Next, having connected creation with God, the Patristic writers, especially St Basil the Great,[18] identified the being of God with the person. Zizioulas argues that the Cappadocians (a group of late fourth-century CE Patristic writers) located the ontological principle, the being and life of God, not in one substance of God, but in the *hypostasis*, the *person* of the Father, who is the cause of the generation of the Son and of the procession of the Holy Spirit. Thus, the Father's personal freedom constitutes the source of the being of the One God (the Trinity) – the Father, out of love, or freedom, begets the Son and brings forth the Holy Spirit. Zizioulas concludes that:

> God as person – as the hypostasis of the Father – makes the one divine substance to be that which it is: the one God … And the one divine substance is consequently the being of God only because it has these three modes of existence, which it owes not to the substance but to one person, the Father. Outside the Trinity there is no God, that is, no divine substance, because the ontological 'principle' of God is the Father. The personal existence of God (the Father) constitutes His substance, makes it hypostases. The being of God is identified with the person.
>
> (Zizioulas 1985: 42)

And more succinctly: '[w]hat therefore is important in trinitarian theology is that God "exists" on account of a person, the Father, and not on account of a substance' (Zizioulas 1985: 42).[19]

For Zizioulas, three existential implications follow from the identification of God with person. The ontology of God explores the necessity of existence, the ultimate challenge to the freedom of the person. Typically seen as freedom of choice, this bounds human freedom with the necessity of possibilities, the most significant of which is existence itself. Humanity may try to transcend the necessity of its own existence, but this always leads, inevitably, to conflict with its own createdness. As a creature, humanity cannot escape the necessity of its existence. Only God can do that. And therein lies the first implication: if God does not exist, then the person does not exist. While philosophy may confirm the *reality* of the person, only theology can explore the *genuine authentic* person: God, uncreated and unbounded by any necessity, including its own existence (Zizioulas 1985: 42–43).

Yet, this view of ontological freedom means that the only way to break free of necessity is to end life. But theology avoids this nihilism and gives the person a positive content: God, uncreated, rather than experiencing this limitation of necessity, enjoys ontological freedom, giving humanity, in spite of its createdness, the hope of becoming an authentic person. Within the Trinitarian existence of God, the Father exercises freedom through the transcendence and abolishment of the ontological necessity of substance by begetting the Son and bringing forth the Holy Spirit. In other words, freedom is exercised in the communion of Father, Son and Holy Spirit, itself a product of freedom, the freely willed communion of the Father (Zizioulas 1985: 42–43).

Here, then, we find the second ontological implication: love (as modelled by the Father's freely willed communion) represents the only exercise of ontological freedom. Love, far from being an emanation or property of the substance of God, constitutes God's substance – it is what makes God what God is, the one God. Love becomes the supreme ontological predicate (Zizioulas 1985: 43–46):

> Love as God's mode of existence 'hypostasizes' God, *constitutes* His being. Therefore, as a result of love, the ontology of God is not subject to the necessity of substance. Love is identified with ontological freedom.
>
> (Zizioulas 1985: 46, emphasis in the original)

Third, rather than simply being, the person wants to exist as a concrete, unique and unrepeatable entity. Humanity cannot achieve this. The inability to ensure a concrete identity means humanity's death, for mere biological existence alone cannot ensure the survival of the unique identity. Biological existence is not survival of persons, but of the species, replicated

throughout the animal kingdom and directed by the harsh laws of natural selection. This supplies only matter for death with any attempt at subversion leading to chaos, the rule of egocentrism, and the ultimate destruction of social life. As we have seen, Greek philosophy and its adherence to monism failed to overcome this ontological difficulty (Zizioulas 1985: 46–49).

While impossible for humanity, Trinitarian existence ensures the survival of a personal identity for God. The distinguishing of the unique and unrepeatable identity of God the Father from that of the Son and of the Spirit ensures the immortality of God the Father. Likewise, the Son is immortal through being the 'only-begotten', and the Spirit because it is communion (Zizioulas 1985: 46–49). Zizioulas argues that '[t]he life of God is eternal because it is personal, that is to say, it is realized as an expression of free communion, as love' (Zizioulas 1985: 48–49). But more importantly, this means that life and love are identified in the person – a person only dies when it does not love and is not loved. Outside the communion of love the person loses its uniqueness and becomes a thing without absolute identity and name. Zizioulas concludes that '[d]eath for the person means ceasing to love and to be loved, ceasing to be unique and unrepeatable, whereas life for the person means the survival of the uniqueness of its hypostasis, which is affirmed and maintained by love' (Zizioulas 1985: 49).

Human

The Christian belief that humanity is created in the image of God (on this see 'Image of God' 1997a) means that there are consequences for identifying God and person (Yannaras 1984: 24–27); in other words, because we are the image of God, we, too, are persons. While this is given fullest expression in the existence of the Christian Church, three anthropological implications for the human person also emerge (Zizioulas 2006: 9–11). First, Zizioulas's reading of the early Christian understanding of the Trinity is the only way to arrive at an understanding of personhood: while the Father, the Son and the Holy Spirit only exist in relation to one another, each is also a unique *hypostasis* the personal properties of which are not communicable from one to another. This applies also, then, to the human person, who is otherness in communion and communion in otherness, emerging as an identity through relationship – an 'I' that can exist only as long as it relates to a 'thou' which affirms both its existence and its otherness. Isolating I from thou results in the loss not only of otherness, but of being. The I simply cannot be without the other. This distinguishes a person from an individual.

Second, both anthropologically and theologically, personhood is freedom. While this implies the freedom to have different qualities, above all it is the freedom to be oneself: absolute uniqueness, not subject to

norms and stereotypes, not classifiable in any way. And because a person depends for existence on relationship – 'one person is no person, [thus] freedom is not *from* the other but … *for* the other. Freedom thus becomes identical with *love*' (Zizioulas 2006: 9–11). God is love, we know, because God is Trinity. We, on the other hand, as persons, can only love if we allow the other to be truly other, and yet remain in communion, in relationship with us. For Zizioulas, 'only a person is free in the true sense' (Zizioulas 2006: 9), which means that '[i]f we love the other not only in spite of his or her being different from us but *because* he or she is different from us, or rather *other* than ourselves, we live in freedom as love and in love as freedom' (Zizioulas 2006: 11).

Finally, the model set by God the Father shows that personhood is creativity. Because freedom is not from but *for* someone or something other than ourselves, the person is ec-static, going outside and beyond the boundaries of 'self'; and rather than moving towards the unknown, this affirms the other. Although usually limited to the other that already exists, it may also extend to affirming the other that does not yet exist (Zizioulas 2006: 10). Kallistos Ware summarizes God's ontological model for human existence this way:

> [p]ersonhood in turn implies *relationship* … it is no coincidence that the Greek word for person, *prosopon*, should have the literal meaning 'face': each of us is authentically a person only in so far as he or she 'faces' others and relates to them in love. Thus [a] key term … is *koinonia*, which in Greek signifies equally 'communion' and 'society'.
>
> (Diokleia 1984: 11)

Relationship constitutes the *sine qua non* of the person and of community. How, then, does this provide us with a narrative of sacrifice for better understanding the role of private property – choices about the use of goods and resources – within the context of climate change?

Implications for private property

Freedom

The social relations critique of the liberal conception of private property, while a significant advance, cannot shed the liberal focus on the atomistic rights-bearing individual. The base-line social relations position is the individual whose freedom (choice) may be, and is, constrained by the state through inherent regulation. The self and self-regarding choices, though, remain the product of freedom. The Patristic understanding of the person mapped by Zizioulas takes a different tack altogether. When viewed from the perspective of the relationally constituted person, the concept of private property, freed from the atomism and absolutism of its associations

with the liberal individual, becomes a tool of freedom, not simply the freedom to choose one's own preferences in relation to a given resource, but freedom to choose both *for* the other and what is *best* for the other.[20]

Yet, what prevents the person from exercising freedom to act egoistically? Seen from the perspective of the liberal *individual*, nothing. Seen through the eyes of an eastern Christian understanding of the *person*, it is clear that such self-regarding choices in fact negate the person, for they deny the importance of the community, the other, in constituting one's very existence. The choices made in respect of private property constitute not simply private property, but also the person. This shifts the focus from protecting choice so that property may exist to how best to exercise choice, at the level of personhood. That is true freedom: to exercise self-constituting choice in creativity and love for the other. In relation to climate change, this means that rather than concentrating on the individual making free choices about resources that drive the enhanced greenhouse effect, we look instead at the outcomes of those choices – the environmental and especially the human consequences.

Ensuring one's personhood, then, becomes a matter of how best to exercise the choices made available by the liberal conception of private property established as the prevailing positive law of the state. The final section examines the way in which early Christianity guided such choices; these admonitions retain their value today.

Choice

While some incidental teaching on private property existed in the very earliest period of Christianity (Bartlett 1915: 100), one finds the core of early Christian teaching in the work of two Patristic writers in two distinct periods: St Clement of Alexandria who, in the pre-Constantinian period (prior to 325 CE) (Pelikan 2003: 15–16, citing Funk 1871 and Paul 1901), holds a 'truly unique and even isolated position' (Pelikan 2003: 16) as 'the only work which deals directly with the problem [of private property]' (Pelikan 2003: 15, n 9, citing Troeltsch 1960: 115) and St John Chrysostom, writing in the post-Constantinian period. Together, they provide an early Christian framework with which to consider the nature and exercise of choice conferred by private property. For the former, private property is in and of itself morally neutral (Pelikan 2003: 18),[21] an 'instrument … which [is] of good use to those who know the instrument' (St Clement of Alexandria N.D.: para 14).[22] One with private property must therefore make the right use it (St Clement of Alexandria N.D.: paras 14–15). What, then, is right use of this instrument? Clement says this:

> It is unbecoming that one man live in luxury when there are so many who labor in poverty. How much more honourable it is to serve many than to live in wealth! How much more reasonable it is to spend

> money on men than on stones and gold! How much more useful to have friends as our ornamentations than lifeless decorations! Who can derive more benefit from lands than from practising kindness.
>
> (St Clement of Alexandria 1954: bk 2, ch 2, 193)

In the post-Constantinian period, Chrysostom demonstrates that Christianity retained the early stance mapped by Clement:

> I have said these things so that we might not despise adjurations, especially when people urge us to do good works, to give alms to show benevolence. Now when poor people sit, with feet that have been amputated, seeing you running by, since they are unable to follow you on foot, as though with a kind of hook they think they will detain you by the fear of an oath, and, stretching out their hands they adjure you that you give them only one or two coins. But you run on by, though adjured by the name of your Lord. And indeed if by the eyes of your husband who is out of town, or your son or your daughter, you are adjured, immediately you give in, and your mind leaps up and you are warmed. But if he adjures you in the name of the Lord, you run on by.
>
> (St John Chrysostom 1857–66c 11.3: 62.465–66)[23]

In allowing one to exercise choice in the freedom of love and creativity for the other, private property serves an instrumental purpose: '[i]f no one had anything, what room would be left among men for giving?' (St Clement of Alexandria N.D.: para 13). Without the choice conferred by private property, in other words, there can be no opportunity, at least as concerns goods and resources, to remain in relationship with others (St Clement of Alexandria N.D.: para 13). There can therefore be no opportunity to constitute one's self. The remainder of this section considers two specific aspects of constituting personhood through choices made about goods and resources. First, we must identify the participants involved in the relationship implicated by private property. Second, the exercise of choice within this relationship of love and creativity requires a proper attitude towards possessions.

Any consideration of the Christian admonitions about the use of private property begins with the identification, first, of those who 'face' each other in relationship.[24] For Clement and Chrysostom, that meant a community comprising both the poor and the rich, both of which emerge from the fact of being made 'insane', 'driven mad' by the 'passion' of avaricious desire for possessions and wealth (St John Chrysostom 1857–66d 4.11–12: 62.595; St John Chrysostom 1857–66a 7.4: 62.349; see also Mitchell 2004: 102–6). No one is immune: '[k]ings, rulers, unskilled, poor, women, men, children, all [are] equally possessed by this evil. As though a dark gloom had fallen upon the world, no one can see straight' (St John Chrysostom 1857–66d 17.3: 62.594). For Chrysostom, then, '[r]iches are

vain, when they are squandered for luxury. But they are not vain, when they are dispersed for the poor' (St John Chrysostom 1857–66b 12.1: 62.89, as translated by Mitchell 2004: 105, n 56). Rich and poor exist, in other words, due to human greed, which, for Chrysostom, endangers the community. In the language of the person, it is greed – the failure to exercise choice correctly – that endangers the relationship that constitutes the person – the community: 'although God from everywhere brings us together, we contend to divide ourselves, and to chop things up by making them our private possession' (St John Chrysostom 1857–66d 12.4: 62.564, as translated by Mitchell 2004: 106, n 62).

In the classical world in which Christianity emerged wealthy citizens, the rich, bore a civic responsibility to provide benefactions for the community (comprised of many strata). In a radical move, however, Chrysostom inserted the poor, previously unrecognized both as a concept and as a group, into this established worldview (Mitchell 2004: 100).[25] These writings, part of a 'larger program of theological and social redefinition' (Mitchell 2004: 102), represent the first to develop the Christian concept of the poor.

Among other things,[26] the concept of the poor served a very significant theological purpose. Because they share the same human body as the rich, those who would give, it established the poor as legitimate objects of concern and thus philanthropy (Mitchell 2004: 100–101; Brown 1992: 91; see also St Clement of Alexandria N.D.: para 16; and see Pelikan 2003: 24). For Clement, property, while given expression in the positive law of the state, remained God's gift to humanity in the sense that it allowed for the possibility of philanthropy: '[w]hy should money have ever sprung from the earth at all if it is the author and patron of death' (St Clement of Alexandria N.D.: para 26; see also Pelikan 2003: 20; Mitchell 2004: 102–3). Similarly, in *On Lazarus*, Chrysostom writes that poverty and wealth tell us nothing of the true human person. Rather, because both are masks, these notions hide the fact that rich and poor are created equal (St John Chrysostom 1857–66f 6: 48.986, as cited by Mitchell 2004: 101, n 39). As such, the choice conferred by private property ought to be exercised in favour of the poor and, in so doing, in the service of God and so for one's own personhood and salvation. For those who have possessions, the art of Christian life is to 'learn in what way and how to use wealth and obtain life' (St Clement of Alexandria N.D.: para 27; see also Pelikan 2003: 121; Mitchell 2004: 102).

How, then, ought one to exercise choice so as to remain in relationship with others? Put another way, how can one exercise the freedom of love and creativity for the other as concerns goods and resources?[27] We find Clement's answer in one penetrating statement:

> he who holds possessions, and gold, and silver, and houses, as the gifts of God; and ministers from them to the God who gives them for the

> salvation of men; and knows that he possesses them more for the sake of the brethren than his own; and is superior to the possession of them, not the slave of the things he possesses; and does not carry them about in his soul, nor bind and circumscribe his life within them, but is ever labouring at some good and divine work, even should he be necessarily some time or other deprived of them, is able with cheerful mind to bear their removal equally with their abundance. This is he who is blessed by the Lord, and called poor in spirit, a meet heir of the kingdom of heaven, not one who could not live rich.
>
> (St Clement of Alexandria N.D.: para 16)

Three principal components of the proper attitude toward private property follow: asceticism, almsgiving and solidarity.[28]

Margaret Mitchell identifies asceticism as 'the seabed' from which almsgiving and solidarity rise (Mitchell 2004: 111). This prioritization is already evident in Clement's statement above that one who is 'superior to the possession of' private property and is able to deal with the resources and goods conferred by private property in such a way as to be 'able with cheerful mind to bear their removal equally with their abundance' is the one who is saved (St Clement of Alexandria N.D.: paras 16 and 39). In fact, Clement denounced the rich person who 'carries his riches in his soul, and instead of God's Spirit bears in his heart gold or land, and is always acquiring possessions without end, and is perpetually on the lookout for more' (St Clement of Alexandria N.D.: para 17; see also Pelikan 2003: 24).

Chrysostom extensively expanded the meaning of asceticism to include an inward conversion away from a focus on the things of this world and towards a concentration on the things of heaven. This conversion required not only the willingness to share or even to do without, but to despise riches and possessions. From inner ascetic conversion follows its outward sign: almsgiving (Mitchell 2004: 111; see also Pelikan 2003: 23).

Who are worthy of alms? Jaroslav Pelikan writes that for Clement the greatest commandment taught by Christ is that 'as you did it to the least of these my brethren, you did it to me' (Matthew 25:40). And because the Father and the Son lie hidden within those brethren, then Christ died and rose for them. As such, in this way, 'if we owe our lives to the brethren, and have made such a mutual compact with the Saviour, why should we any more hoard and shut up worldly goods, which are beggarly, foreign to us and transitory? … Divinely and weightily John says, "He that loveth not his brother is a murderer," … He has not God's compassion' (St Clement of Alexandria N.D.: para 37). The brethren, in other words, are others, those in favour of whom one ought to give alms as an ec-static exercise of the freedom of love and creativity constitutive of the person.

