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Freedom of Religion and Freedom of Speech – The United States, Australia and Singapore compared

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Freedom of Religion (more correctly, freedom of conscience, belief and religion under the *International Covenant on Civil and Political Rights 1966 (ICCPR)*), and Freedom of Speech have been logically tied together since human beings were sentient creatures. The two rights are inseparably connected by logic, since one cannot speak freely unless one has the freedom of conscience to think out something to say. For this reason, the two rights were combined in the First Amendment to the US Constitution in 1789 and that joinder has cemented the connection ever since even though the extrapolation of the two rights has seen them separated in modern human rights instruments. That latter-day separation in the interests of more complete expression however, seems to have disconnected the two rights in the minds of modern philosophers, legislators and judges.

I will begin this paper in Part I, by setting out the logical connection between the two rights as simply as I can before briefly discussing the philosophical separation of the two in US jurisprudence and in the political philosophy of John Rawls since 1991. In that discussion, I will suggest that it is John Rawls' notion of 'public reason' which has powered the rise of 'political correctness' (PC) at the expense of both freedom of speech and religion, despite Rawls' denials of inconsistency. I will then explain how the imposition of public reason onto the human rights expressed in the *US Constitution* by the US Supreme Court is inconsistent with the doctrine of parliamentary sovereignty in Westminster democracies including Australia and Singapore before outlining the current debate in Australia concerning both freedom of speech and freedom of religion.

In Part II, I shall move to Australia. While s 18C of the *Racial Discrimination Act 1975* (Cth) is the pivot around which the current Australian debate swirls, I will seek to position that argument in a broader long term discussion of human rights. While contemporary arguments about racism, immigration and same sex marriage may seem intellectually discrete and separate, they are

unwillingly joined together at the intersection between freedom of conscience and speech. My purpose in identifying that connection, is to enable the consideration of how human rights are best balanced when they compete despite the PC demands of a particular moment. It is this last discussion that I hope will engage Singaporean attendees at the conference. For Singapore's long term practical need to balance freedom of speech and religion in the interests of national security provides a context that moderates the discussion of human rights in a vacuum.

In Part III I therefore explain how freedom of conscience and speech have been balanced in past US and Australian jurisprudence, and I measure that against the international standards that are now set out in the *ICCPR*. That discussion also enables comparison with the Singaporean jurisprudence and ultimately concludes there is not a great deal of difference in practice – the jurisprudence of all three countries falls short of the *ICCPR* standard though there was a thirty year period between 1960 and 1990 when the US came close. The unnecessarily narrow approach to the free exercise of religion in Australia is identified as a primary reason why s 116 has been described as a dead letter in commentary. I suggest that all three governments need to explore ways to upgrade their protection of freedom of conscience and speech so that it accords with the standards set in the *ICCPR*.

I conclude that because the protection afforded to freedom of conscience and speech in the US, Australia and Singapore falls below the international law standard set by the *ICCPR*, all three countries have work to do to enhance human freedom. As a teacher of Australian constitutional law, it is simple for this author to observe that Australia could achieve this goal by passing domestic legislation using its federal external affairs power. Singapore could begin by ratifying the *ICCPR* and then taking steps to implement it in domestic law. The US ratified the *ICCPR* in 1992 with reservations and could pass domestic law to implement it except that the Supreme Court does not

currently agree that the *Constitution* can be interpreted consistent with the *ICCPR*. There is the possibility that the Supreme Court's view may change if the new President has the opportunity to appoint judges who see the Free Exercise Clause differently than their post 1990 predecessors.

Part I – Freedom of Conscience and Freedom of Speech are inseparably connected

My first observation is that the freedoms recognized in international human rights instruments since the *Universal Declaration of Human Rights (UDHR)* in 1948 do not stand alone. They are a 'compound in one'. They stand or fall together. Though it is trite, a single matchstick can be easily broken, but a collection of matchsticks is harder to break. Freedom of Conscience, Speech and Association stand together or they fall. The stronger they are, the stronger the individual rights and freedoms of the citizens of the country concerned. That these rights are compound rights, is demonstrated by their logical connection. Freedom of conscience logically precedes freedom of speech because one cannot speak freely unless one can first think freely. But equally, freedom of conscience is meaningless unless the things an individual thinks about can be freely expressed. While some human laws have been designed to regulate human thought (as with tests for public office), human conscience is generally unregulated as international human rights norms mandate. But international human rights norms also say that the expression that flows from freedom of conscience (the forum externum) should only be regulated to the extent it interferes with public safety, health or morals.¹

