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Religious freedom in a time of declining moral authority

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Freedom is one of those words that conjures up mental pictures like eagles soaring high and wild horses galloping unrestrained. It is so much more than a verbal definition or even an ideal. It is visceral, beyond words even. To people who have always lived in a relatively free society it may be taken for granted but for those who have been oppressed and persecuted, it is sweet beyond words.

Freedom is one of the most prized elements of life. As an individual ideal it is the power or right to act, speak, or think as one wants.[1] In society and politics however it is not unlimited and requires a counter-weight of careful legislation to ensure that it is fairly and equally distributed in society. The Siracusa Principles are helpful here, stating that: *In applying a limitation, a state shall use no more restrictive means than are required for the achievement of the purpose of the limitation.*[2]

The beginnings of religious freedom

Freedom has been particularly important in Judeo-Christian traditions. The ideal of freedom resonates so strongly with all people that it's not surprising to find it in the words and ways of Jesus and the Apostles. In brief, the Christian love of freedom is firstly personal and spiritual – freedom from the enslavement of the soul. Once free, a Christian's calling is to become an agent of true light and liberty in the wider world.

The first recorded use of the phrase 'religious freedom' was by lawyer and Christian, Tertullian (AD c.150-229). In language that sounds like it belongs in a recent UN international treaty, Tertullian wrote,

> *"…it is a fundamental human right, a privilege of nature that every man should worship according to his own convictions: one man's religion neither harms nor helps another man. It is assuredly no part of religion to compel religion—to which free-will and not force should lead us."*[3]

Tertullian argued for universal freedom of religion on the basis of conviction (or conscience) - matters and positions believed to be universally true and right for all and not just for some. Convictions of conscience are to be formed without coercion, chosen freely and for the good of all.

Religious freedom in our time

In a more general sense the concept of ***freedom of religion*** arises from the capacity of humans to order their lives by thought, belief and reason, rather than being driven by instinct or compulsion. Governments serious about the humanity of their citizens will recognise their inalienable right to freedom of thought, belief and opinion, including the right to change religion or belief. As Augusto Zimmermann, a senior law lecturer at Murdoch University stated:

> *…religion is not an isolated component of life, because religion has broad, holistic implications for the lives of its adherents as a worldview that shapes the way individuals think and act.*[4]

The right to religious freedom is beyond a right to worship in the sense of regular and habitual religious exercises. Princeton University law professor Robert P. George described the broad nature of religious freedom succinctly:

> *It is a right that pertains not only to what the believer does in the synagogue, church, or mosque, or in the home at mealtimes or before bed; it is the right to express one's faith in the public as well as private sphere and to act on one's religiously informed convictions about justice and the common good in carrying out the duties of citizenship.*

Religious freedom is not just a particular freedom, but a critical source of freedom itself. Rev. Dr. Michael Bird, an Academic Dean and Lecturer in Theology at Ridley College in Melbourne, explains that in order to understand why this is so, we must first consider what freedom requires:

> *…that we should have the ability to live our lives as far as possible without undue interference by our government or our fellow citizens. This is what individual rights, limited government, and the rule of law aim to provide. They create a zone in which we can be authors of our own lives without being involuntarily subject to the overbearing power of others trying to force us to live or act or think in certain ways.*[5]

Rev. Dr. Bird states that the negative consequences of undermining the foundations of religious liberty not only harm the individual believer, but also the wider community:

> *In seeking to corral, marginalize, and privatize religion, they endanger the health of religious institutions more generally, threatening to cut off a critically important source of moral reflection and orientation.*[6]

The High Court of Australia confirmed in its judgement on the "Scientology case" that the legal definition of religion encompasses both belief and conduct.[7] Justices Mason and Brennan held that "for the purposes of the law, the criteria of religion are twofold: first, belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief…"[8] Consequently, freedom of religion in Australia involves both freedom of belief and freedom to act in accordance with that belief.

All sincere adherents of religion have canons of both belief and conduct. Observance of these canons is essential to their religion and also to their freedom to practise their religion.

For Christians the canons of conduct extend beyond observance of religious ceremony and habit. From the very outset, Christianity has been vocational - about the common good and not just about converting others. Conversion has been a priority as it is understood as reconciliation to God and humankind, but not by coercion. Rather it is framed by Jesus as freely giving to others what Christians have freely received.

Vocational faith is not limited to the clergy. The principle role of the clergy is to support Christians in their vocation among their families, communities and society more broadly. ***Sex Discrimination Act (1984)*** in section 38 (1) recognises that the principal purpose of the educational institutions of the broader church is to prepare young people for a vocational life in the world, to serve more than their own economic and social interests.

Exemptions from anti-discrimination legislation

In an attempt to accommodate religious freedom, the ***Sex Discrimination Act (1984)*** provides exemptions in a number of contexts including religious bodies and educational institutions established for religious purposes.