Clement takes the parable of the Good Samaritan as a supreme paradigm for the selfless generosity of the one who gives alms (Luke 10:30–37;

see Pelikan 2003: 22). And Pelikan points out something very significant about the parable itself: 'before he ever found the man half-dead by the side of the road, the Samaritan already "came provided with such things as the man in danger required," which included not only medicinal wine and oil, but also the "money for the innkeeper, part given now and part promised" ' (Pelikan 2003: 22–23, citing St Clement of Alexandria N.D.: para 28). This highlights yet again the importance of having private property; without it, one could not have what was required, let alone choose to give alms (Pelikan 2003: 23, citing St Clement of Alexandria N.D.: para 33).

Given that one is only authentically a person to the extent that one faces others, and given that such 'facing' involves asceticism and almsgiving, it is obvious that solidarity of the rich with the poor is a key attribute of the proper attitude towards possessions. In solidarity, Chrysostom combines into one virtue the requirements of asceticism and almsgiving (Mitchell 2004: 114):

> Let us go down via almsgiving into the furnace of poverty, let us see the people who walk in it, philosophizing and treading on the hot coals, let us see the strange and paradoxical marvel of a person in a furnace singing praise, a person amid flames giving thanks, a person bound in the most extreme poverty and yet bearing great praise to Christ … Now, let's not stand outside the furnace, with no mercy toward the poor … But if you go down to them … no longer will the fire be harmful to you. But if you sit above, disregarding those in the flames of poverty, the flames will burn you up. Come down, then, into the fire, so that you might not be burned up by the fire. Don't sit outside of the fire, lest the flames snatch you up. But if it sees you with the poor, then it will stay away from you. But if you are alienated from the poor, the fire will chase you down quickly and snatch you up. Therefore don't stand apart from the ones who are being thrown into the furnace. For when the devil orders those who have not worshipped money to be thrown into the furnace of poverty, do not be with the ones who are throwing, but rather with those thrown, so that you might be among the saved, and not the burned.
>
> (St John Chrysostom 1857–66e 4.20, as translated by Mitchell 2004: 114)

In explaining solidarity Chrysostom alludes here to community – the relationship between rich and poor – within which the proper attitude towards possessions operates and achieves its fullest expression.

We set out to offer a Christian narrative of sacrifice for the way in which one might exercise choice, conferred by the liberal conception of private property, so as to provide some alleviation to the negative outcomes for climate change. How can we draw together the Patristic Christian understanding of the person and its implications for Christian teachings on

possessions so as to provide that narrative? The final Part of this chapter turns to that task.

Conclusion: climate change and Christian sacrifice

We have seen that, on one hand, the liberal concept of private property confers the ability to choose the control and use of goods and resources – to set agendas about them. Yet, we also saw that liberalism, preoccupied with the freedom and choice of the atomistic, rights-bearing individual, fails to place adequate emphasis on the importance of relationship to the existence, the legal construction and creation, of private property. The property as social relations critics of the liberal conception demonstrate that in addition to freedom and choice, private property is also, perhaps more importantly, about relationship – it is instantiated by social relations among people concerning the control and use of goods and resources.

We also saw that the legal–social relationship that instantiates private property reveals another type of secondary, physical–spatial relationship, itself predicated on the existence of private property. The idea of choice exercised within a complex web of social relationships means not only that there are rights, duties and obligations, but also that there are consequences, outcomes, externalities for others within the web of relations. While climate change most clearly demonstrates this secondary physical–spatial relationship, we might just as easily have looked at any global human phenomena and found replicated similar physical–spatial relationships predicated upon private property: rather than the climate change relationship identified here, we might see the 'global economic relationship', the 'global water supply relationship', the 'global food supply relationship', or the 'global energy supply relationship'. And, indeed, each of these phenomena are linked to one another through anthropogenic climate change.

In every case, climate change, the global economy, and so forth, the same theme lies just below the surface; the choice conferred on some through the concept of private property legally invoked allows self-regarding behaviour which produces negative outcomes for others, typically those in developing parts of the world. In the case of climate change we saw that the major externalities of choices about where to live, what to eat, what to wear, the supply of energy, methods of transportation and travel result in decreased human security, increased health risks, food shortages and water stress. And, what is more, those in the developing world disproportionately bear these externalities.

In exploring the importance of relationship, it becomes obvious, then, that obligation plays an important role if a legal system is to combat negative outcomes, externalities, and in the protection of the community from the self-regarding, atomistic behaviour of the liberal individual. While obligation may be self-imposed by the holder of choice, in practice, that rarely

happens. Rather, it is inherent to the state's role in the creation, conferral and protection of choice that it also protects the other and the community through legislated regulation containing moral imperatives and obligation. Far from imposed, the state's role in regulating choice is an inherent and necessary part of the existence of private property itself. Without it, there would be no private property.

What we are really concerned with, though, is the individual who holds private property and what they do when exercising the choice conferred. Put another way, we are concerned with sacrifice, the self-regulation of the choice left once accounting for state regulation. The communitarian critique of liberalism identifies the importance of human narrative – the voice of those individuals and groups living within community – in explaining the nature of being human and how individuals ought to relate to one another. This chapter proposed a Christian narrative of relationship as the foundation for sacrifice regarding the choices conferred by private property which allow us to use goods and resources in ways that produce and exacerbate anthropogenic climate change.

This narrative first rejected the atomistic liberal individual as the relevant ontological entity in favour of the relational Christian *person*. Zizioulas's reading of Patristic Christian theology reveals that the *person* only exists in relationship, in *facing* the other – those who bear the consequences of our actions. Patristic theology established that God can be both one and three in the Trinity as a consequence of the relationship between Father, Son and Holy Spirit. Because humanity is created in the image of God that relational ontology represents the model of our own personhood. The *hypostasis*, the person, of God the Father freely willed the communion of the Trinity through an act of love and creativity; as such the relational ontology of humanity, in the image of God, is freedom to act in love and creativity *for* the other, to go beyond oneself, to act ecstatically for the other. Acting relationally, in love and creativity for the other, we constitute our own being, our own personhood. Choices about the self or the other have the potential either to negate or to enhance our personhood, our being, our existence.

Applying this ontological conclusion to Christian teachings on possessions means that the choices conferred by private property, and the way we exercise them, have consequences not only for others, but also for those making the choices. Simply, the way we choose, for our own self-interest or for others, the community, has the potential either to constitute our personhood or to negate it. In this light, the relationship between rich and poor, the contours of which include asceticism, almsgiving and solidarity, take on new meaning. They become a narrative of sacrifice capable of application to contemporary human phenomena and their associated problems.

For anthropogenic climate change, the choices made possible by private property have the potential, when seen through a Christian lens of

sacrifice, to constitute not only property itself, but our very selves. We must see the 'rich' as those of the developed world who hold liberal choice – where to live, what to eat, what to wear, the supply of energy, methods of transportation and travel – conferred by private property and the 'poor' as those who bear the consequences – largely, as we have seen, those in the developing world who bear disproportionately the burden of decreased security, increased health risks, food shortages, and water stress. Asceticism and almsgiving become the sacrifice those in the developed world must make, not in physically giving goods and resources to those of the developing world, but in refraining from making choices detrimental to their well-being through the physical/spatial climate change relationship. This may mean foregoing what might otherwise have been thought to be an available choice as to the use of a good or resources – car, house, land, energy supply, holiday, and so forth – but in so doing, those with choice express the third, and greatest virtue of the proper attitude identified by early Christianity: solidarity with those of the developing world.

Notes

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1 See 'A squeaker, with more to come', citing a YouGov/Polimetrix Poll conducted 28–30 June 2009, (2009) *Economist* www.encyclopedia.com/doc/1G1–202806753.html accessed 30 December 2009; 'ANU poll reveals nation worried about climate change', (2008) *Australian National University* http://news.anu.edu.au/?p=784 accessed 30 December 2009.

2 The background to the recently failed Australian cap-and-trade legislation – the Carbon Pollution Reduction Scheme Bill 2009 [No 2] (Cth) and a suite of complementary legislative enactments – is found in Australian Government (2008a; 2008b; 2008c). Other jurisdictions, most notably the United States, are currently embroiled in their own attempts to enact climate change legislation: see American Clean Energy and Security Act (Waxman-Markey) HR 2454, 111th Cong (2009) www.govtrack.us/congress/billtext.xpd?bill=h111–2454 accessed 30 November 2009, which passed the United States House of Representatives on 26 June 2009 and is now pending before the United States Senate.

3 While other forms of property – state or public – in both capitalist and non-capitalist systems also play a role in environmental harm, this chapter limits itself to the role of private property.

4 On the importance of private property in relation to various aspects of human life, see Singer (2008b: 142).

5 This section draws upon earlier work (Babie 2010).
6 For a summary of some of the major liberal theories and theorists, see Kahn (2005: 14–21); Harris (2004: 277–300).
7 On the issue of essential rights, see Merrill (1998: 734–35).
8 On the idea that rights are the background knowledge of modern property, see Ellickson (2006: 236–40); Smith (2003).
9 This begins with John Stuart Mill's 'self-regarding act': Himmelfarb (1974). See especially Singer (2008a: 7–11) and Singer (1982).
10 This information is readily available in the popular media; this section relies upon *Time* (2007).
11 The leading proponents of this attack were MacIntyre (1981), Sandel (1982) and Taylor (1989).
12 Additional text available at www.cambridge.org/twining ch 15: 1–7.
13 This view can be traced to Wesley Newcomb Hohfeld, the father of the bundle metaphor: Hohfeld (1913; 1917; 1919; 1923). The American legal realists subsequently developed Hohfeld's thinking: see Hale (1923); Cohen (1927); Hale (1943); Cohen (1954). Contemporary scholars extensively developed and expanded the early realist work: see especially Nedelsky (1993); Kennedy (1991); Singer (1982; 1988; 1992; 2000a; 2000b; 2005); Singer and Beermann (1993); Rose (1994); Baker (1986); Underkuffler (1990; 2003).
14 Even China, a legally communist state, both politically and economically, is turning increasingly to capitalism and its foundation, private property, in order to fuel an ever-expanding economy: *Property Code of the People's Republic of China* (2007); see Chen (2007).
15 These consequences are well documented; see IPCC (2007b; 2007c).
16 This section draws heavily on the work of John Zizioulas (1985; 2006) and that of Yannaras (1984). See also Knight (2007); Gunton (2007); Farrow (2007).
17 See also Knight (2007: 3), who writes that Zizioulas's work 'represents one of the most rigorous expressions of the neglected themes of the Christian faith'.
18 On the development of Patristic thought in this regard, see Pelikan (1993).
19 This is a controversial view: see Farrow (2007).
20 A rudimentary outline of this conception of private property forms the core of some recent eastern Christian scholarship: see eg Dounetas (2009).
21 This seems true also of St John Chrysostom 1857–66b 20.9: 62.148 (the translations of Chrysostom's writings used in this chapter are those of Mitchell 2004: 88).
22 The translation used in this chapter is that of Pelikan (2003: n 12).
23 One continues to find similar Christian statements today, both western and eastern, that explore this understanding of 'stewardship' first taught by Christ and spread widely by the Patristic tradition. For the Christian east, see the collection of essays found in Scott (2003). In the case of the Christian west, see Alexander (2008).
24 This section draws heavily upon Mitchell (2004: 99–110).
25 On St John Chrysostom and the poor, see also Brown (1992); Leyerle (1994).
26 Economically, for instance, because the poor possess genuine spiritual commodities just as significant as tangible goods and resources, recognizing them opened up the possibility of their power to trade with the rich on the open market (Mitchell 2004: 101).
27 This section draws upon Mitchell (2004: 111–14).
28 This division is taken from Mitchell (2004: 111–14).

Part IV

Negotiating religious law and personal beliefs

10 Jewish law in a modern Australian context

Jeremy Lawrence

One of the tensions in modern democracies is the attempt to reconcile the desire to maintain consistency and the rule of law while supporting the rights or demands of religious and ethnic groups to adhere to their own practices and traditions.

Recent comments by the Archbishop of Canterbury Rowan Williams (2008b), seen as overly encouraging of the incorporation of Shari'a law, were widely publicized in alarmist tabloids. Different religious groups even from within the same denomination have both endorsed and opposed charters of rights, some feeling that civil legislation is the best way to enshrine religious practice, others that it will curtail it.[1] Key areas of common concern arise over medical practices which affect the religiously determined sanctity of life, the regulation of marital status, dietary codes and the opportunity to celebrate and observe religious feasts and fasts.

From a Jewish diaspora perspective, tensions may arise when legislation regulates animal slaughter or circumcision, or prohibits gender or sexuality differentiation in a manner contrary to religious requirement, need or practice. Recent cases before the courts have tested whether contracts between religious Jews or by Jewish religious organizations implicitly incorporate Jewish religious process[2] and whether a Jewish school has the unfettered right to determine who is a Jew within its admissions policy.[3]

Judaism is a religion of 'the Law'. The Torah[4] defines and regulates every aspect of Jewish life. This essay introduces the main sources of Halacha[5] and examines the tension and reconciliation of conflicting jurisdictions from a Torah perspective.

Sources of Jewish law

Jewish law has two broad subdivisions. The first is the Written Law (*Torah she-bichtav*) given at Sinai, essentially comprising the 613 commandments[6] which are discerned within the Five Books of Moses.

The second is the Oral Law (*Torah she-b'al peh*). Orthodoxy determines that this, too, was revealed at Sinai (Ethics of the Fathers (Pirkei Avot)

1:1). The Oral Law is the explanation of the gaps and seeming inconsistencies in the written record.

Additionally, the Oral Law includes the hermeneutic principles or rules of interpretation and exegesis (see listings of Hillel and R' Ishmael in Sifra). When the Written Law says that an animal must be slaughtered according to the prescribed manner, but does not fill in the details, we look to the Oral Law to complete our understanding of *Shechita*.[7]

The Oral Law was never meant to be written down. As an oral text it remains more fluid; scholarly interpretation becomes less locked into the limitations of certain words and semantic constructs.

Moreover, an oral tradition requires a mentor–student relationship. Ideas are imparted in context, with texture and feeling. The Oral Law censures an autodidactic approach, where individuals assume they can pick up a text and master it alone (Iggeret Rav Sherira Gaon).

In the aftermath of the destruction of the Temple, the Romans prohibited the study and teaching of the Torah. Fearful that the Oral Law would be lost, Rabbi Yehuda Hanassi (Judah the Prince)[8] compiled many of its essential teachings in the Mishna, a second-century text.[9]

As the Jewish world fragmented into an expanding diaspora, the rabbinic discussions on the Mishna were recorded in the Jerusalem/Palestinian Talmud in the fourth century and the Babylonian Talmud in the fifth century. Whereas the Mishna establishes the core principles, the Talmud explains the provenance, and discusses the origins and rationale, of current practice.

The Talmud includes the long and often meandering debates of the sages. We are therefore armed with the final decisions of their discussion, yet we also have insight into the ideas which they suggested and rejected. This approach, which has been continued through the centuries, enables contemporary authorities to extend the ambit of fifth-century debate to modern circumstances. For example, when modern rabbis seek to discern the relevance of an ancient ruling they are able to see if a certain line of reasoning was previously advanced and overruled.

Subsequent generations have extracted the precepts of the Talmud and re-codified them to suit their times. Maimonides's *Mishneh Torah* in the eleventh century rationalized the tapestry of interwoven ideas and broke everything down into clear statements of what is required and what is prohibited. He was concerned that too many people needed to answer questions too quickly, without the time, patience or skill to work through the entirety of the Talmud to get it right.[10]

The *Tur* in the fourteenth century (Yaakov ben Asher, 1270–1343), followed by Rabbi Joseph Karo's (1488–1575) *Shulchan Aruch* in the fifteenth century, established four 'pillars' of Jewish law (*Orach Chayim*, the festive calendar; *Yoreh Deah*, Jewish ritual; *Even Ha-Ezer*, interpersonal relationships; and *Choshen Mishpat*, justice and liability). These codes only addressed the laws applicable to contemporary Jewish living, omitting the

laws of sacrifice, as well as all provisions for penalties and sanctions.[11] These divisions have remained the standard for all subsequent codes.[12]

The codes are general statements of law, and cannot identify or predict every instance or question which might arise. The practical questions which are raised with rabbis are called *sheilot*, and the responsa, *Teshuvot*.

The collections of the responsa of the great scholars of every generation are significant precedents which are followed as sources of law. The responsa literature is fast growing; these days, for instance, questions are asked about medical and scientific innovations such as fertility treatments, organ donation and life support, or about intellectual property and the Internet. In the 1990s, Yeshivat Eretz Hemdah[13] in Jerusalem set up a fax responsa service to assist rabbis in remote communities. Now, predictably, there are online and email services (all only as reliable as the 'scholars' who answer them) and an unprecedented collection of Halachic works is available as a reference on DVD, courtesy of Israel's Bar Ilan University.[14]

Rabbinic legal literature is augmented by some additional writings: the *Midrash* (rabbinic fables to elucidate and resolve some of the Biblical narrative), works of *Machshava* (Jewish philosophy), *Kabbalah* (Jewish mysticism), *Mussar* (ethical teachings) and *Chassidut* (the spiritual teachings).