Just as freedom of conscience is antecedent to freedom of speech, so freedom of conscience and

speech are logically antecedent to freedom of association. That is, freedom of association is meaningless unless someone can think and speak freely so as to communicate in association with others. Again, freedom of conscience, speech and association are a compound. To the extent one is diluted, so are all the others.

When this compound or indivisible nature of the human rights and freedoms that theorists have traditionally named as the first freedoms is misunderstood,^{2,3} we pass laws abridging one or other of these freedoms without counting the combined cost, and freedom as a whole suffers a slow "death by a thousand cuts".⁴

This understanding of freedom as a compound of sub-freedoms - conscience including religion, plus speech and association - was elementary for the American framers. It is a part of the reason why they lumped freedom of religion and speech together in their First Amendment. John Rawls, the famous late 20th century American political philosopher, accepted that these freedoms were foundational in US jurisprudence when he published *A Theory of Justice* in 1971.⁵ But something had changed in his understanding when he wrote *Political Liberalism* in 1993⁶ and "The Idea of Public Reason Revisited" in 1999.⁶ In *A Theory of Justice* in 1971, he wrote that because people in his 'original position' "do not know ... what their religious or moral convictions are ... [t]he question they are to decide is which principle they should adopt to regulate the liberties of citizens in regard to their fundamental religious, moral and philosophical interests."⁷ He concluded quite simply that

equal liberty of conscience is the only principle that the persons in the original position can acknowledge. They cannot take their chances

¹ Article 9 of the *European Convention on Human Rights* (1950) does not anticipate any limitations on the forum externum in Article 9(1). Article 9(2) says the forum externum shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 18(3) of the *International Covenant on Civil and Political Rights* (1966) follows the *European Convention* and states that freedom to manifest one's religion should 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.

² Martha Nussbaum has said that democracies need to be vigilant in teaching their citizenry the interrelationship of fundamental human rights lest they be unwittingly whittled away (*Liberty of Conscience*, Basic Books, New York (2008), 359-

³). In that connection she has recalled Thomas Jefferson's statement

The Tree of Liberty must be refreshed from time to time by the blood of patriots and martyrs. It is its natural manure (Thomas Jefferson to William Stephens Smith, Paris, 13 November 1787). Human rights are a comparatively recent human discovery and have come as the legacy of thousands of years of bloodshed.

⁴ *International Finance Trust Company v New South Wales Crime Commission* (2009) 261 ALR 220 per Heydon J 238 [57].

⁵ John Rawls, *A Theory of Justice*, Harvard University Press, 1971. ⁵ John Rawls, *Political Liberalism*, Columbia University Press, 1993.

⁶ John Rawls, 'The Idea of Public Reason Revisited' in John Rawls, *The Law of Peoples*, Harvard University Press, 1999.

⁷ Rawls, above n 4, 181.

with their liberty by permitting the dominant religious or moral doctrine to persecute or to suppress others if it wishes.⁸

For Rawls in 1971, equal liberty of conscience was not absolute. As in the *ICCPR*, it “is limited...by the common interest in public order and security”⁹ since from the original position, each would recognize “that the disruption of [public order and security] is a danger for the liberty of all”.¹⁰ But in *Political Liberalism* in 1993, Rawls’ position on equal liberty of conscience had shifted. In my 2015 article in *The University of Notre Dame Australia Law Review*,¹¹ I explained Rawls’

‘idea of public reason’ this way:

In a nearly just society there is a public acceptance of the same principles of justice”.¹² But there does not need to be complete agreement. There can even be “considerable differences in citizen’s conceptions of justice provided that these conceptions all lead to similar political judgments”.¹³ “[D]ifferent premises can yield the same conclusion”¹⁴ and therefore groups with different perspectives can accept the same judgment in a dispute though for different reasons. However, “there comes a point beyond which the requisite agreement in judgment breaks down and society splits...on fundamental questions”.¹⁵ Responsible citizens will not then do as they please. While they may act conscientiously and disobey law, yet they will be held responsible for what they do.¹⁶ Citizens responding to such differences should sacrifice their comprehensive doctrines in the interests of preserving the overlapping consensus necessary to preserve society when viewed from the original position. To use Rawls’ own words:

Citizens realize that they cannot reach agreement or even approach mutual understanding on the basis of their irreconcilable comprehensive doctrines. In view of this, they need to consider what kinds of reasons they may reasonably give one another when fundamental political questions are at stake. I propose that in Public Reason comprehensive doctrines of truth or right be replaced by an idea of the politically reasonable addressed

to citizens as citizens.¹⁷

By the late 1990s, equal liberty of conscience in Rawls’ thought was not compromised by the sacrifice of one’s comprehensive beliefs if they lay outside political consensus because everyone was making the same sacrifice and that sacrifice was part of a citizen’s “duty of civility”.¹⁸

In my 2015 Notre Dame article, I explained that Rawls did not believe he was sacrificing any part of equal liberty of conscience when he asserted the need for his idea of public reason to trump it in the interests of overlapping consensus in liberal democracies. But I suggest that a life spent marinating in US Establishment Clause jurisprudence and particularly the compromises of the free exercise of religion which were embedded in the 1991 decision in *Employment Division v Smith*,¹⁹ blinded him as to how his idea of public reason undermined liberty of conscience as understood in international human rights instruments. Rawls’ belief that religious ideas should not be used in the public square unless they could be explained in proper political terms, misunderstood the idea of freedom of religion prized by the US framers and expressed more fully in the *ICCPR*. In the First Amendment and in the *ICCPR*, religious believers could speak about anything they chose in the public square unless, in the *ICCPR*’s modern expression, those words would endanger “public safety, order, health, or morals or the fundamental rights and freedoms of others”.

Outside of the US, the idea that religion and the state must be completely insulated from one another in the interests of freedom of conscience and religion is foreign. Europe is full of countries with established state churches where freedom of religion is accepted and protected. In Australia where there can be no national church,^{20 21} the federal government does not offend ‘the establishment clause’ by spending 35% of its educational budget in the support of private schools many of which are sponsored by churches.²¹ Nor can the High Court of Australia strike down legislation on constitutional grounds because it offends human rights because there is no constitutional Bill of Rights in Australia.

⁸ Ibid.

⁹ Ibid 186.

¹⁰ Ibid 187.

¹¹ “Should ‘public reason’ developed under US establishment clause jurisprudence apply to Australia?”, (2015) 17 *UNDALR*, Article 6, 107-134

< <http://researchonline.nd.edu.au/undalr/vol17/iss1/6/> >.

¹² Rawls, above n4, 340.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid 341.

¹⁷ Rawls, above n6, 131-32.

¹⁸ Ibid 135-136, 138.

¹⁹ *Employment Division v Smith* 494 US 872 (1990).

²⁰ *Attorney-General (Vic); Ex rel Black v Commonwealth* (‘*DOGS case*’) (1981) 146 CLR

²¹ .

Additionally in Australia, under the doctrine of parliamentary sovereignty, the Parliament can abolish any common law right it wishes to abolish, so long as it does so in sufficiently clear and unambiguous words.²² But the absence of constitutional protection for human rights in Australia does not mean that those rights do not exist. Political accountability to the public is not something that just happens three yearly at the ballot box; it is vigorous and is part of the reason why Australia has had four different Prime Ministers between 2012 and 2016. However, to date the Australian federal government has not seen fit to pass domestic human rights legislation implementing the commitments it made when it ratified the *ICCPR* in 1980²³ and which it has the constitutional power to pass.²⁴

In Singapore, freedom of religion is protected by the Constitution but it is interpreted narrowly.²⁵

²¹ Ibid.

²² See for example *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 per Gleeson CJ and *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 per French CJ.