However, the consequence of this provision is that:

1. Anti-discrimination tribunals and courts are required to determine the "religion" in question and its "doctrines, tenets or beliefs", which may be understood by adherents but not carefully defined in writing;

2. Exemptions are further restricted to actions done "in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed";

The "doctrines, tenets or beliefs" of a religion and the "susceptibilities of adherents" are matters more theological and traditional than judicial;

Courts, commissions, tribunals and judges are not generally equipped to determine such matters as "religious purposes", "precepts" of a religion and "religious susceptibilities" of adherents, etc., – matters which are more theological than judicial. Justice Nettle observed in his ***Catch the Fire*** judgement: "In my view it was calculated to lead to error for a secular tribunal to attempt to assess the theological propriety of what was asserted at the Seminar."[9] Justice Nettle in fact determined that the Victorian Civil and Administrative Tribunal had erred in nineteen findings.[10]

In the ***OV & OW v Wesley Mission*** case, the NSW Supreme Court found that the NSW Anti-discrimination Tribunal had wrongly identified the "religion" (at 41), wrongly determined the question of "doctrinal conformity" (at 45) and was wrong about "religious susceptibilities" (at 46).[11]

A Commonwealth example again highlights the inadequacy of such exemptions. In 1998 the Catholic Education Office (CEO) of the Archdiocese of Sydney refused an applicant's classification as a teacher because of her "'high profile as a co-convenor of the Gay and Lesbian Teachers' and Students' Association and her public statements on lesbian lifestyles".[12]

The CEO claimed a religious exemption under the ***Sex Discrimination Act 1984*** on the basis that homosexual behaviour ran contrary the "doctrines, tenets, beliefs and teachings of the Church", which a teacher would be required to uphold. The matter was decided by the Australian Human Rights Commission (at that time the Human Rights and Equal Opportunity Commission).

The AHRC found against the CEO, not only acting as arbiter of what constituted Catholic teaching, but ruling that Catholic beliefs ran in favour of the complainant. In its ruling, the AHRC went so far as to say:

> *If the employment of (the complainant) would injure the religious susceptibilities of these students and their parents, the injury would be founded on a misconception. Indeed it would be not an injury to their religious susceptibilities but an injury to their prejudices.*[13]

Such arbitrary use of anti-discrimination provisions demonstrates how poorly the AHRC understood the purposes of the exemptions and how severely restricted freedom of religion can become.

The huge costs incurred by respondents in seeking to defend their religious freedom are unjust and a person might wonder if this was intended as a way of persuading religious bodies to avoid malicious prosecution that would also characterise them as discriminatory.

It must be noted that anti-discrimination exemptions do not apply to natural persons who adhere to religious beliefs and practices is a failure to take religious belief seriously. Freedom of conscience and belief should also be recognised for any person (or company) who holds a genuine and conscientious belief that some of the protected attributes are morally unacceptable.

In October 2018 the national media ran the story of a Christian couple (Luke and Carla Burrell) who had to cease publishing their magazine following economic persecution. They recently wrote on their website:

> *A campaign was launched targeting the magazine, our team and our advertisers. Couples who have featured in our magazine have also been the subject of online abuse despite their individual beliefs. We're really saddened by this.*
>
> *The result has been that a number of advertisers withdrew their sponsorship out of fear of being judged, or in protest. We have had to recognise the reality that White Magazine is no longer economically viable.*[14]

This example demonstrates that persons are increasingly subject to discrimination, intimidation or their business or work affected because of their conscience or belief. This despite the fact that the Constitution and the ICCPR takes these matters very seriously.

The increasing denial of religious conscience and practice

Cardinal George Pell has rightly pointed out that:

> *Neither the government nor anyone else has the right to say to religious agencies "we like your work with vulnerable women; we just need you to offer them abortion as well" or "we really like your schools, but we can't allow you to teach that marriage between a man and a woman is better or truer than other expressions of love and sexuality." Our agencies are there for everyone without discrimination, but provide distinctive teachings and operations. In a wealthy, sophisticated country like Australia, leaving space for religious agencies should not be difficult.*[15]

The Cardinal's words help us to understand that the church does not offer abortion or facilitate "marriage" to the same gender because Christian teaching and conviction preclude these matters. Christian teaching is not just a reaction to the current shift in social opinion but is rather born of Scripture and the long experience over hundreds of years of religious life in service of God and humanity.

Cardinal Pell is not demanding that all of society conform to this position, but that Christians have the right to do what they believe to be in the public interest as a matter of Christian conscience.

Assault on religious conscience

The current ideological pressure to preference sexual orientation and gender identity above the rights of conscience and religious freedom is an assault not just on the religious sensibilities but also the reason and sense of objective reality of all who support the biological male/female norms for marriage and orientation.