Courts and tribunals

The framework for the development of Jewish law is established within the Torah:

> Judges and officers shall you appoint in all your gates, which the Lord your God gives you, throughout your tribes; and they shall judge the people with just judgment. You shall not pervert judgment; you shall not favour persons, nor take a bribe; for a bribe blinds the eyes of the wise, and perverts the words of the righteous. Justice, only justice shall you pursue, that you may live, and inherit the land which the Lord your God gives you.
>
> (Deuteronomy 16:18)

The Talmud explains how the system of Biblical judges developed into the Sanhedrin (which operated through Temple times) and the *batei din*, or tribunals, which continue to this day.

'The Great Sanhedrin consisted of 71 members; the small Sanhedrin of 23. How do we deduce that the Great Sanhedrin is of 71? The Torah says: "gather unto me seventy men". With Moses at their head we have 71' (Talmud Bavli, Sanhedrin 2a).

The Sanhedrin of 71 met in the Temple. It was the court of final appeal and it alone had jurisdiction on matters to do with the king or with false prophets. It could legislate by decree for the entire nation. The Sanhedrin of 23 existed in each region and was the authority for most capital cases.

Only in the era of the Sanhedrin could a court impose punitive fines and exemplary damages. Contemporary *batei din* (singular *beth din*, translating as 'house of law') which are courts of three (or a greater odd number), may only award compensatory damages based on actual or anticipated loss.

Be they the Biblical Sanhedrin or contemporary *batei din*, Halacha accords Jewish tribunals a binding status, asserting that Samuel in his day had the authority of Moses in his day and that we in our generation have the authority of Samuel in his (Talmud Bavli, Rosh Hashana 25b).

There are different compositions of *batei din*. A distinction is drawn between a *beth din* of acknowledged experts and one comprising trusted laymen. Both are empowered to hear any case, but the measure of expertise anticipated and the consequent liability of the judges for their determination is affected by the composition of the particular *beth din*.

Cognisant that it was important to resolve local disputes in remote villages with little access to a *beth din* of Torah scholars, and recognizing that it is impractical to send every dispute into the city, Halacha allows for parties to convene a *beth din* of three locally trusted cattlemen[15] to hear a case (Talmud Bavli, Sanhedrin 25b). Although such a tribunal might be lacking in formal scholarship or expertise, it establishes a model of dispute resolution through consensual arbitration.

Distinctions are also drawn (Shulchan Aruch, Choshen Mishpat 3:1) between a permanent *beth din* which meets on a regular basis (traditional court days are Monday and Thursday) and an ad hoc *beth din*. The former has the acknowledged power to summons people in order to compel attendance and regulate municipal affairs. The latter may only adjudicate by the consent of both parties and has declaratory powers alone.

Many disputes are resolved by a *zabla*. *Zabla* is the acronym for the Hebrew expression which translates as 'this party chooses a judge and that party chooses a judge' (*Zeh borer lo echad*…). The two judges then select the third member of the tribunal (the *shelish*) between themselves. It is the intention that all the judges act impartially in a *zabla*. The two nominated judges are not to serve as proxies or advocates for the party which nominated them.[16]

The Sydney Beth Din (SBD) is considered a permanent *beth din* and has been meeting regularly for over 100 years. It processes divorces and conversions and answers many questions about personal and ritual status from local communities and those overseas. It also hears a number of disputes involving both private individuals and community organizations. Most of its operation is necessarily both quiet and confidential.

In the absence of a Sanhedrin, there is no automatic formal *beth din* hierarchy. A *beth din*'s authority is established in Halacha and in practice derives from its acceptance by the parties. This is reinforced by the Talmudic precept that one *beth din* does not have the jurisdiction to investigate another (Talmud Bavli, Bava Batra 138b).

The relative seniority of a *beth din* is a matter of its reputation (the reputation and learning of the individual *dayyanim*). Accordingly, unless one is established (such as in Israel and some major Jewish communities and rabbinic associations)[17] there is no formal system or structure for appeal against an adverse decision (see Quint 1990: vol 1, ch 23). Nonetheless, a *beth din* might be advised to reconsider or vacate its award on the basis of advice from a senior *posek* (a scholar of acclaim who is accustomed to be asked and to answer *sheilot*) or *beth din* of international standing. Its decision is void if there is a fundamental error of Mishnaic law (Shulchan Aruch, Choshen Mishpat 25). Halacha makes provision for restitution and compensation (even from the judges) where a decision must be reversed.[18]

The ambit of Halacha

Jewish civil law is intrinsic to Torah Judaism. The Torah's instruction to set up a judiciary (Exodus 21–23) to hear cases occurs, in the Torah narrative, between the giving of the Torah (Exodus 20) and the Ten Commandments on Sinai and the later instructions about the establishment of the Tabernacle or *Mishkan* (Exodus 25).

We are told: 'For every kind of trespass, whether it be for an ox or an ass, for a sheep, for a garment or for any kind of lost thing, which another challenges to be his, the cause of both parties shall come before the judges' (Exodus 22:8). Property rights and tortious liability are as much the business of the Torah as the observance of the Sabbath and festivals or the regulation of our dietary code.

In its codification of the tenets of these verses, the Mishna elaborates on sources of loss. It establishes that there are four principal heads of damages: the ox, the pit, the feeder and the fire (Mishna, Bava Kama 1). An individual has different measures of control over his goring ox,[19] the hole he leaves lying in a public thoroughfare,[20] his grazing cattle which wander into the field of another[21] and the sparks which jump from his flint axe or fireplace.[22]

The Mishna, the Talmud and later codices define the appropriate duty of care in each circumstance. As each case is raised, it should be brought to the *beth din*. Contemporary Halacha draws on these ancient principles and analogous examples to assess the appropriate measure of responsibility and the foreseeability of loss.

Peshara – arbitrated or mediated resolution

Despite the stereotype reinforced by *The Merchant of Venice*, Jewish jurisprudence does not favour pursuit of the strict letter of the law to exacting the precise pound of flesh. The Talmud describes voluntary and arbitrated compromise as 'the justice within justice' or the 'justice within which

peace abides' (Talmud Bavli, Sanhedrin 6b).[23] Parties are encouraged to resolve their differences amicably and equitably rather than insisting on their rights. In one notable instance, a leading sage directed a wealthy scholar to yield his claim against some labourers on the basis that a man of his stature was expected to live beyond the strict letter of the law (Talmud Bavli, Bava Metzia 83a).

The *Beth Din* imperative

The Torah decrees: 'these are the *Mishpatim* which you shall lay before them' (Exodus 21:1). The word *Mishpat* can mean both law and case. The word 'them' in the context of this verse could mean both the Children of Israel or their nominated judges. Therefore on the one hand the verse is interpreted as 'these are the principles of justice which you should lay before the Children of Israel', and on the other it is interpreted as 'these are the cases which you shall lay before the nominated judges'. From the second understanding, Halacha has determined that all the matters discussed should be tried before judges of Torah expertise and therefore should be heard by Torah courts and not the courts of Gentiles (Shulchan Aruch, Choshen Mishpat 26:1).

Until recent times, many Jewish communities were comfortably self-regulating and there was a broad acceptance of the principle that disputes between Jewish individuals should be heard before their learned rabbis, rather than in local civil courts.

As well as many social factors, which have diminished reverence for religion and its authority, the rule of law in many countries today assumes and asserts that its courts will determine all matters. Nonetheless, Halacha instructs as a matter of law – and not as a matter of personal taste – that the *beth din* is the appropriate forum for the resolution of disputes between Jews.

The Midrash Tanhuma declares that 'whoever abjures Jewish judges and goes before the idolaters has foremost denied the Holy One and thereafter denied the Torah' (Tanhuma Mishpatim 3). The Zohar asserts that 'it is forbidden for us to present our lawsuits before the courts of Gentiles, because they have no portion in our faith' (Zohar, Exodus 257a). In the Shulchan Aruch we are told that 'it is prohibited to be judged before idolatrous judges or in their courts'. The commentary elaborates that even if both parties consent, it is prohibited and any party that pursues such a judgement is considered wicked.

Writing in the eleventh century, Rashi[24] makes it clear that these principles apply even if you know that the Gentile judges will rule consistently with Torah law (Commentary to Exodus 21:1). He makes it plain that the injunction is not fixated on the idea that the non-Jewish judges are idolatrous, heathen or in any way unsuitable. Rashi and a millennium of subsequent authorities are at pains to emphasize that, in abandoning Torah law, this looks like a rejection of divine wisdom.

Even modern religious authorities discuss the subtle nuance in the implication that divine law is preferable and paramount.

The Chazon Ish (Rabbi Abraham Isaiah Karelitz, 1878–1953) wrote:

> Whoever has not fixed in his heart complete obedience to the law of the Torah will not be benefited by all his endeavours to acquire high ethical standards; for any serious conflict he will encounter will undoubtedly be resolved in accordance with his natural tendencies, and even if these are reformed, they will very often not agree with the celestial Halacha; and if the basis of his judgment is distorted, then all that follows will be alien and injurious as well…

This suggests strongly that decisions reached purely through our reason or intellect will be tainted and impure.

By contrast, Rabbi Abraham Isaac Kook (1865–1935), the first chief rabbi of the British mandate in Palestine, wrote: 'The fear of Heaven must not suppress man's natural morality, for then the fear of Heaven is no longer pure. Pristine fear of Heaven is evident when the natural morality, rooted in man's upright nature, is enhanced to a greater degree than it would be without such fear' (Rav A I Kook, Orot Hakodesh). For Rav Kook, there clearly are principles of natural justice and morality. Suppression of these in the slavish adherence to a text debases the quality of any ensuing determination.

There are many cases where recourse to the civil courts is allowed by Halacha (Bleich 2005: vol 5, 25). These include: non-adversarial and declaratory proceedings; where there is a need for a court to confirm a *beth din*'s order to make it enforceable; where leave is given by the *beth din* to go to the civil courts after a party has refused to attend the *beth din*; and in the related case where a non-observant litigant would simply defy the summons to attend. Clearly, disputes with a non-Jewish party are not subject to a *beth din*.

In some instances, such as insurance claims, the law requires a civil process to be followed in order that a remedy or a relief may be paid. Here too, it is understood that parties will go to the civil courts. Halacha does establish that accepting a civil award which is greater than a *beth din* could impose would constitute an act of theft in Jewish law (Tshuvot HaRashba, cited in Beit Yosef Choshen Mishpat 26). To this end, leave to pursue a case in the civil courts cannot be given simply because the party imagines he or she might be granted a greater award.

There are also some cases which a civil court will refer to a *beth din*. These include instances where the *beth din*'s jurisdiction has been stipulated in an arbitration clause or where a prenuptial agreement or consent order requires the parties to attend a *beth din* in order to complete a religious divorce and effect a *gett*.[25]

The rule of state law

An important distinction must be drawn between Halacha's requirement that disputants attend a *beth din* and the authority of civil legislation. A very significant tenet of Halacha is the principle known as *dina de-malchuta dina*, which translates as 'the law of the state is law'.

The Talmud explains: 'Samuel said, the law of the state is law' (Talmud Bavli, Bava Kamma 113b). The Sage, Rabba, explained that you can prove this from the fact that authorities seize or appropriate palm trees without the consent of the owners and construct bridges with them. We make use of the appropriated palm trees and bridges by passing over them (and never questioning if we are taking advantage of stolen property). His opinion is challenged by another Sage, Abaye, who says that perhaps the original proprietors have abandoned their rights in the palm trees, so that when we pass over them, they no longer constitute stolen property. To this, Rabba responds: if the rulings of the state did not have the force of law, why would the proprietors abandon their rights?

From this we learn that in societies where there is a rule of law and where we acknowledge the state's power to regulate our property, the Jewish community is bound to adhere to civil legislation. As a consequence, the *beth din* in hearing a case, must consider all rights and duties conferred by civil law in formulating its determination. In other words, a *beth din* will use civil law as a source of law which it will then interpret and apply in the context and within the scope of Halacha.

The principle of *dina de-malchuta dina* emphatically does not extend to include the state's authority to compel violation of Jewish law. Halacha cannot accept slaughter legislation which compromises the validity of *Shechita*,[26] a ban on *Brit Milah* (male circumcision as required: Genesis 17, 10) or any other constriction on Torah living.

Given that criminal prosecutions are brought by the state, affected parties are not in a position to bring them to a *beth din*.[27]

Aside from the application of civil law as a legislated force, civil law is also applied by a *beth din* as *Minhag HaSocharim* (also *Minhag HaTagarim*), the 'custom of the marketplace'. Just as the redactors of the Talmud recognized that members of small communities might not have ready access to expert judges and courts, they also acknowledged that most merchants and consumers are relatively ignorant of the law, its provisions and fine print. Nonetheless, the market has devised and applies its own conventions, which merchants respect and enforce among themselves.

In some places a handshake cements a contract; some transactions are routinely effected in this way, and others in that way.

Where a local custom applies, even though it does not satisfy the minutiae required by the strict letter of Halacha, a *beth din* will respect local custom, convention and market practice. By and large, in contemporary

society, all the normative principles of civil commerce can be held to satisfy the criteria of *Minhag HaSocharim*.

Despite the earlier stated objection to taking a case to the civil courts rather than to a *beth din*, Halacha has always acknowledged a long-standing tradition that disputes might be brought by the parties before the civic ruler or local lord (as opposed to a constituted tribunal). This is done on the basis that Halacha welcomes dispute resolution through arbitration and compromise according to general principles of equity and justice as an alternative to the strict application of law. So long as the governor (even non-Jewish) will make a personal determination on the basis of these principles, then it is a perfectly acceptable way to resolve a dispute. Halacha does not see in this approach to a prominent individual the same rejection of divine law as it does with recourse to the courts.

The *Beth Din* in the courts

Mond v Berger

Recent years have seen the jurisdiction of the *beth din* raised within the Australian courts. *Mond and Mond v Dayan Rabbi Isaac Dov Berger*[28] was a synagogue dispute which had been referred to a *zabla beth din* under its constitution.

The case originated with a breakdown in the relationship between the Caulfield Hebrew Congregation (CHC) and Or Chadash (OC), which was a smaller *minyan* or prayer group that had originated within the CHC and used its premises. OC worshippers had a number of complaints against the CHC's attitudes to the *minyan* and its rabbi. Mr Mond was a member of the parent CHC and also served as an officer of the OC *minyan*. He complained of several irregularities in the CHC handling of its membership, its voting procedures and preparation for its annual general meeting, where the OC members sought to address their dissatisfaction. Mr Mond obtained oral leave from the OC rabbi to obtain an injunction in the magistrate's courts preventing the AGM from taking place until a *din Torah* had ruled on the membership issues.[29]

Pending resolution, Mr Mond made further complaints about the infringement of membership rights and of being denied religious honours by the CHC rabbi. His brother also became a party to the action.

A *zabla beth din* was eventually convened to address the complaints by the brothers Mond and OC, and counter-complaints by the CHC. The arbitration agreement did not specifically empower the *beth din* to resolve status issues of the independence of OC itself.

During the course of the *din Torah*, a number of complaints there were private meetings between *dayyanim* and litigants. The *borer* appointed by the CHC and the third *dayan* (*shelish*) made comments which suggested to the Monds that they sided with the CHC. The CHC rabbi who had testified left

to assume a position overseas prior to the completion of his cross-examination. The *dayyanim* undertook to make directions on the status of OC despite the protests of the Monds that this was beyond their jurisdiction.

In the Supreme Court of Victoria the Mond brothers successfully challenged the partial award by the *beth din* on the basis of misconduct under section 42 of the *Commercial Arbitration Act 1984* (Vic).

In his judgement, Judge Dodds-Streeton set aside the partial award and criticized the *dayyanim* for their management of the hearing; for the lack of formal process; and for conduct giving rise to a reasonable apprehension of bias. The inherent problems of partiality within the *zabla* were highlighted.

Engel v Adelaide Hebrew Congregation

In 2007 the rabbi of the Adelaide Hebrew Congregation (AHC) sought to have a dispute over the termination of his contract resolved by the *beth din*.[30] The rabbi who had served for about seven years challenged a letter from his board of management giving him three months' notice. The rabbi disputed the capacity of the board to terminate him without cause and sought a ruling from the SBD which the AHC constitution identified as the point of reference for Halachic disputes between the rabbi and any members. The rabbi contended that a *beth din* was the only appropriate forum in Halacha to hear a dispute; that Halacha deals with contracts and specifically with contracts for rabbis. The AHC strenuously denied that there was a dispute. There had been a contract and now there was not. Further, the references to the SBD were intended to cover disagreements with the board and members over the dietary laws and observance rather than the employment of staff.

The rabbi applied to the SBD, which assumed jurisdiction in Halacha and declared that the rabbi should retain his position pending resolution. It sent a letter of summons to both parties for a preliminary hearing and offered arbitration with the incorporation of an Institute of Arbitrators and Mediators of Australia (IAMA) member to serve on the panel.

The AHC demanded that the rabbi vacate the house and return the car, which were provided for him by the congregation. They applied to the District Court.[31]

The congregation refused to deal with the *beth din*, which sent further summonses and eventually declared the board to be in contempt of *beth din* until they attended any orthodox *beth din* to address the dispute with the rabbi. The contempt order or *siruv* falls short of an excommunication but it declares that the officers of the congregation are not fit people to manage orthodox Jewish affairs. This would certainly make it harder for them to recruit another orthodox rabbi or obtain religious support.