²³ Article 2 of the *ICCPR* sets out the commitments made by ratifying states. Australia's agreement to be bound by Article 2 was made subject to her constitutional processes and the agreement of the Australian states and territories. The full text of the reservation is set out at <<http://www.austlii.edu.au/au/other/dfat/treaties/1980/23.html>>.

²⁴ See for example *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, *Victoria v Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 and *Toben v Jones* (2003) 199 ALR 1.

²⁵ Article 15 provides:

- (1) Every person has the right to profess and practice his religion and to propagate it.
- (2) No person shall be compelled to pay any tax the proceeds of which are specifically allocated in whole or in part for the purposes of a religion other than his own.
- (3) Every religious group has the right –

²² The state of the law in these two Westminster democracies stand in contrast to the position in the United States where even the results of public referenda have been struck down on that basis. See *Perry v Schwarzenegger* Case No. C 09-2292 VRW (US District Court for the Northern District of California, 4 August 2010) where District Court Chief Justice Vaughan Walker struck down a constitutional ballot proposition (Proposition 8) which had amended the *California State Constitution* because it had no rational basis even though it was the will of the majority of the voters in that state.

- (a) to manage its own religious affairs;

However, the fact that Rawlsian public reason has not led, and should not lead to the invalidation of laws in Australia because a trace of religious influence can be detected in their text,²² does not mean that Rawlsian ideology is without influence in Australia. As I noted in my article in the *UNDA Law Review* cited above, journalists and other opinion leaders regularly repeat Rawls' idea that religious expression and belief has no place in the public square and that it should not justify government law or policy.²³ And the Rawlsian idea that speech should be voluntarily managed in the interests of overlapping consensus in the public square, is increasingly evident in new anti-discrimination laws despite *ICCPR* freedom of speech, free exercise of religion under s 116 of the *Constitution* and the freedom of political communication recognized by the High Court as an implied right under the *Australian Constitution* since 1992.^{24 25} There are many examples of

- (b) to establish and maintain institutions for religious or charitable purposes; and

- (c) to acquire and own property and hold and administer it in accordance with law.

- (4) This Article does not authorize any act contrary to any general law relating to public order, public health or morality. See below nn 41-45 and supporting text for discussion of the narrow interpretation of this Article in Singapore.

challenges to freedom of conscience and expression in Australia that could be discussed to show the reach of the Rawlsian ideology popularly known as PC,²⁹ but for the sake of brevity, I shall only canvass the current debate concerning s 18C of the *Racial Discrimination Act 1975* (Cth). I have chosen that debate as my focus in Part II, not because it most clearly focuses the conscience and religious aspects of the friction, but because it is a federal law and so applies in every state.

²³ Above n11, nn 3-7. Well known Australia media personality Andrew Denton has reaffirmed this proposition recently with his insistence that the churches should step aside from the public debate concerning euthanasia law reform (*The Australian*, August 10, 2016).

²⁴ The High Court of Australia first recognized an implied freedom of political communication arising under ss 7 and 24 of the *Constitution* in two cases in

²⁵ - *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 and *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106. That implied right has been developed since including in *Lange v*

Part II – Should we limit speech that is merely offensive?

In the international context, the expression of religious belief can only be limited if the limitation is prescribed by law and it is “necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.”²⁶ Of course religious expression is not the only speech that may be limited. But speech generally, is subject to an equivalent limitation under Article 19(3) of the *ICCPR*.^{27,28} To accord with these *ICCPR*

Australian Broadcasting Corporation (1997) 189 CLR 520, *Coleman v Power* (2004) 220 CLR 1 and most recently in *McCloy v NSW* [2015] HCA 34.^{29,9} For example, the proposed ‘prosecution’ of Catholic Archbishop Julian Porteous under Tasmanian anti-discrimination laws despite constitutional protection of freedom of religion in that state because he distributed a booklet to Catholics concerning traditional marriage that offended transgender Greens political activist, Martine Delaney; the settled ‘prosecution’ of two pastors who had offended Muslims attending their seminars about Islam (*Catch the Fires Ministry Inc v Islamic Council of Victoria* [2006] VSCA 284); and the successful appeal by a gay outreach group seeking to prevent youth suicide when they were denied the use of a Convention Centre run by the Brethren Church (*Christian Youth Camps Limited & Ors v Cobaw Community Health Services Limited & Ors* [2014] VSCA 75 (16 April 2014).