Religious teaching plays a role in affirming the conscience of those who support the biological male/female norms, but the norms themselves are plain and obvious. A person's self-defined gender may not be obvious in an age when multiple genders are being proposed. To provide a legal basis to punish those who do not affirm ideological, non-biological gender identity, either out of conscience or ignorance - is a step too far.

To describe a person's true, biological identity as male or female at birth as a person's 'designated sex at birth'[16] is an ideological invention. Governments should not give ideology the same weight as biological fact in legislation. It is conceivable that someone would not affirm someone's non-factual identity out of a duty of conscience to be honest. Should they be punished for being honest?

Respecting the moral dilemma

Anti-discrimination laws that conflict with religious conscience over distinctions about gender identity/sexual preference/sexual orientation place the religious person in a great moral dilemma. This is recognised in both section 116 of the Constitution of Australia and Article 18 of the International Covenant on Civil and Political Rights. Both documents take freedom of (religious) conscience very seriously not just because of the Christian history as a persecuted minority, but because of the principle of freedom of (religious) conscience for all is foundational to a free society.

Section 116 of the Constitution of Australia enshrines the principle of non-interference by government in religious belief or practice:

> *The Commonwealth shall not make any law… for prohibiting the **free exercise** of any religion.*[17] …Consequently, the Commonwealth Parliament:
>
> - **cannot (among other things) prohibit religious observance;**[18]

To limit the teaching and observance of a faith on matters of sexuality and gender is a clear breach of this principle of non-interference.

Article 18 of the International Covenant on Civil and Political Rights states:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.[19]

Justifiable limitations

These rights are so fundamental to our humanity that, according to Article 4 of the ICCPR, they "cannot be derogated from, even in time of public emergency." The ICCPR recognizes this when it states in Article 18(3) that limitations are justifiable only when "**necessary** to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."

Religiously motivated violence, such as the siege of the Lindt Café in Sydney by Man Haron Monis,[20] was an example of a religious act that threatens public safety and order. It was clearly unacceptable and may be justifiably prohibited.

In the case of Charlie Hebdo even in the face of harsh mockery, such violence is never justified, as political commentator John Stonestreet aptly noted:

> *What happened in Paris [with Charlie Hebdo] was despicable. No matter how offensive the magazine's cartoons might have been, nothing justifies murder.*[21]

The way forward

- Religious freedom must be given the proper recognition it deserves as a universal right as reflected in section 116 of the Constitution of Australia and Article 18 of the International Covenant on Civil and Political Rights. Those who ignore these documents are making a very deliberate statement of intent against religious freedom.
- Treating religious freedom as (only) a permissible exemption in the Sex Discrimination Act (1984) rather than a universal right creates the impression that it is less important than sexual orientation or gender identity. Reducing the importance of religious freedom would suggest it should be removed from the list of exemptions in order to give full force to the Sex Discrimination Act (1984).

  It should be noted there are other legitimate contexts listed in the Act for exemption that are coming under unwelcome pressure such as public amenities,

services for members of one sex, accommodation provided for employees by biological gender, single gender entities like schools, scout and guide groups and sporting competitions based upon gender. Each of these has a valid case for exemption.

- Imposing gender ideology on one of the contexts listed above flies in the face of common sense and public opinion. It also begs the question why an exemption would be denied on religious grounds but allowed on say, sporting grounds.
- The hardening of attitude against religious freedom is concerning. The attempt by Labor in December 2018 to remove the exemptions for religious bodies from the Sex Discrimination Act (1984) prompted the Attorney-General Christian Porter to say of Labor's uncompromising stance that it was "an extraordinary and unprecedented incursion on religious freedom in this country."[22]

Paul Kelly of *The Australian* acknowledges that there has been a shift in the underlying cultural base and that we are experiencing a clash of worldviews. The division is not strictly on party political lines but is being played out in federal parliament as if it is. He observed that:

"For Labor, issues of discrimination and religion are policy matters, not conscience issues…This is now firm ALP dogma."[23]

- The way forward then will include an ongoing struggle between these two worldviews for some time to come. The assumption is that the parliament is where this matter will be decided. The media, universities and other civic institutions should recognise that escalating tension between worldview warriors - as observed in confected political outrage, should not be encouraged. .
- Civil society simply must take responsibility to improve the tone of public debate and social cohesiveness because changes to the law will not resolve the deepening divisions in the country. Extending civility to all, especially those who strongly oppose the Church is not new territory for Christians. Jesus taught His followers how to relate to those who oppose them. He instructed His people to take the initiative - to love their enemies, to do good to those who hate them, to bless those that cursed them and pray for those who abused them.
- Defending religious freedom then is not the Church being simply self-interested. In the current climate Christian influence is most under attack but religious freedom is a vital part of the wider right of all citizens to the greatest possible freedom within the most reasonable limitations in the interest of all. The Church's defense of liberty then is on behalf of all citizens including those who oppose them.

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