The District Court and the Supreme Court of South Australia found for the congregation. In the District Court, Simpson J held that the

application of Halacha to the contract was not explicit and there was no reason to assume the implicit incorporation of Halacha into a rabbinic contract. The rabbi had to vacate the house and return the congregation's car.

The Supreme Court dismissed the appeal. Chief Justice Doyle observed that it was inadequate for the rabbi to simply assert the jurisdiction of the SBD when neither the rabbi in his submissions nor the SBD in their letters to the congregation had established by what principles of Halacha a (different) result might have been reached.

The Chief Justice considered it 'doubtful' that Jewish law was to be incorporated into the contract, and stated further that 'even if Rabbi Engel has a remedy under Jewish law, which would result in an order under that law that he be restored as rabbi and given possession of the property, this Court would not enforce such an order by injunction or by order for a specific performance'.

After the hearing but before the judgement was delivered, the AHC and the rabbi signed an arbitration agreement accepting that the London Beth Din should arbitrate. The *siruv* was then lifted. The congregation was able to engage another rabbi. However, no arbitration agreement was made with the London Beth Din and the process was not initiated.

The principle of *dina de-malchuta dina* precludes the Sydney Beth Din from making even a declaratory ruling in Halacha contrary to the South Australian Supreme Court. It should be noted that though the congregation contended that the SBD supported the rabbi, the SBD only ever tried to bring the matter before a *beth din* to be heard and at no stage addressed or made comment on any of the substantive issues in the case.

Gutnick v Bondi Mizrachi

In the 2009 case between Rabbi Gutnick and the Bondi Mizrachi Synagogue,[32] the judge did refer the dispute to a *beth din* for resolution,[33] identifying a 'balance of convenience' for the dispute to be arbitrated by Jewish law before a tribunal of Jewish law.

The synagogue sought to terminate its contract with Rabbi Gutnick who had served the community as part-time rabbi for over 20 years. He claimed that he could not be dismissed as he had life tenure (*chazaka*) which was expressly excluded in his initial contract but had been agreed as a part of his contract renewal in 1990. This fact was disputed by the synagogue. Rabbi Gutnick (who serves as a *dayan* on the SBD) further asserted that under his contract and under Jewish law the dispute should be heard in another *beth din* convened by *zabla*.

Rabbi Gutnick sought an injunction against the synagogue bringing a resolution at its AGM to make his position redundant.

White J in issuing the injunction found fault with the synagogue's preparation of materials for the AGM, noting that they could be prejudicial

against the rabbi, who would be at a disadvantage fighting for his job after it had been made redundant. He noted that the reason for making the position redundant was the financial position of the community – but that the rabbi had agreed to forego drawing a salary pending a *beth din* hearing:

> It seems to me that the balance of convenience favours this dispute being determined by a Jewish tribunal in accordance with Jewish law. The evidence before me would not justify an order compelling such an arbitration, and that is not the relief sought in the present application. But in the light of the attitude expressed by both parties in the open offers which have been exchanged, I think it likely that if injunctive relief is granted the dispute will be referred to an appropriate Jewish tribunal for determination and I see no reason that that determination would not take place within a reasonably prompt time.

The London Beth Din heard and adjudicated the dispute – drawing a distinction between the concept of *chazaka* as tenured rabbinic authority and the idea of having a salary for life. At the time of writing, the parties have not agreed on the implementation of the award.

R v JFS – no right to self-definition?

A recent case has caused great anxiety to the Anglo–Jewish community.[34] The Jewish Free School, which is an orthodox school in London, operated an admissions protocol favouring Jewish children under Jewish law. Under Halacha, Jewish heritage is passed down from the mother (or conferred by conversion). The Supreme Court determined by five to four that identifying a Jewish child through matrilineal descent was an ethnic test which violated the *Race Relations Act 1976*. The justices agreed that there was no suggestion of racist behaviour or moral turpitude by the school governors and, very significantly, that the legislation had not been enacted to encompass these circumstances. Nonetheless, the Jewish law as applied was found to be in conflict with the statute and judgement went against the school.

The British Supreme Court has thus effectively ruled that a religious Jewish institution[35] (covered by the Act) is barred from applying Jewish law to determine who is a Jew for the purposes of admission. The parameters of the decision will be carefully scrutinized. Might a synagogue be the next target for litigation? Could it be compelled to admit non-Jewish members? Perhaps in its Sunday school?

The dissenting judges and some of the majority anticipated that the problem created in Parliament will have to be resolved by Parliament. In a climate where the right to exercise religious freedoms and government support for religious organizations is much in the spotlight, the *JFS* decision might well be seen as the courts signalling they will leave it for the legislature to set and determine standards.

The Jewish Arbitration and Mediation Service (Australia)

In 2008 a new initiative was seen in Sydney which satisfies both the need to resolve cases in a *beth din* and meet the standards mandated by New South Wales law. The Jewish Arbitration and Mediation Service of Australia (JAMS)[36] was established under the joint aegis of the SBD and the New South Wales Society of Jewish Jurists.

The objective of JAMS was to create a better and more acceptable forum for dispute resolution which completely satisfied Halacha. It had to address the reluctance of disputants to come to a *beth din*, the apprehension of bias when one party was a rabbi, and the fear that disputes before a *beth din* might not be handled professionally or with transparency.

All matters referred to JAMS are to be addressed by an independent registrar who weighs up the parties' requirements and expectations for a decision under civil law/Halacha/equity and compromise.

The registrar then convenes a suitable panel of judges comprising a mix of rabbinic and legal practitioners who have registered with the service.

In setting up JAMS, a number of practical issues have had to be addressed. Within the tribunal, all matters of civil law will be determined by the qualified lawyers. All matters of Halacha will be determined by the rabbis. Where there is a lack of rabbinic agreement, the London Beth Din has been nominated as the arbiter of Halachic interpretation. While Halacha only admits men as judges on a *beth din*, a JAMS tribunal is gender-blind; similarly, JAMS would not distinguish between men and women as witnesses.

There are some Halachic constraints on cases. JAMS would not be able to adjudicate a dispute requiring a breach of Jewish law. To that end, it could not be put in a position where it might need to uphold a contract mandating a violation of the Sabbath or where the contract charges Halachically prohibited interest.

A JAMS tribunal will have no less competence as a *beth din* than the three cattlemen referred to in the Talmud, but will at the same time operate within New South Wales civil law. It is the hope of its founders that the JAMS will satisfy a need within the community and inspire confidence in resolving disputes according to the traditions of the Jewish people: the pursuit of equitable justice as a truly godly ideal.

Closing thought

The scriptures are resplendent with teachings of righteousness, justice and peace:

- 'Judges and officers shall you appoint in all your gates, which the Lord your God gives you, throughout your tribes; and they shall judge the people with just judgment. You shall not pervert judgment; you shall not discriminate, nor take a bribe; for a bribe blinds the eyes of

the wise, and perverts the words of the righteous' (Deuteronomy 16:18, 19).

- 'Thus says the Lord, Keep judgment, and do justice; for my salvation is close, and my righteousness will be revealed. He has told you, O man, what is good; and what does the Lord require of you but to do justice, and to love mercy, and to walk humbly with your God' (Michah 6:8).
- Rabbi Shimon ben Gamliel said that the world stands on three things; on truth, on justice and on peace (Ethics of the Fathers 1:18).

Jewish living enmeshes its ritual and spiritual identities with and within its code of law, its high ethical standards and the teaching that these, properly applied bring harmony to society. The laws of the Sabbath, the laws of kosher food, the laws of worship and family life are part of God's covenant with the Jewish people. The laws of the judiciary, the principles of justice, of fair weights and measures and impartiality in judgement – the requirement to live by these are an equal and inseparable part of the whole.

Though we are over 3,300 years since the Torah was revealed at Sinai and though Jews have lived in exile subject to other jurisdictions for most of the last two millennia, the Jewish world has adhered to its codes, developed them and kept them current so that there are volumes of responsa on stem cell research, intellectual property rights and piracy, medical and fiduciary duties of confidentiality and disclosure.

The tomes which would have filled a large and costly library, accessible to only a few until recently, are all available on a DVD and updated with new responsa every year.[37] Seminars in Jewish law and business ethics are a mouse-click away online, with recourse to advice and tutorials from accredited rabbinic experts.[38]

The encouraging of alternative dispute resolution (ADR) by a number of countries as a way of alleviating the burden on their civil courts has opened a fully sanctioned window for *batei din* to provide consensual adjudication subject to local arbitration and mediation legislation. To those who hold their Judaism dear, we live in an age of unprecedented opportunity to live by and apply a flourishing system of Jewish civil law.

The JAMS model, which is a twenty-first-century approach, has sought to open that window even further by augmenting regulation and accountability, by removing some of the fears of the *beth din* process and by circumventing, where needed, religious barriers to the full and equal participation of women.

Locally, the high-profile disputes between rabbis and the attempts to snub religious authority capture the headlines. They have undoubtedly influenced the SBD to become more professional and have inspired the establishment of JAMS. Nonetheless, they represent a minority of *beth din* work; the cases resolved, the religious divorces and conversions processed.

Where approach is made by a disputant to the civil courts, it is unlikely that they will cede jurisdiction without a clear and express reference to the

beth din as arbitrator in the relevant contract. Civil courts will not consider it implicit that rabbis and their synagogues expect and undertake to be bound by Jewish law. The reference of the *Gutnick v Bondi Mizrachi* case back to the *beth din* was probably atypical. It was not a ruling on Jewish law but a reflection of the judge's understanding that allowing the AGM as called completely disempowered the applicant.

Though the court would not find it implicit that rabbis and their synagogues imagine themselves bound by Jewish law, one might have expected a court to endorse the explicit definition of religious identity applied within a religious school. The *JFS* case asserts the de facto supremacy of state institutions and the state law in circumscribing standards for society.

The courts will look to the legislation and Parliament's declared public policy considerations in determining a case. There is a wariness of religious dogma and its tribunals. There is concern that not all religions do hold by state law, not all religious authorities do respect the state criminal code. Streams and sects of some religions advocate practices such as polygamy[39] and remedies such as corporal punishment which the civil society repudiates. It must be for Parliament to establish rights and draw clear lines.

Within those parameters it is hoped that the freedom for people of faith to live true to their traditions will continue to flourish. The cross-fertilization of ideas and cultures has nurtured understanding between peoples and a greater appreciation of the unique value of every individual in society whatever his or her colour, capacity or creed. Religious perspectives, writings, proverbs and insight have enriched our societies. It is hoped that we may continue to honour God's statute, and with it to pursue justice, to walk in the ways of righteousness, to love mercy, to act kindly and to realize peace.

Notes

1 Addresses by His Eminence George Cardinal Pell and the author at the Ambrose Centre, NSW Law Soc, 26 November 2009.
2 *Engel v Adelaide Hebrew Congregation Inc* [2007] SASC 234 (26 June 2007); *Gutnick v Bondi Mizrachi Synagogue* [2009] NSWSC 257 (31 March 2009).
3 *R (on the application of E) v Governing Body of JFS and the Admissions Appeal Panel of JFS* [2009] UKSC 15.
4 The word 'Torah' is used in many ways in Judaism. A Torah scroll contains the Five Books of Moses. The word is also used to refer to the Jewish Bible (Old Testament). The Torah, as such, is the definitive source of Jewish law. Orthodox Judaism describes itself as 'Torah Judaism' or 'Torah True'.
5 Halacha is applied Jewish law. The word is derived from 'going' or the following of a path. While a number of avenues might have been within the undefined ambit of the Torah, the Halacha is the path prescribed by authority.
6 There is a strong religious tradition that there are 613 commandments, 248 positive and 365 negative (TB Makkot 23b), though there is no definitive listing. There are ninth-century listings including Rav Saadia Gaon. Most Hala-

chic works use the reckoning of Maimonides in his Sefer HaMitzvot of the late twelfth century, or the Sefer HaChinuch (c. 1260). Nachmanides's thirteenth-century Hassagot presented a challenge to Maimonides, preferring the more ancient reckoning by R' Shimon Karaya.

7 *Shechita* is the process of slaughter prescribed by Halacha for consumption. The term 'ritual slaughter' is not favoured as a translation. Ritual slaughter suggests 'rites' and slaughter for sacrifice or purely ritual purpose.

8 'The Prince' because he was of the Davidic line. Yehuda Hanassi was the leader of the Jewish community of Judea toward the end of the second century CE, and the Jews' intermediary with the Roman authorities. Fluent in Hebrew and Greek, he was reputedly an adviser to the Roman Emperor Antoninus Pius.

9 The Mishna and Talmud followed thematic categories: agriculture, seasons (calendar and festivals), personal status and relationships, damages, holiness (temple observance and ritual) and purity.

10 Maimonides re-categorized the corpus of Jewish law into fourteen key areas and covered both Temple time and contemporary practice.

11 According to the Talmud, penalties and sanction (though administered by a lesser court) required the Great Sanhedrin to be present in its court at the Temple. Accordingly, with the destruction of the Temple was lost the power to fine or impose punitive/exemplary damages as well as the power to impose capital punishment.

12 To these four columns commentators have added an imaginary fifth, known as *sechel* or common sense. Although not always easy or intuitive, Jewish law should be both reasoned and reasonable.

13 www.eretzhemdah.org.

14 www.biu.ac.il/JH/Responsa.

15 Local men of means and stature, familiar with the ways and needs of the community but not necessarily men of great learning.

16 The *zabla* has nonetheless been widely criticized for the apprehension of bias where two partial judges lobby the third.

17 These do apply a hierarchy and have internally defined procedures for appeal and review.

18 This is evaluated with reference to the expertise of the judges and the nature of the mistake.

19 The ox is calm, can become violent and heads towards its victim.

20 The hole is a foreseeable danger but is rooted in one spot.

21 Oxen will wander, crush whatever is underfoot and graze wherever they are allowed to be.

22 The sparks are an inevitable danger which move unpredictably within a radius.

23 Far from being alien to Jewish law, 'the quality of mercy' is an integral part of it: 'For what does the Lord require of you but to do justly, love mercy and walk humbly with your God' (Micah 6:8).

24 Rashi is the acronym for Rabbi Shlomo Yitchaki (1040–1105). He is widely regarded as the father of Biblical commentary. His explanations of the Torah and Talmud are extensive and considered the primary interpretation. Any serious study of Jewish religious texts includes understanding Rashi and the Baalei Tosafot (the school of scholars around his sons-in-law).

25 *Gwiazda v Gwiazda* No M10631 of 1992. A Jewish *gett* (bill of divorce) must be drawn up at the behest of the husband acting under his own free will and until the *gett* is written the parties remain married in Jewish law. To that end a *gett* cannot be compelled either by a prenuptial agreement or court order. Both can require a husband to attend the *beth din* and listen to its instruction. The *beth din* is empowered to order spousal maintenance to be paid for the duration of the Jewish marriage. The English and many US prenuptial contracts

empower the *beth din* to order payments until the *gett* is given. In Australia, the *Family Law Act 1975* (Cth) strictly regulates any financial provisions which might constitute spousal maintenance, reserving them for the court.

26 There is no religious obligation to eat meat, so a ban on *Shechita* would merely compel the Jewish community to become vegetarian. However, there are affirmative requirements to perform *Brit Milah* (male circumcision) and to keep the Sabbath, etc. Legislation abnegating these practices would not be effective in Halacha under *dina de-malchuta dina*.

27 The nature of cooperation with the state criminal authorities is covered substantially by the codices and responsa literature over the ages (see Shulchan Aruch, Choshen Mishpat 388). Halacha strenuously opposed handing over suspects where they would face cruel penalties such as exile and gladiatorial combat or to tyrannical authority. However, Rashi, the Shulchan Aruch, its commentaries and many other sources are emphatic on philosophical and the most pragmatic grounds that it is wrong to impede the administration of justice or to leave society vulnerable to murderers, bandits and abusers. Contemporary literature reflects attitudes to and the quality of the rule of law and the administration of justice in Israel and the many countries of the Jewish diaspora.

28 [2004] VSC 45.

29 Oral leave was given but there was a strong contention that it was not necessary to obtain leave to go to the civil courts for an injunction as this was not a determination of rights.

30 *Engel v Adelaide Hebrew Congregation Inc* [2007] SASC 234 (26 June 2007).

31 *Adelaide Hebrew Congregation Inc v Engel* [2007] SADC 23 (6 March 2007).

32 *Gutnick v Bondi Mizrachi Synagogue* [2009] NSWSC 257 (31 March 2009).

33 The Sydney Beth Din could not hear the case as Rabbi Gutnick is one of its judicial panel.

34 *R (on the application of E) v Governing Body of JFS and the Admissions Appeal Panel of JFS* [2009] UKSC 15.

35 Non-Orthodox Jewish groupings also apply matrilineal and/or patrilineal criteria. These too would be affected by the *JFS* ruling. The Act legitimately prevents discrimination against individuals on the basis of ethnic origin. Favouring individuals on the basis of parentage rather than observance or practice was found to be an ethnicity test and to offend against the Act.

36 www.jamsaustralia.com.au.

37 www.biu.ac.il/JH/Responsa.

38 www.baishavaad.com.

39 Both polygamy and corporal punishment existed within Judaism and are discussed and regulated within the Talmud. Corporal punishment was abrogated with the destruction of the Temple (see above). Polygamy was very rare and altogether banned in the Ashkenazi communities (European) from the late tenth century. The Jews living in the Arab world continued to allow for more than one wife, consistent with the prevailing social norms.

11 Do Australian Muslims need a mufti?

Analysing the institution of *ifta* in the Australian context[1]

Mohamad Abdalla

Introduction

Fatwa plays an important role in the lives of Muslims wherever they are. It allows them to understand the dictates of their religion and operationalize it in their lives. A mufti, or one who issues a fatwa, is likewise important and can play a vital role in facilitating the practice of Islam and, more importantly, contextualizing it. In fact, some classical Muslim scholars, such as Imam Nawawi (1234–78 CE),[2] declared that it is prohibited for Muslims to live in a country in which there is no mufti, and that they should migrate to a place where a competent mufti lives (Al-Juhanai 2007: 156). Whilst this may be an extreme view that is subject to refutation, the point is that muftis – or perhaps the issuance of fatwas – is a very important part in the lives of Muslims, and can shape the way they practise their faith. Fatwas can be instrumental in shaping extremist or moderate (*wasatiyya*) understanding and implementation of Islam.[3] Fatwas issued by non-competent people can cause havoc between individuals, societies and even nations (eg, the fatwas of Osama bin Laden against western nations). In nations with majority Muslim populations such as Saudi Arabia or Indonesia, there are authoritative and recognized individuals and organizations that are responsible for the issuance of fatwas. While controversial fatwas may also be issued in these countries, the situation is overwhelmingly regulated and serves the contexts of these places. The problem is compounded for Muslims living in countries with minority Muslim populations such as Australia. This is due to a host of factors including the absence of qualified muftis who can contextualize fatwas.

In 2006, the controversially appointed mufti of Australia's Muslims, Sheikh Taj el-Din Hamid Hilali, was sacked from his long-standing position. Just a few months prior to the sacking, he had attracted heavy criticism from politicians, the media, and the Muslim and wider Australian community over inflammatory statements that he made regarding women's dress code. Hilali's comments prior to this had also caused controversy. In response to the Hilali 2006 crisis, more than eighty Australian imams[4] from various states met to discuss the future religious leadership of

Australia's Muslim community. Among other things the meeting resulted in the establishment of the Australian National Imams Council (ANIC), whose aim was to provide religious leadership and also to deal with the quandary of the then mufti. The great majority of imams voted against Hilali as a mufti and instead formed a fatwa council called the Council of Islamic Jurisprudence and Research (CIJR), whose aim was to deal with issues pertaining to *ifta* within an Australian context. ANIC's decision was unprecedented and although the initial idea was against having a mufti for Australian Muslims, ANIC's executive committee replaced Hilali with Sheikh Fehmi Naji el-Imam as the new mufti.

There is no empirical evidence to inform us of how Australia's Muslim community feels about this new appointment, or about having a mufti for Australian Muslims. Evidence however shows how eager Australian Muslims are for a fatwa, and in the absence of an alternative they continuously seek online fatwas to diverse issues (Black and Hosen 2009). While an online fatwa cannot be stopped, the immediate problem that arises from asking overseas scholars is that they are usually unaware of the Australian context. Potentially, this can have adverse effects on the way Islam is practised in Australia. The fact remains that people need fatwa from a good authority, and that nomination of a mufti is one way this authority can be clearly identified. However, it is not the only way people may gain authoritative fatwa, and this chapter discusses a number of these alternatives.

Given the importance of this issue, a number of questions arise: can a single mufti effectively represent the diverse ethnic groups that make up Australia's Muslim community? Is an institution of *ifta* more appropriate for Australian Muslims? What should Muslims look for in a mufti and in an institution of *ifta*? And what are the processes that should be employed in making such decisions? To offer some possible answers, this chapter will discuss the meaning, qualifications, powers and limitations of a mufti, and the historical development and nature of the institution of *ifta*, focusing on countries with minority Muslim communities. In light of this the chapter will then examine the most practical model for Australian Muslims.

Fatwa and mufti: definition, process and function

Classical and contemporary Muslim scholars have written extensively on the meaning of fatwa,[5] the qualifications of a mufti, and the etiquettes of giving and seeking a fatwa.[6] The word 'fatwa' appears in various forms in the Qur'an to denote clarification or exposition of a matter, as in Qur'an 4:127: 'And they ask you (Muhammad) for a fatwa (*yastaftunaka*) regarding women…'. The linguistic and legal definitions of fatwa are multifaceted but, simply put, fatwa is a legal opinion issued by an expert scholar (mufti) clarifying a ruling within Islamic law based on evidence as a

response to a question. According to Muslim jurists (*fuqaha*), a fatwa denotes clarifying God's law for a problematic legal case (*nawazil*) based on some textual legal evidence (Al-Ashqar 1976: 9). In terms of applicability, fatwa can cover many fields such as issues of legal theory, theology and creed.

Imam Shihab al-Din al-Qarafi al-Maliki (d. 1258 CE) defines the function of the mufti as being analogous to that of a translator of the speech of God, while Ibn al-Qayyim al-Jawziyyah (d. 1350 CE) states that a mufti is one who essentially signs on behalf of God (Al-Ashqar 1976: 18). From a legal perspective, a mufti can be an independent *mujtahid* (an interpreter of law qualified to exercise legal reasoning independently of schools of law), or *muqallid* deriving his or her authority from the doctrine of *taqlid* (adherence to tradition). Although a mufti is expected to cite authorities for an opinion, it is not always the case that this occurs (Al-Nawawi 1997).

A fatwa has 'the effect of a direct authorization' since the mufti develops his legal conclusions by interpreting the religious scriptures (Jackson 1992: 203–4). However, the function of the mufti is to convey and *not* implement a given fatwa. Thus, a fatwa is not binding in itself since the seeker of the fatwa may reject it in favour of another fatwa issued by another qualified mufti. Opinions issued by muftis hold 'a high degree of authority that represents the closest Islamic equivalent to the familiar Anglo-American legal mechanism of case-law precedent' and 'to the response of Jewish scholars' (Masud *et al.* 1996: 4–10).

Understanding of the nature of fatwas can be gained if considered in the light of Islamic law and adjudication. In Islam, Shari'a (often incorrectly translated as 'Islamic Law') refers to a body of revealed laws (*nass*, pl. *nusus*) found in the Qur'an (Islam's primary book of religious and moral teachings that is also the first source of legislation) and *Sunna* (Prophet Muhammad's sayings, actions and tacit approvals and second source of legislation), both of which 'provide the subject matter of the law' (Hallaq 1997: 1). The *nusus* are basically fixed and unchangeable and largely general, with basic principles such as 'establish prayer' and 'do not approach prayer whilst intoxicated'. On the other hand, Islamic jurisprudence (*fiqh*) is knowledge of practical legal rulings derived from their specific evidences. It is a body of laws deduced from the *nusus* to cover specific situations not directly treated in the revealed sources. *Fiqh* is flexible and changes according to the circumstances under which it is applied, and it tends to be specific. The process of deducing such laws is called *ijtihad* (legal reasoning and interpretation), using methods of *Ijma* (general consensus of the learned), *Qiyas* (analogical reasoning), *Istihsan* (juristic preference), *Istislah* (public interest), *Istishab* (presumption of continuity), and *'Urf* (customary precedent).

A *mujtahid* is also defined as 'the creative jurist', or a *faqih*, who deals exclusively with Islamic law deriving rulings independent of a specific worldly situation or predicament; it is pure jurisprudence. This experience

is acquired through years of training in 'the methodology of deriving rulings from their specific evidences in the primary sources of Islamic law while fulfilling its greater goals' (Gomaa 2008; Hallaq 1997). A mufti examines a particular situation or predicament by looking into the corpus of Islamic law to take a ruling that best suits the situation. The result, a fatwa, is a non-binding legal opinion that serves to guide one out of his or her difficulty. A judge (*qadi*), however, enters a certain situation to change a predicament by issuing an obligatory ruling (*qada*) to the parties involved. Imam al-Qarafi explained that the major difference between fatwa and *qada* is in their enforceability: *qada* is binding and enforceable whereas fatwa is voluntary.

The concept of fatwa can therefore be seen as an indirect instrument for defining formal concepts of law when applied in courts. Another difference is that a *qada* is limited to that which is considered in Islamic law as compulsory (*wajib*), prohibited (*haram*), and permissible (*mubah*), but does not cover matters that are regarded as disliked/hated/detested (*makrooh*) or recommended act of worship or actions (*mustahab*). Additionally, *qada* is specifically concerned with financial transactions (*Mu'amalat*), while fatwa is often related to acts of worship ('*ibadat*) and manners/morals (*adab*) (Al-Ashqar 1976: 8–11).

There are differences of opinion as to whether a mufti, *faqih* and *mujtahid* mean the same thing. Some scholars contend that the difference between the qualifications of a *mujtahid* and a mufti is that the former's competence in giving opinion is absolute, extending to all subject matters in the sacred law, while the competence of a mufti is usually limited to applying his imam's *ijtihad* to particular questions (Keller 1991: 16). However, classical Muslim scholars such as Hassan al-Basri (d. 1044 CE) and Imam Ahmad ibn Hanbal (780–855 CE) believed that a mufti must be a *mujtahid* 'capable to use his utmost effort in extracting a rule from the subject of revelation while following the principles and procedures established in legal theory' (Al-Juhanai 2007: 166; Hallaq 1997: 117–23). Al-Basri and Imam al-Ghazali (d. 1111 CE) considered the ability of *ijtihad* as a prerequisite for *ifta* and regarded the issuing of a fatwa by non-*mujtahids* as a serious offence that may lead to incompetent issuance of fatwas. In fact, the terms *faqih*, *mujtahid* and mufti were used interchangeably by classical Muslim scholars to mean the same thing (Al-Juhanai 2007: 166).

The example of the prohibition of intoxicants such as alcohol can be used to clarify the difference between a mufti, *faqih* and *qadi*:

1 A mufti would say to one who is in a desert and dying of thirst, 'You must drink alcohol, despite it being prohibited, in order for you to survive' because the mufti would apply the general rule of taking the lesser of two evils.
2 A jurist will say that alcohol is prohibited according to Islamic law due to the evidence found in the verse, 'O you who believe! Strong drink

and games of chance and idols and divining arrows are only an infamy of Satan's handiwork. Leave it aside in order that ye may succeed' (Qur'an 5:90).

3 A judge would be the one to carry out a punishment for the one who unlawfully drinks alcohol, sparing the one in the dire situation (Gomaa 2008).

Qualifications of a mufti

Much has been written on the qualifications of a mufti, and what follows is but a summary of that. Classical Muslim scholars assumed that the qualifications of a mufti and *mujtahid* are the same. While these qualifications are identified listed in various ways, there is agreement that a mufti must fulfil the following: be a Muslim; be sane and of sound rational faculties; be of responsible age (*takleef)* – an adult; possess a just and trustworthy character ('*adala*); be intelligent with a creative imagination; and be able to perform *ijtihad* (independent legal reasoning). There is unanimous agreement about the first three conditions. The ability to perform *ijtihad* is a necessary condition for a mufti and a *qadi* (judge) according to Imam Ahmad ibn Hanbal, Imam al-Shafi'i (767–820 CE) and Imam Malik ibn Anas (711–95 CE) but is merely preferable according to Imam Abu Hanifah (699–765 CE).[7] Provided a mufti meets the aforementioned conditions gender is not an issue (Al-Ashqar 1976: 26; Al-Juhanai 2007: 167).

Imam al-Shafi'i, Imam al-Ghazali (d. 1111 CE) and Imam al-Shatibi (d. 1388 CE) among others stated that a mufti, like a *mujtahid mutlaq* (absolute *mujtahid*), is also expected to possess skills that will enable him or her to extract rules and legal opinions from the subject of revelation. These skills or qualifications are summarized as: the adequate understanding of 500 legal verses of the Qur'an; familiarity with the *Hadith* literature that is relevant to law and the sciences of *Hadith*; expertise in the Arabic language; possession of a thorough knowledge of the theories of abrogation (*Naskh*); high proficiency in the procedures of inferential reasoning; understanding the *maqasid* or higher objectives of Shari'a; and knowledge of cases that have become subject to consensus (Al-Ashqar 1976; Al-Juhanai 2007: 168–69; Hallaq 1997: 117–18). Imam al-Razi (1149–1209 CE), Imam al-Juwaini (1028–85 CE) and Imam al-Shawkani (1759–1834 CE) argue that a mufti or *mujtahid* must also be well versed in the principles of jurisprudence (*usul al fiqh*).

The reason for the various conditions stipulated by classical scholars is due to changes in location, time and circumstances. Early Muslim scholars recognized that while there are fundamental qualifications that a mufti or *mujtahid* must possess, extra qualification will be needed depending on context. Imam al-Shafi'i identified this matter when he stated that the changes of intellectual and political contexts demand an additional set of qualifications to enable a mufti or *mujtahid* to reach appropriate and

contextual conclusions (Al-Juhanai 2007: 172). For example, it is vital for a mufti to be proficient in the language of the host country in order to issue adequate and contextual fatwas (Jackson 1992: 205–7), and to understand the socioeconomic and political contexts of the country in which he or she operates.

Clearly, a mufti needs to possess a set of highly specialized disciplines equivalent to a *mujtahid mutlaq*. The problem, however, is that scholars recognize that a *mujtahid mutlaq* no longer exists (Al-Juhanai 2007: 173). There are many reasons for this, but perhaps one of the most important is the traditional teaching methodology that is rampant in Muslim religious institutions that is absent of critical thinking, and that does not equip with the necessary tools of becoming independent thinkers (Al-Juhanai 2007: 175).

The status of *ifta* in Muslim and non-Muslim countries

The position of the mufti appeared at the very early stages of Islam. Prophet Muhammad was the first jurisconsult of the Muslim community (Hallaq 1997: 205). Some of his companions also issued fatwas (Nurbain 1995: 32–33), which were considered valid only if they were approved by the Prophet. After the Prophet's death, the process of issuing fatwas was continued by a number of his companions most notably Umar ibn al-Khattab, 'Aisha, the Prophet's wife and others.

With the expansion of the Islamic state the institution of *ifta* and the status of the mufti became more institutionalized. During the Umayyad caliphate (661–750 CE) muftis started to serve as legal consultants for judges and governors and some muftis were even designated by the caliphs and governors as official or semi-official workers to serve the needs of the caliphate (Masud *et al.* 1996: 9). Abbasid caliphs also institutionalized the issuing of fatwas in an attempt to control the muftis, although independent muftis that resisted official involvement with governments continued to flourish during these eras. Official involvement of the muftis was very significant during the Islamic rule of Spain (Tyan 1965: 866) as they were attached to the magistrates and used to serve as advisers to their councils. A similar situation was found in Mamluk states, where muftis participated in the state Council of Justice. During the Ottoman Empire muftis also served as magistrates.

Throughout Islamic history, the ruling classes of Muslim countries would choose from among their 'distinguished class of scholars a Grand Mufti to oversee an official body that helps disseminate *fatwas* in an organized and mass manner'. The first grand mufti in Egypt was established in November 1895 by order of Khedive Ismail Pasha (1830–95 CE). In Egypt, and because of Ottoman influence, a grand mufti had to master the Hanafi legal code and issue fatwas exclusively based on it. This situation changed with time and the office of the Grand Mufti of Egypt does not

only consider 'the four Sunni schools of law, but also the two Shiite schools of Islamic law (the Ja'fari and 'Ibadi schools), the Zaydi and Dhahiri schools, and the entire eighty plus schools of all of the *Mujtahid* Imams found throughout Islamic legal history' (Gomaa 2008). Today, the office of the Grand Mufti of Egypt is one of the most inclusive and prestigious bodies of Islamic law. Grand muftis have wielded considerable political influence through their official fatwas. Muftis were also appointed to various other positions, including market inspectors, guardians of public morals, and advisors to governments on religious affairs.

In contemporary Muslim countries the institution of *ifta* functions in two distinct forms. The first form represents state-dependent institutions and centres such as the Research Academy of al-Azhar in Egypt and *Diyanet* in Turkey. The second category represents independent individual muftis like the Qatar-based Sheikh Yusuf al-Qaradawi (Shadid and van Koningsveld 2002: 152). In Saudi Arabia the process of *ifta* is organized by the Saudi government where institutions run by qualified scholars are authorized to issue fatwas. The members of these institutions are selected and appointed by the King of Saudi Arabia. Private fatwas however are issued by individual scholars well known for their religious reputation. Yet in Saudi Arabia, fatwas that are issued by members belonging to an authorized institution are usually associated with the name of the issuer (Vogel 1996: 262). Recently, a new website for qualified fatwas was set up in the Riyadh-based Presidency for Scientific Research and Religious Edicts (*Dar Al-Ifta*), an affiliate of the Council of Senior Islamic Scholars headed by Saudi Arabia's Grand Mufti Sheikh Abdul Aziz al-Sheikh. A similar situation exists in Egypt where various muftis and religious authorities operate individually or are appointed by the government.

In Malaysia there is an overregulation of the process of *ifta*. According to Kamali (2000: 38), Malaysia has a different religious authority for each of its states, thus it has fourteen different religious authorities. This situation has led to some inconsistencies and contradictions in the provisions of law. The situation in neighbouring Indonesia is different; where a number of prominent organizations issue fatwas, including the *Muhammadiyah* (that counts about 40 million members) and *Nahdlatul Ulama* (with 60 million followers). Recently, for example, the *Muhammadiyah*, a moderate Muslim organization, has issued a fatwa declaring smoking as 'morally illicit' (*haram*).

Given that in secular states the government does not appoint a mufti, or other religious office-bearers, it is up to the Muslim community to appoint this post, or seek fatwas from overseas muftis. In some cases minority Muslims have their own mufti and rely on him for fatwas. Interestingly, the earliest official recognition of the position of mufti by a non-Muslim nation happened after the annexation of Bosnia by the Austro-Hungarian Empire. The mufti of Bosnia was appointed and recognized by the Austro-Hungarian emperor under the title *Reis-ul-Ulama* or

the leader of Islamic scholars (Al-Arnaut 1994: 250). In recent times, many European states have introduced policies in an attempt to control the institution of *ifta* (Caeiro 2006: 673). Although these policies have failed to achieve their intended aims, their presence indicates the indirect recognition of the institution of *ifta* in these European countries (Caeiro 2006: 673).

The process of *ifta* and the recognition of the mufti are organized in a centralized manner in the Kingdom of Thailand. The mufti of Thailand has the specific title of *Sheikh-al-Islam* (spiritual leader of Islam), a position officially recognized by the Thai monarch since 1945 (Yusuf 1998: 279). The religious authority of Thai Muslims was reorganized when the Islamic Centre of Thailand was created as the representative body of Thai Muslims. In 1997 a bill was endorsed by the Thai monarch to give Thai Muslims more autonomy in selecting their religious leader, who must however be appointed by the King of Thailand through an official decree.

The situation is different in India. The British occupation of India forced the status of *ifta* and the position of the mufti to become highly decentralized, and it lies outside official recognition of the secular government of India (Masud 1996: 197). The British colonialists surrendered the legal tasks performed by the muftis and the *qadis* to appointed judges, and stripped the Indian muftis from their official legal positions. This situation, however, led to the flourishing of independent muftis among Indian Muslims who did not recognize the authority of British-appointed judges.

Muslim minorities living in western countries adhere to various religious authorities in regard to their needs for fatwa. A visible religious authority that issues fatwas for Muslims living in western societies is represented by muftis that are sent through Muslim countries to serve their ethnic citizens. Examples of these muftis include scholars sent by the Turkish *Diyanet* government body to fulfil the needs of Turkish Muslims in Germany. In addition to these state of origin-controlled satellite muftis, there are a number of other individuals that have called themselves muftis and a variety of institutions that issue fatwas (Shadid and van Koningsveld 2002: 152). A popular option for Muslims in western nations is online fatwas. Otherwise called 'e-fatwas', 'fatwa shopping', and 'surfing on the inter-madhab net', these avenues provide Muslims with a variety of options (Black and Hosen 2009).

The need for an authoritative fatwa-issuing organization in the west led to the establishment of a number of councils including the Fiqh Council of North America (FCNA), and the European Council for Fatwa and Research (ECFR). The FCNA has a number of scholars on board and was established in 1986 to advise and educate Muslims 'on matters related to the application of Shari'ah in their individual and collective lives in the North American environment'. Established in 1997, the ECFR is based in Dublin, Ireland, and is comprised of a number of world-renowned

scholars such as Professor Yusuf al-Qaradawi, Sheikh Dr Abdullah ibn Bayya, and Mufti Muhammed Taqi Othmani. Among their aims is the '[i]ssuing of collective fatwas which meet the needs of Muslims in Europe, solve their problems and regulate their interaction with the European communities, all within the regulations and objectives of Shari'a' (ECFR 2010).

The Australian experience

Australian Muslims are not monolithic and their presence predates that of British colonization by between 200 and 400 years. The earliest contacts were in the 1600s between the Indigenous peoples of northern Australia and fishermen from Makassar (formerly Ujung Pandang), southern Sulawesi in Indonesia. The Macassans came in search of *trepang*, a type of sea cucumber, which was then exported to Chinese markets (Abdalla 2010: 36). Muslims continued to come to Australia alongside Europeans as sailors, prisoners or immigrants. Documented presence of the first Muslim immigrants to Australia appears during the 1860s and 1870s, when Malay divers and Afghani camel riders (cameleers) settled in Australia to open the interior of the country, and they participated in the building of the new Australian society. Between the 1860s and 1920s, about 2,000 cameleers arrived in Australia. They pioneered a network of trails and tracks that later became today's roads, linking towns, stations, mines and missions all across the outback. However the number of Muslim immigrants declined when the White Australia Policy was introduced in 1901. Albanian and Bosnian Muslims however managed to immigrate to Australia between the 1920s and 1930s due to their white European background (Abdalla 2010: 37–38; Saeed 2004: 7).

The number of Australian Muslims grew significantly during the twentieth century. This increase is attributed to Turkish Muslims who arrived in Australia to supply various immigration needs that existed among the Australian society during the 1950s and 1960s. During the 1970s, a large number of Lebanese Muslims arrived in Australia on humanitarian grounds due to the ongoing conflict in Lebanon. Since then, many other Muslims have migrated to Australia from a wide variety of cultural backgrounds including the Middle East, Turkey, Bosnia, Indonesia, the Indian sub-continent, and from other national and ethnic backgrounds. Over one-third were born in Australia, and there are now Muslim families who have lived in Australia for three or more generations (Abdalla 2010: 33).

According to the 2006 census, Muslims constitute 1.7 per cent or approximately 340,394 people in Australia. Compared with the 2001 census (281,578 Muslims) and 1996 census (200,885 Muslims), this figure represents a considerable increase. However, the rate of increase over the five-year inter-census period has actually dropped from 40 per cent in the 1996–2001 intervals to only 21 per cent in 2001–6. Interestingly, about 60

per cent of Muslims were born overseas, about 91,000 are considered second generation, with almost 7,500 as third-generation Australian Muslims. As a result, around half of the Muslim population is under the age of 25. In fact most Australian Muslims are under the age of 21 and were born in Australia (Abdalla 2010).

Naturally, with the ethnic diversity of Australian Muslims comes diversity in religious understanding and practice. Most Muslims belong to the *Sunni* tradition that encompasses various jurisprudential schools of thought (*Madhāhib*). Other Muslims follow the *Shia* tradition, the largest branch being the Twelvers. Other branches include the *Zaidi* and *Ismaili*, and all three follow a different line of imamate or religious leadership (Abdalla 2010: 32–33). Usually, *Sunni* and *Shia* Muslims pray in different mosques, follow different imams, and seek their fatwas from their own respective muftis. Clearly, the legitimacy and authority of one mufti for all Australian Muslims will not be recognized.

Religious institutions and leadership

As the number of Australian Muslims has increased, so has the number of Muslim worshipping places (mosque or *masjid* in Arabic), institutions and religious authorities. Today there are a few hundred mosques and a large number of prayer facilities all over Australia (Saeed 2004: 54). Given the ethnic diversity of Australian Muslims it is logical to find mosques being run and administered by Muslims of a certain ethic background. Some mosques are administered by committees, others by trustees. Committee-run mosques appoint their members through an election process following a certain constitution consistent with Australian standards. A few mosques are administered by a trusteeship that appoints various people to run sub-committees to manage such matters as funerals or public relations. In both models the imam is appointed as a paid employee who must adhere to a certain job description. Imams are often 'imported' from Muslim countries and only very few are 'home-grown'. Of course the problem with this is that an overseas imam may not speak English or understand the Australian context. While this may not necessarily be a problem for older-generation Muslims, often it is the young who fail to relate or identify with the imam, because the imam fails to contextualize religious discourse in a way that is both consistent with Islam and the Australian context. This dilemma has recently forced some Australian Muslims to argue for the establishment of the equivalent of seminaries to produce their own 'home-grown' imams. While this is a noble idea, it will take a substantial amount of resources to see it come to fruition.

There are also organized bodies that represent Islamic societies and councils in each Australian state and territory, such as the Islamic Council of Victoria (ICV) and the Islamic Council of Queensland (ICQ). Often these councils are not representative of the local Muslim population and

have internal political discord that paralyses their effectiveness. Most of these state-based organizations are represented by the Australian Federation of Islamic Councils (AFIC), an umbrella body that is not accepted by all Australian Muslims because of allegations that have been made involving corruption and mismanagement. Additionally, AFIC only represents *Sunni* and not *Shia* Muslims, or even the *Ahbash* group that is predominantly found in New South Wales. Since the Australian Muslim community is very diverse, ethnically and religiously, naturally no single religious authority can represent it. Nevertheless, in 1980 AFIC bestowed on Hilali the title 'mufti of Australia', not because of his credentials but for political reasons. While the appointment was welcomed by Muslims in places such as Lakemba, a Sydney suburb with a very high proportion of Lebanese Muslims having their own mosque, others did not recognize Hilali as the nation's mufti but did not challenge the appointment at the time.

The absence of an Islamic religious organization that has the support of a majority of Australian Muslims led to the formation of boards of imams in New South Wales and Victoria in 1990 (Saeed 2003: 141). However, these boards are not truly representative because very few imams or religious scholars are involved in these institutions (Saeed 2004: 55).

The struggle for national leadership and religious authority in Australia is represented by the continuous introduction of associations that claim to be the fatwa authority in Australia. For example, the Darulfatwa Islamic High Council was formed in 2004 as a rival authority to the already-existing mufti of Australia (Jakubowicz 2007: 272–79). As stated above, Hilali's controversial statements about Australian society and its members also led to a national gathering of Australian imams and religious leaders, some of whom requested that the position of the mufti be dissolved. However, the gathering resulted in the formation of another religious authority called the Australian National Imams Council (ANIC).[8]

ANIC's (2008) supposed aim is to 'establish a Council of Jurisprudence (*Fiqh*) and Research (CJR) consisting of qualified imams and Islamic scholars to issue Islamic legal rulings, fatwas, on new and emerging issues, considering the socio-cultural, economic, and political contexts in Australia'. The first initiative of the council's inaugural meeting on 10 June 2007 was to appoint Sheikh Fehmi Naji el-Imam (who was old and ill) as the new mufti. Anecdotal data inform us that many Australian imams and Muslims are not satisfied with the new mufti because of his lack of religious credentials and because he, like Hilali before him, does not represent the wider Australian Muslim community.

Regardless of how and why a new mufti was chosen, it is clear that there is no authoritative religious body in Australia that is representative of Muslims, or that seems to be able to deal with religious matters that affect the day-to-day lives of Australian Muslims, and is able to respond to specialized social, economic, medical or political concerns. It was noted above that, in traditional Muslims societies such as Saudi Arabia, religious

response to emerging issues often comes in the form of a fatwa issued by one qualified and recognized mufti or a council of *ifta*. These individuals and organizations are often accredited and recognized by the government and people of the country, which makes the task much easier and more acceptable. This is not true in the case of countries such as Australia, leading to the question: how best can Australian Muslims seek reliable and contextual fatwas in a non-Muslim setting?

Consider, for example, the case of buying a house with a mortgage from a conventional bank. Based on many years of experience with the community, I can safely state that this is perhaps the most discussed topic among the Australian Muslim community. It is discussed almost on a daily basis between individuals at mosques and other places. In fact, this topic is always raised in the form of a question whenever an overseas guest scholar visits Australia. Islam categorically and emphatically prohibits any transactions based on usury or *riba*. And so it is not permissible for a Muslim to purchase a house through conventional banks because of the element of *riba* involved. This predicament places many Muslims in a disadvantaged status economically and, invariably, socially. But is living in a non-Muslim country a valid excuse for the permissibility of dealing with *riba*-based transactions? How can a mufti respond to this type of question if he or she is unable to read or write in English and has no expertise in conventional banking and finance? Until recently, most Muslim scholars, including al-Qaradawi, prohibited the buying of a house from conventional banks. This opinion has undergone considerable shift in the last few years. Organizations such as the European Council of Fatwa and Research studied and debated the matter vigorously and decided that usury is forbidden, and that bank interest is usury. The council invited the Muslim community to do its utmost to seek Islamic alternatives such as *Murabaha* (sale at a profit), which is practised by Islamic banks. However, in the light of evidence and juristic considerations, the council decided that if no alternative is available for Muslims in western countries then there is no harm in buying mortgaged houses if the following restrictions are strictly observed:

a The house to be bought must be for the buyer and his household.
b The buyer must not have another house.
c The buyer must not have any surplus of assets that can help him buy a house by means other than mortgage.

(ECFR 2010)

Since the Australian Muslim community is not monolithic, it is quite logical to expect that some would accept this fatwa whilst others would question its validity. The fact remains that to date no Australian Muslim authoritative religious body has studied this issue and provided answers relevant to Australian Muslims.

It is logical and clearly obvious that Australian Muslims' search for fatwas will not be uniform. Some people may ask their local imam for a fatwa, while others may ask the imams council in their state, and others may ask an overseas scholar for a fatwa. Black and Hosen (2009: 422) inform us that 'a visit to sites as Islam on-line, Islamtoday, Ask the Imam, Islam Q&A and Fatwa on-line show Australians are strongly represented as questioners' and that there are '1,112,998 requests for fatwas from Australia found in the domain report of Islam Q&A'. Furthermore, out of 'the 128 countries from which requests have been received Australia is number seven, behind Saudi Arabia, the United Kingdom, France, the Netherlands and the United States'. These figures demonstrate the desire of Australian Muslims to seek guidance from qualified scholars, and that there is either a lack of avenues in Australia where they can ask for a fatwa or there is no confidence in what already exists, or both.

Regardless of why Australian Muslims seek fatwas from overseas scholars, the complexity of the Muslim community and of contemporary issues demands an array of specializations, both religious and otherwise, for the issuing of contextual and relevant fatwas. The emergence of new issues such as medical and financial practices has resulted in an extreme need among Muslim communities for legal opinions that explain the Sharia's perspective on these matters. Furthermore, the print and electronic media in the last two centuries reinforced the role and impact of fatwas and not only did the scope of fatwa widen but, because of its instant availability to a wider public, its language, presentation, and style adapted. It seems reasonable therefore to assume that a council of specialists would be more efficient and relevant for the fatwa needs of a cosmopolitan community such as that of the Australian Muslims.

The nature of a particular legal problem plays an important role in determining how many scholars are needed to get involved in issuing a fatwa. As an example, a fatwa related to the application of the conventional law on a Muslim community in a western society implies that the questioned mufti should have adept expertise in the conventional law. A similar situation faces a mufti who is being asked about a medically related issue. Unless the mufti has proper qualifications in medicine, or advice from medical experts, his or her opinion cannot be considered a competent one. A proper fatwa in the abovementioned legal and medical fields should be the product of cooperation between a group of religious scholars and qualified experts.

Given the aforementioned, it seems adequate to propose an all-inclusive model for the issuance of fatwas in the Australian context. Australian Muslims need to move away from having a single mufti and instead advocate for the formation of a council of specialized scholars with expertise in the sciences of the Qur'an and Hadith; jurisprudence; principles of jurisprudence; expertise in the Arabic and English languages; possession of a thorough knowledge of the theories of abrogation (*Naskh*); high

proficiency in the procedures of inferential reasoning; understanding the *maqasid* or higher objectives of Shari'a; and knowledge of cases that have become subject to consensus. Additionally, the council should have specialist men and women from various fields such as medicine, finance, law and sociology. These experts would act as advisors to the religious scholars, and help them arrive at fatwas that are consistent with Islamic law, relevant fields of knowledge, and the contextual realities of Australia. This is a model that was proposed to ANIC and, although it was accepted in theory, we are still waiting for its practical manifestation.

Conclusion

Classical scholarship clearly defines and articulates the credentials of a mufti, and stipulates his responsibilities and limitations. In Muslim nations this is a matter that is well established although it can come with its own complications. The situation for Muslims living in non-Muslim nations is compounded by the complexity of the Muslim community, and the absence of a single authoritative religious body. The need to seek religious guidance in the form of fatwas has forced Australian Muslims to search outside Australia. While this is a matter that cannot be controlled, potentially it can have its dangers. Certainly, overseas scholars may lack proper or complete understanding of the Australian context, therefore leading them to issue fatwas that are inconsistent with life in Australia, or with the law of the land.

It is difficult for Australian Muslims to have a single authoritative religious body represent them. The controversy raised by the ex-mufti of Australia, Sheikh Taj el-Din Hilali, caused concerns among Australian Muslims about the need for having a mufti. Developing religious authorities that are truly representative of Muslim communities in western countries will always remain a difficult task. It could be suggested that a true religious representation of Australian Muslims will not come to fruition unless it is done in a democratic process involving Australian Muslims in the selection and appointment of their religious leadership. Perhaps a way forward for Australian Muslims would be to eliminate the idea of a single mufti, and form a council of experts, religious and otherwise, including men, women and youth, for the issuance of Australian-related fatwas.

Notes

1 This paper is a work in progress. The author is currently gathering empirical evidence from Australian imams and other Muslim leaders on the issue of an Australian mufti. I wish to acknowledge the research assistance of Mr Klodian Xhepaj and the editorial assistance of Ms Gillian Warry.

2 I have chosen to use CE ('Common Era') over AD (*anno domini*, a Latin Christian term meaning 'year of our Lord'). I have also chosen to use the Georgian over the Islamic calendar, as this will be more familiar to our audience.

The Islamic calendar, otherwise known as the *Hijri*, is based on 12 lunar months and the migration of Prophet Muhammad from Mecca to Medina in 622 CE marks the first day of the *Hijri* calendar. Each year is designated either AH ('after *Hijra*' (migration)) or BH ('before *Hijra*'). So, for example, the *Hijri* equivalent of the years 540–61 CE would be approximately 82–61 BH.

3 For a recent study on the importance of fatwas in the shaping of moderate understandings of Islam, see Al-Juhanai (2007).

4 In the Islamic tradition the title 'imam' denotes religious leader. Classically, imam used to refer to an individual of the highest standing in terms of religious authority. Islamic scholars of the first calibre who were founders of legal schools of thought were considered imam. Today however the title 'imam' is used to denote a religious leader at a local mosque. The religious standing of these imams varies from one place to another depending on the degree of their knowledge of Islamic law and other Islamic sciences. Often, today's imams are people who know the Qur'an by heart (*Hafidh*) and know the essentials of a particular school of thought. Usually such imams are not jurists or of the level of a mufti.

5 Although the expression 'fatwa' is correct and in common usage, according to Arabic linguists a more accurate expression is *futya* (Al-Ashqar 1976: 7).

6 See for example Al-Ashqar (1976); Al-Hanbali (1960); and Al-Nawawi (1997).

7 For more details, see Al-Hanbali (1960); Al-Nawawi (1997); and Al-Ashqar (1976).

8 The author, Associate Professor Mohamad Abdalla, was asked to chair this meeting. About 90 imams from across Australia attended the meeting and the vast majority wanted Hilali to resign. Initially, ANIC members gave Hilali a grace period of three months to resign, but he asked for one year, a request that was vehemently rejected by ANIC. Later, Hilali attempted to curtail this decision but was unsuccessful. Although ANIC's initial objective was to replace the idea of a mufti with a council of *ifta*, they felt compelled to choose Sheikh Fehmi Naji el-Imam as the new mufti, not for his qualifications but as the only option acceptable by Hilali.

Afterword

A posteriori

The experience of religion

Nadirsyah Hosen and Richard Mohr

Descartes's third meditation, on the existence of God, is cited as a classic *a posteriori* argument (Mautner 1997: 33). Clearing his mind of all sense experience and assumptions about existence, the seventeenth-century philosopher sought to find a proof of the existence of God within his own mind, the innate ideas of personal thought (Descartes 1965: 95–99). This final chapter has a similar focus: not in proving the existence of God, but in examining the personal experience of religion. This is an examination of social rather than theological dimensions, since even the personal experience of religion has its sources in community and public life, and has manifestations that impact on politics and the public sphere. In the credo of the 1970s, the personal is political.

Our title also refers to a more recent use of the term *a posteriori*. While *a priori* arguments are built up logically from first principles, to reason *a posteriori* requires the examination of experience: in this case, of people and the way they live. Now a thorough examination of these Latin 'keywords' would have to note the way they have shifted, according to contemporary fashions of thought, between two contrasting views, from introspection to empiricism. We claim the privilege of being unfashionable, so that we may consider the nexus between the inner life of ideas about religion and the experience of social life – *a posteriori*. So here at the end of the book, we can look back on those issues that have emerged in the personal experience of religion and law.

Some of the contributions to this book, notably Paul Babie's, have indicated religion's role in guiding our moral and legal choices. Mohamad Abdalla refers to the need of ordinary Muslims to seek advice and guidance on matters of everyday life, and the informal as well as formal ways in which they may find it, whether from a mufti or an online fatwa. Here we would like to explore these questions a little further. Having inquired in our introduction about the proper limits to the law, and specifically the constitutional law of the state, here we ask about the limits of religion.

This presents even more difficulties than an inquiry that starts with the law. This collection has focused on those religions that have a dominant role in dominant states and, among those, on the monotheistic,

Abrahamic religions. Within those religions there is great diversity in terms of observance, the degrees of intersection between public and private life, and the range of beliefs about matters of everyday life. Beyond those communities there are large numbers of people who profess no religious belief (the second highest proportion in Australia, as shown in the introduction), and a wide range of other formal and informal creeds. Some atheists or 'rationalists' carry their beliefs as a guide to political and social life, while others simply do not care for or about religion. Many people in a country like Australia believe in health fads, astrology or other 'new age' notions and potions with a fervour that many adherents of more formal religions may find puzzling. Their numbers are hard to gauge from membership of any 'congregation', or from census data (where only about 2,000 Australians actually wrote in 'new age' as their religion).[1] However, this is a religiosity to which the market, not the churches, cater. Its adherence is better judged by sales figures than attendance on the Sabbath, and in those terms, judging by merchandise and magazines, it is quite successful.

In comparing health fads to established religions we do not intend to be flippant, but rather wish to draw attention to the diversity of beliefs by which people in a country like Australia guide their lives. If some religions, or adherents of particular religions, find the 'selling of spirituality' distasteful, there are others, such as US televangelism, that thrive on it (Carette and King 2005). Without attempting to seek some common denominator of human need or innate impulse, we need to draw attention to the various manifestations of religion and their analogies with law. In either sphere these include codes or norms, procedures or guides for decision-making, and ceremonial frameworks to mark rites of passage or changes of status.

In any of these activities, most people draw lines between the proper sphere of religion and that of public life, or state law. If public secularism excises religion from affairs of state (as we discussed in the introduction), there is also a private secularism that discourages discussion of politics, sex or business deals in the mosque or church. These boundaries are drawn at different points by different adherents and traditions. Fundamentalists of any faith are likely to include more areas of life within the religious sphere than are more liberal traditions. Religions that promote capitalist modernization, such as particular versions of Protestantism, are more comfortable with an alignment of religious and business interests than are more ascetic traditions.

In making these decisions and drawing these lines people are guided by conscience or belief and also by a well-founded restraint. Aware that many areas are contentious, or are matters of individual or family concern, certain limits are established by common interests in minimizing conflict and promoting civil communication. The public expression of this isolation of religious affairs within a private sphere is a more generalized form

of secularism than the type discussed in our introduction. There we considered how the formal legal sphere could respond to, and perhaps even be protected from, religious differences. The secularist trend has been to exclude more and more areas from that sphere. Partly as a result of this process, an increasing range of issues have been piling up in the category of matters of private, individual conscience, until, '[e]xempt from public discursive rationality and accountability, religion as well as morality became simply matters of individual, private taste' (Casanova 1992: 34). Such trends can be seen in those consumerist 'new age' religions or individualist spiritualism to which we just referred, and also in fundamentalist religions that seek direct and literal guidance from the religious texts, unmediated by institutional exegesis or social circumstance.

Meanwhile, a secular rationalist ideology draws on an increasing range of areas of expertise – science, economics, public administration – which are seen to guide public policy from their own specific cockpit or control tower, each independent from the other, and all separated from a religious or ethical discourse. Two recent matters of urgent public debate have drawn attention to the limitations of narrow expertise as a foundation for policy decisions.

Attacks on scientists for their interventions in the climate change debate have led to some soul-searching within the scientific community. This has not generally led to any repentance on scientific grounds, on which the scientists have been attacked from the most naïve and self-serving viewpoints. The science has, generally, been sound and within the normal range of drawing tentative but well-supported conclusions from the best available evidence. Where there has been some concern over the propriety of scientific intervention has been over whether, based on the science itself, and hence within their own areas of expertise, the scientists have overstepped a line between science and public policy. There is increasing caution in the scientific community about making policy statements, beyond reporting on science.

The global financial crisis shook assumptions about the role of experts, as financial institutions across the world spun out of any of the orbits familiar from the discourse of mainstream economists. Subsequent debate has been dominated by references to 'moral hazard', a curiously old-fashioned term that carries ethical overtones into its dry economic usage. The search for understanding of the phenomenon and ways out of it have seen references to Shari'a banking as well as new interest in Karl Marx as economist, and the participation of a wider range of writers participating in debates on economic issues, from Kate Jennings's *Quarterly Essay*, in which she claimed prescience for her 2003 novel called *Moral Hazard*, to Margaret Atwood's (2008) Massey Lectures for the CBC.

Of course the revival of religion in the public sphere predated these current examples, but can be seen (as noted by Casanova in 1992) as part of a response to this modern phenomenon of narrow systems of expertise

that are nowhere integrated in an ethical framework. Habermas (2008) has made a similar point, though drawing attention to the predominant naturalistic ideology (which purports to explain everything in natural scientific terms), rather than to a wider range of technical expertise.

In the introduction we inquired into the proper distinctions to be made between law and public life from the point of view of the state and the constitution. We concluded that various views of law may draw these lines at different points. The most important criterion may be to foster civil relations among religiously diverse groups, recognizing and respecting difference. This suggests an approach which would work towards positive outcomes rather than establish hermetic seals or *cordons sanitaires* between domains of public life. We find related concerns in responding to the barriers around privatized religion and areas dominated by expertise and instrumental reason (*Zweckrationalität*) or, in Habermas's formulation, naturalism. Are human interests best served by the negative drawing of boundaries, or are there alternative means for opening communications without increasing community tensions and international conflicts? Again we would like to approach such a question with a view to exploring the potential of positive mutual interactions rather than setting restrictions in order to limit those interactions.

In broad terms we could ask how and to what extent religious considerations may inform public debate (on the model of our contribution from Babie). On the other, we could question the role of public debate, contemporary issues or just the simple exigencies of modern life in framing religious choices.

Paul Babie explores these issues in relation to environmental choices. While it may be argued, based on secularist precepts, that public policy should not be informed by religious considerations, Babie offers another model. By making explicit certain principles derived from eastern Orthodox Christianity, he builds a persuasive argument for a certain approach to environmental policy. The principles relate to the interconnectedness of people, and the policy favours selflessness over individual greed. An attraction of this argument is that it makes its ethical postulates transparent. We may not subscribe to all or any of the range of religious practices and beliefs associated with eastern rites, yet we can judge the principles on their ethical foundations, and follow the argument to its logical conclusions. The same could apply to any religious argument. While disputes over Aboriginal religious sites have been divisive in Australia, there is increasing awareness that we have much to learn about environmental care from indigenous beliefs and practices. The ethical precepts (or legal postulates, as discussed below) can be judged on their merits, without adopting an entire religious stance, in reasoning about matters of moral or public policy.

Conversely, religious considerations may be informed by contemporary issues and public debates. A living religion can discuss issues of family

planning in a crowded world, or other religious accommodation to environmental constraints. As Australian cities move to higher level water restrictions, Islamic communities can respond with appropriate fatwa on ablutions and recycled water. The traditional interpretation that requires ablutions to be performed three times may not be mandated under all circumstances. The definition of clear water for the purpose may include suitably purified recycled water, as in Singapore, where so-called 'newater' is recycled to drinking quality. The issue of water recycling continues to be divisive in Australia, and there is room for religious leadership and socially responsive *fiqh* in a community that places such ritual as well as aesthetic importance on water, and in a place where it has such environmental significance. At a practical level, religious authorities and local communities could even install modern water-saving technology at mosques, making use of sensor taps, for instance. We mention these possible approaches to water as an example of ways in which religion can respond to as well as lead debate in matters of everyday life and social significance.

We have elaborated on some instances of environmental policy here, but there are of course many matters in which religious beliefs interact with public policy and personal choice. Religion may guide choices in numerous decisions of everyday life: how to choose a restaurant, a healthcare provider or a solicitor. Restaurateurs and professionals may wish to be guided by their religious convictions, and as their clients we may ask whether this is appropriate, or wish to know what those convictions are. Catholic pharmacists refusing to sell contraceptives have long been known in Australia, and the issue arose also in Spain when the 'morning after' pill RU 486 was legalized some years ago by the Socialist government. Around the same time, same-sex marriage was legalized. There were well-known cases of civil resistance by pharmacists refusing to stock RU 486 and registry clerks refusing to celebrate gay marriages. In a more recent case the Saskatchewan Court of Queen's Bench upheld a decision of the Saskatchewan Human Rights Commission finding discrimination by a marriage commissioner who had refused to celebrate a same-sex marriage.[2] When French fast-food chain Quick introduced halal burgers early in 2010, sales went up but so did protests from politicians. One of the present authors found he received a very different tenor of advice regarding a 'living will', about his wishes not to prolong life, from two solicitors in the same legal practice, one of them a Catholic. Sydney-siders complain about the difficulty of finding a taxi at certain times during Ramadan.

How are these issues to be judged? A liberal approach may advocate freedom of choice on both sides: businesses may choose to cater to particular religious communities, as indeed many do already. The sign in the butcher's or restaurant window will advise clients seeking kosher or halal food. Protests against such a choice appear absurd. Liberalism is perhaps a less convincing guide outside the realm of commerce. Are there different

principles at play if the provider is a professional, like a lawyer or a pharmacist? Professional responsibility may include, at the least, an explanation as to how the provision of advice or services may be affected by the professional's personal religious beliefs, and an offer or suggestion of alternative sources. In the Saskatchewan case, while the marriage commissioner stated he had suggested alternative providers, and the complainant had in fact been married on the original date he had selected, the court found that the marriage commissioner, as a public official, had a greater duty to respect the rule of law, and so was obliged to perform the ceremony: 'A marriage commissioner is, to the public, a representative of the state' (35). The state bound by the rule of law in this case trumps the free market in marriage services.

These two poles – the rule of law (linked to rights discourse) and the liberal market – appear to leave a considerable middle ground for exploration. A wealth of reflection and guidance on such issues is available in the report of the Consultation Commission on Accommodation Practices Related to Cultural Differences in Québec, chaired by Gérard Bouchard and Charles Taylor. The report notes the possibility of 'reasonable accommodation' to avoid discrimination, which the authors refer to as a 'legal route', requiring that 'requests … conform to formal codified procedures that the parties bring against each other and that ultimately determine a winner and a loser' (Bouchard and Taylor 2008: 51). The Saskatchewan case conforms to this model, to the point that Mr Nicholls was fined for his discriminatory act.[3] Bouchard and Taylor (2008: 52) propose an alternative 'citizen route':

> which is less formal and relies on negotiation and the search for a compromise. Its objective is to find a solution that satisfies both parties and it corresponds to concerted adjustment.

They strongly favour concerted adjustment on the grounds that it promotes learning to manage differences, avoids excess litigation in court, and relies on the same values that 'underpin interculturalism': 'exchanges, negotiation, reciprocity, and so on'. Opportunities and limits to compromise are explored in a number of examples, including the wearing of religious symbols, provision of a female driving examiner, the display of a crucifix in the national assembly, and the installation of an *eruv* to mark boundaries defining Sabbath activities for Orthodox Jews. In each case the authors promote compromises that avoid inconvenience and conform to other accepted patterns of adjustment. Just as the Queen's Bench for Saskatchewan placed government officials in a special position to uphold the rule of law, Bouchard and Taylor see the organs of government having a special responsibility to uphold neutrality: the National Assembly, as 'the very embodiment of the constitutional state', should remove the crucifix:

> On the other hand, the installation of an eruv does not infringe the neutrality of the State and thus may be authorized provided that it does not inconvenience other people.
>
> (Bouchard and Taylor 2008: 60)

Such an approach, founded on concerted adjustment and reciprocity, does not rely on predetermined rules or legal prescription. Instead it calls for negotiation, communication and compromise in individual instances. We are to be guided by and through our education as citizens (cf. Leone, this volume) and certain informal norms of a civil society, rather than jurisprudence.

In moving away from an adversarial model of law as the only alternative to a liberal reliance on choice and the market, we have found an alternative in an ideal of civil society and citizenship that negotiates, rather than litigates. This model is based on a classical republican image of a community of citizens who work out differences face to face. For practical as well as philosophical reasons this cannot be taken as a literal meeting of individuals. The protagonists in these questions of difference are members of cultural and religious communities as well as being fellow-citizens of the one polity. Indeed, it is as members of communities that they seek recognition from others and from the state. The prescription of wearing religious symbols or being confined by an *eruv*, while guiding individual actions, does not spring from individual invention, but from an interpretation of communal norms.

Bouchard and Taylor commend the move of recent Canadian and Québécois jurisprudence away from the requirement to justify accommodation by demonstrating the objectivity of religious beliefs. Such an approach required the courts to adjudicate on theological testimony, with the possibility of a civil court 'having to convert itself into a religious tribunal'. By moving to judge claims based on the sincerity of belief, the courts have espoused a more 'subjective conception of religion' which:

> avoids the risk that would stem from giving credence to the majority opinion in a religious community at the expense of minority opinions, which would thus be marginalized.
>
> (Bouchard and Taylor 2008: 58)

This approach also corresponds to the trend, noted above, toward more individual conceptions of religion on the part of believers, and 'circumvents the virtually insolvable problem of trying to define what is or what is not a religion' (Bouchard and Taylor 2008: 58). In keeping with the principles defined in Davies's contribution to this volume, we support a more decentralized recognition of religious beliefs, rather than one that can only be adjudicated by an established hierarchy. Nonetheless, there is a distinction to be made between a communally held belief and an

individual accommodation to a private and unshared deity. Notwithstanding recent developments in advanced western societies, from 'new age' religions to 'Sheilaism' (as one of Bellah's respondents self-named her own personal religion) (Casanova 1992: 28), religion has its roots in communities. Indeed, the requirement for accommodation between the state and a religious belief, or between a majority and minority religious practice, is inherently an adjustment to be made between communities.

While there are obviously differences between more traditional, communally based religions, personal religions and sects of varying degrees of liberalism and fundamentalism, their adherents generally seek some more or less authoritative or expert advice on moral or spiritual matters. These may be sought through the world wide web, a counsellor, or recognized religious authority. The web offers guidance from search engines that home in on the most popular current buzz words or sites, or from official religious sites and online fatwa. Criteria for choice of advice, whether in 'fatwa-shopping' or self-constructed religions, may derive from compatibility with one's own sense of the right, the good or the sacred, but they also require the perception of some form of authority or reliability. This may derive from traditional sources of a wise or accredited religious authority, or simply from the authority of the herd, encapsulated in the 'wiki' principle that the correct or preferable view inheres in the majority (of a community of internet users, if not a congregation). We need to review the ways in which subjects can relate to each other and to the broader structures of a mass or civil society.

In this book there have been several discussions of forms and processes of religious decision-making (eg, Lawrence, Abdalla). Returning to our starting point, regarding the points of divergence, overlap and common sources of law and religion, we would like to conclude by bringing this approach to bear on the present question. When people require religious guidance in a world that recognizes subjective as well as objective religious experience and faith, what can we learn from the existing procedural forms which encompass religious laws, as well as civil laws, religious as well as civil courts? Is there room for religious law in personal or communal guidance, and can this be reconciled with state or civil law?

This question comes down to an assessment of the possibility of legal pluralism. Religion is a promising area for such an inquiry, since until recent historical times civil courts coexisted with religious courts, whether Christian, Muslim or Jewish. We begin this inquiry by considering some of the historical and doctrinal issues regarding pluralism within Islam, before attempting a more systematic classification of possible pluralisms.

Islam can be seen to advocate legal pluralism. It considers all kinds of ethnic (QS 49:13), religious (QS 5:48), linguistic and racial (QS 30:2) differences as coming from God and hence natural. These Qur'anic traditions have meant that historically in Muslim lands communities with different religions had the right to live in accordance with their own laws

and traditions, just as Muslims could follow any legal school they preferred.

Based on the idea of *ahl al-kitab* and the concept of *dhimmi*, the Ottoman Empire initiated the millet system. The Ottoman policy toward non-Muslims was based on this system which organized the population on the basis of religion and the sect and determined the relationship not only between the communities and the state, but also among communities themselves. In a society composed of Muslims and non-Muslims, the factor which determined the status of the individual within the state was based either on religion or denomination. All the Muslims formed the Millet-I Islam, regardless of their races, cultures, languages and even sects. Thus Millet-I Islam included Turks, Arabs, Kurds, Albanians, Bosnians, Lazs, etc. The non-Muslims were organized in different millets, that is, around different churches such as Orthodox (Greeks, Bulgarians and Serbs), Catholic, Gregorian (Gregorians, Armenians), and around the synagogue (Jews).

The millets had a great deal of power – they set their own laws and collected and distributed their own taxes. All that was required was loyalty to the empire. When a member of one millet committed a crime against a member of another, the law of the injured party applied, but the ruling Islamic majority being paramount, any dispute involving a Muslim fell under their Shari'a-based law.

The rise of nationalism in Europe under the influence of the French Revolution extended to the Ottoman Empire during the nineteenth century. Each millet became increasingly independent with the establishment of their own schools, churches, hospitals and other facilities. These activities effectively moved the Christian population outside the framework of the Ottoman political system. The Ottoman millet system of citizenship began to degrade with the continuous identification of the religious creed with ethnic nationality.

Karen Armstrong (2002) points out: 'In the Islamic empire, Jews, Christians and Zoroastrians enjoyed religious freedom'. Al-Shaybani explains that the Christians had complete freedom to trade in wine and pork in their towns, even though these practices were considered immoral and illegal among Muslims. However, they were prohibited from doing the same in towns and villages controlled by Muslims. Al-Mawardi recognizes the right of non-Muslims to hold public office, including the office of judge and minister (Hosen 2007: 208).

Nowadays, many liberal Muslims suggest that a differentiation based on faith only applies when standing individually before God, and forms no basis for any civil inequities. Modern scholars rejected the *dhimmi* classification of non-Muslims as a historically bound concept. It is essential to note that by modern standards of citizenship and rights, this *dhimmi* minority status would now be a form of second-class citizenship. It is against the notion of equality before the law (Hosen 2007).

In this context, the model of legal pluralism might be seen against the idea of legal centralism in which law is and should be that of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions. In this sense, legal pluralism is seen as promoting discrimination that could lead to further social division because different people will be judged according to different norms and standards. In other words, multiculturalism is recognized but legal pluralism is avoided. There should be only one law for all.

However, Bouchard and Taylor (2008: 25) note that 'a treatment can be differential without being preferential', and they quote with approval a comment made during their hearings: 'Citizens are equal in their differences'. Their report did not go so far as to enquire into the legal regime per se. Yet we may pose the question of whether multiculturalism should extend beyond languages and cultural practices, and could in principle extend to law. In answering this question Gary Bell (2006) argues that 'multiculturalism applied to the law should lead to an acceptance and celebration of legal pluralism [for example] Islamic law is part of a Muslim's culture and completely denying any recognition of this law goes directly against any profession of multiculturalism'.

In response to Bouchard and Taylor, we could point out that religious law may offer one further avenue for negotiation, reciprocity and exchange. If the civil courts are wary of becoming religious tribunals, we note that there are already such tribunals, as the Shari'a Council in the UK and the *beth din*, and that certain civil courts have been pleased to cede jurisdiction of certain religious-based disputes to those authorities (see Lawrence, this volume). Legal pluralism involves complex arrangements of legal and public reasoning, moral practice, and political authority. Indeed, Brian Tamanaha (2000) has correctly pointed out that 'since there are many competing versions of what is meant by "law", the assertion that law exists in plurality leaves us with a plurality of legal pluralisms'.

While in the Ottoman Empire, under the millet system, the Islamic ruler allowed non-Muslims to have their own court, in most modern western countries the idea of Islamic family tribunal or arbitration is likely to fuel the debate on radicalism and liberalism.

This brings us to examine Masaji Chiba's model of legal pluralism (2002) in order to guarantee the citizen's rights but at the same time accommodating pluralism within the society.

In Chiba's model, at the first level, there is official law, namely, the legal system sanctioned by the legitimate state authority, which also includes all those rules that originated in society, but have been co-opted, as it were, by the state. The state claims them as its own rules, keeping quiet about the fact that these elements of law were not created by the state in the first place. Many of these rules are now administered as state law or part of the official legal system. The second level is unofficial law. It is the law not

approved by any legitimate authority of the state, but practically endorsed by a certain group in society either within or beyond the bounds of the state. In Chiba's view, the term unofficial law is here not applied to all laws unapproved by the state but is limited to the ones having an influence upon the effectiveness of the state law, either in the form of opposing, supplementing, modifying or undermining it.

There is another level of law that transcends the legal, and yet needs to be counted into the equation because it influences the operation of legal systems in more substantial ways than most lawyers are prepared to recognize. According to Chiba, a legal postulate is 'a value principle or system which specifically connected with and worked to justify particular official or unofficial law' (Chiba 2002: 69). It may consist of established legal ideas, such as natural law, justice, equity, social and cultural postulates, political ideologies and so on.

To sum up, instead of simply opposing state law and people's law, Chiba identifies many legal levels. The three levels of law consist of official law, unofficial law and legal postulates.

Now, in Chiba's scheme, religious values could sit properly in legal postulates. Finding halal or kosher meat, doing transactions with Islamic financial institutions, applying canon law in the church, the establishment of a *beth din* or an Islamic family tribunal might be seen as the application of legal pluralism or 'unofficial law'. Therefore, the state should not intervene or should not think that legal pluralism will compromise the idea of secularism, since legal pluralism can be practised at many different levels.

As in the Ottoman system described above, there must be an official law that deals with disputes between members of different communities. We would add that, in keeping with long-standing traditions, religious courts would not hear matters of criminal law in which the state prosecutes citizens. But there need be no objection to religious courts hearing by consent matters brought by two members of the same faith.

This may be supported, first, by reference to alternative dispute resolution. Where parties to a dispute agree to mediation by a third party, it need not matter whether this be a community justice centre, a commercial arbitration tribunal or a religious tribunal. The second ground on which it may be supported derives from the relative expertise in the matters to be adjudicated. Where these matters are agreed to be matters of religious significance, the 'judges' of a 'religious court' may be expected to have greater understanding and authority than civil judges. Instances falling under each of these grounds can be seen in Rabbi Lawrence's chapter, such as the Jewish Arbitration and Mediation Service, or the case of *Gutnick v Bondi Mizrachi Synagogue* referred to the Sydney Beth Din by the New South Wales Supreme Court, which noted the 'balance of convenience' in having the matter arbitrated by a Jewish tribunal under Jewish law.

Before leaving this topic, we need to test proposals for legal pluralism and certain delegations to religious courts against some of the principles

advanced in Professor Davies's contribution. Her argument for a renewed approach to a 'pluralist secularism' was founded in large part on the desirability of pluralizing religions as well as the state. By hiving off religious matters to the private sphere, she argued, matters of broader interest and public policy could be excluded, while leaving religious deliberation to a religious hierarchy who could continue to marginalize and silence 'dissidents, critics and reinterpreters, including feminists and other subversives'. These are valid concerns for both a pluralist society and for living religions.

In referring to the sort of pluralism that sustained and ordered members of traditional faiths under the Ottoman regime, we find confirmation of the possibility of pluralism, but not the ideal model of pluralism. By juxtaposing a legal pluralism with a classical ideal community of citizens, we hope to stimulate discussion of the best features of both ideals. While religious tribunals may deal with suitable matters, by consent among members of a religious community, we would see that community as a community of citizens among others. Far from classifying citizens into predetermined silos under the labels of different faiths, we envisage dialogue within and between those communities. In drawing attention to various pre-existing traditions of deliberation on religious, communal and ethical matters, we seek to expand the range of voices that may be heard and the forums through which they may participate. If a Sikh or Orthodox family is in negotiation with a public school system over matters of dress or religious observance, it is only to be expected that the family's own communal reference group may be – indeed, it already *is* – a legitimate party to the discussion. Recognition of religious laws, together with the variety of their interpretations, can engage traditions and communities in debate over concerted adjustment (in Bouchard and Taylor's terminology). This has the immediate advantage that a family or individual is not left unsupported confronting an apparatus of the state. It has the longer-term value that it involves a broader range of citizens, not as individuals but as groups, in learning 'to manage their differences and disagreements' (Bouchard and Taylor 2008: 52).

Before summarizing our main conclusions, we would like to point out the widespread importance and applicability of these issues. Multiculturalism is once again a hotly contested topic. As religious tensions have risen with confrontations between the (Christian) religious right and (Islamic) fundamentalists through 'the war on terror', the battles on the 'home front' (in Europe, North America or Australia) have been joined by militant secularists, whether as bona fide defendants of *laïcité* or provocateurs opposed to religious minorities. The cheerful celebrations of multiculturalism (many of which always did avoid the hard issues) and the hard-won accommodations alike have been condemned as political correctness standing in the way of assimilation to a homogeneous society. That such homogeneity, at least in a new world society of colonists and immigrants,

exists only as a mythic dream formation (Ricoeur 1981: 252–56) does nothing to deprive it of its pernicious allure.

Politicians and pundits pick over the remains of domestic multiculturalism, finding new ways of integrating, assimilating, profiling or oppressing migrants and the racially, religiously or politically different. Do they fail to notice, or is their anxiety driven by the fact that multiculturalism has been reborn as a global reality that they do not have the power to kill? All cultures and religions now live in one world, united by the instant exchange of information: images, messages, trades, threats and insults. Our fleeting experiences of multiculturalism in Australia or Canada, Adelaide or Québec, must now be seen as the best hope we have as a miniature model for a global order in which people can coexist and can 'learn to manage their differences and disagreements' (Bouchard and Taylor 2008: 52). As has been seen in recent years, international stability and good will depend as much on relationships between major global groups – played out in global communications and community relations – as on diplomacy or intergovernmental relations. The conclusions we offer here are all the more tentative, if increasingly relevant, if they are seen to suggest guidance for relations between law and religion in a global as well as a domestic context. We offer them less as a blueprint than as straws to grasp at.

As we noted in the introduction to this volume, law and religion are two highly organized and effective ways of ordering the social and moral world. They have been intermingled in the past, and continue to have a complex relationship. While modernity has seen law rise to dominance, religion continues to be influential in large sections of the population. Far from withering away in the face of modernization, religion has had a resurgence. Even as more Australians profess no religious affiliation, religion has gained increasing political salience as people, including the atheists, become more aware of religious differences, and of the social and political implications of those differences.

Law, together with many of our assumptions about the rule of law and the social order, grew out of the Christian tradition, building on classical foundations and, in Australia, was challenged and potentially stimulated by ancient indigenous traditions. As a sort of step-child of religion, law has a special opportunity to enter into relationships across communities of faith, while it is also uniquely challenged in doing so. We have criticized excessively 'legalistic' approaches to communal differences, but only if these are seen from an adversarial and antagonistic viewpoint. Alternative approaches are more promising:

- legal activity can promote communications and negotiations;
- laws need not be monolithic and centralized.

A laissez-faire approach to many religious issues has its attractions. We can think of the image of a main street with restaurants catering to different

religious diets, with mosques, churches and synagogues, with some communal facilities where particular groups meet, and where people mingle on the street. Such a main street works well on the model of the free market. Yet the limits to this model are reached when we come to the post office, courthouse or public library, which exist expressly to meet the needs of all groups. This is where we have had to dig deeper, into community relations and legal and religious traditions, for guidance.

Having reached the limits of laissez-faire liberalism, we find that liberal rights-based discourse also has its limits. As noted in the Saskatchewan case and, some may suggest, the *Catch the Fire Ministries* case, contests over rights can degenerate into zero-sum games, where one party's win is, by definition, the other's loss. Following Bouchard and Taylor, we have suggested ways that legal accommodation may be built, more positively, into 'concerted adjustment'. There can be a tolerant and inclusive – or, as Davies terms it, pluralist – secularism, that brings parties together at all levels to promote positive outcomes.

We have gone further to propose a legal pluralism that can seize another model of law to build a richer and more cohesive, but equally diverse, society. If the precise mechanisms for negotiating positive-sum outcomes are under-specified and hard to imagine, there is the possibility that they will continue to be dominated by public officials negotiating on behalf of the state with relatively isolated individuals and families. As public officials gain more experience, understanding and, it is to be hoped, tolerance, they will get better at it. We also suggest that religious legal and dispute resolution traditions might contribute to these mechanisms. Community exchanges, negotiation and reciprocity need not all take place in the town hall. Many issues can be deliberated by gatherings based in existing traditions and jurisdictions. These may consider formal or informal, official or unofficial laws. Religious and legal authorities might include Jewish arbitrators, an Islamic *ulama* or online fatwa, experts in canon law, or lawyers or judges of the common law. Any of these may take a proactive approach, as we suggested in the case of environmental issues, or may assist in resolving existing disputes within a congregation.

With a new openness to the plurality of legal traditions, each of these sorts of approach might provide opportunities for dialogue, transparency and debate. Our image of religious courts, as of common law courts, is that they exist to assert a monolithic authority within a closed tradition. It need not be that way. As religious and legal debates open up to communities, of one or many faiths, secular or religious, the terms of those debates can be broadened. Secular pluralism can meet legal pluralism in constructive discussions of big social, moral and environmental issues. All legal and religious traditions may offer contributions to these debates. As we noted above, the boundaries between isolated fields of expertise – economic, scientific, medical – need to be opened up to languages of ethics and

politics. At the same time, we could seek openings between various religious and secular traditions through which, if we listen carefully, we may begin to hear the murmur of a wider and more inclusive conversation.

Notes

1 2006 Census (Australian Bureau of Statistics www.censusdata.abs.gov.au accessed 22 April 2010).
2 *Nicholls v MJ* 2009 SKQB 299.
3 In *Nicholls v MJ* the appellant argued for reasonable accommodation of his religious beliefs (citing the decision in *Moore v British Columbia* (*Ministry of Social Services*) 1992 BCCHRD No 15), an argument rejected by the court (2009 SKQB 299, 36).

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