specifications, limitations on freedom of speech, including religious speech, passed by the legislatures of countries which have ratified the *ICCPR* and are genuinely striving to accord with these now well established principles of international law, must be passed in valid national or state law and they must be “necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.”^{30,2}

The requirement in the *ICCPR* that limitations on freedom of speech including religious speech, be created by valid national or state law, denies ‘*ICCPR* legitimacy’ to arbitrary or capricious exercises of discretion by law enforcement officers or other public officials which do not carry the stamp of formal legislative authority. The point is that any limitations on freedom of speech including

religious speech, must be created as formal law or they do not meet the *ICCPR* standard.

In western democracies like the United States, Australia and Singapore, the requirement that formal law be passed before freedom of expression including freedom of religious expression can be limited, ought to be elementary. But compliance with the second limb of the *ICCPR* limitation requirement, is anything but elementary. For if the word ‘necessary’ is interpreted subjectively to mean that a law can be passed because the legislature believes, hopes, or wants to decide as a matter of policy that such a law is necessary, the protection intended is denuded of practical effect. The limitations expressed in Articles 18(3) and 19(3) of the *ICCPR* rely on a strongly objective interpretation to achieve their protective purpose. This strongly objective interpretation of the necessity requirement in the *ICCPR* is controversial in Westminster democracies that accept the principle of parliamentary sovereignty rather than the older American developed idea that courts can strike down any law that does not accord with fundamental principles including

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 20(1) prohibits war propaganda and Article 20(2) requires the prohibition by law of expression that would incite discrimination, hostility or violence on the grounds of race.³² *ICCPR*, Article 18(3).

those set out in constitutional instruments and supra-national human rights covenants.³¹

This strongly objective interpretation of the necessity requirement, is also controversial in Europe where the European Court of Human Rights accords the legislatures of member states a ‘margin of appreciation’ in setting laws for their own countries since the Court is said not to know what is necessary in the member states.³² Still, the European

²⁶ *ICCPR* Article 18(3).

²⁷ The full text of Article 19 setting out the right to freedom of expression under the *ICCPR* reads:

²⁸ . Everyone shall have the right to hold opinions without interference.

²⁹ . Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

³⁰ . The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

³¹ Martin Krygier, “The Rule of Law: Pasts, Presents, and Two Possible Futures”, *Annual Review of Law and Social Science*, 12 (2016) 199, 207.

³² See for example *Handyside v United Kingdom* 5493/72; (1976) 1 EHRR 737; [1976] ECHR 5. ³⁵ For

Court of Human Rights does make some decisions against member states despite protestations of necessity and reference to the margin of appreciation doctrine, if the Court considers that such laws could not have been passed by any reasonable legislature.³⁵ The point flowing from this brief discussion of a vexed topic, is that sovereign legislatures do not always pass objectively reasonable laws especially when they are confronted with crises like the war on terror.³³ The point is good for all countries regardless of the extent of their rule of law compliance tradition. Respect for the rule of law and objectively adjudged human rights, is only as good as the last law that a legislature has passed. Human fallibility and caprice is not a uniquely individual human trait. It can be manifested by groups of human individuals including legislatures.

So how should the *ICCPR* limitations on freedom of expression including religious expression be interpreted in practice? I submit that a strongly objective interpretation of the *ICCPR* limitation principles was intended, remains appropriate and is essential if human rights are to survive. The post WWII context of the *UDHR* and the *ICCPR* demonstrates the intention that strongly objective interpretation was intended. That is because the *UDHR* and the follow on covenants are widely accepted as flowing from the excesses of the Axis regimes and particularly the Nazi regime during that World War. Anything less than strong objectivity would thus subvert the intention of those who framed the *UDHR* and the *ICCPR*. Thus I further submit that objective interpretation of those covenants is an integral part of their whole meaning.

It is now appropriate to situate the current debate about whether s 18C of the *Racial Discrimination Act 1975* (Cth) in Australia, is consistent with the level of freedom of speech established in international law by Articles 18 and 19 of the *ICCPR*. While a full bench of the Federal Court of Australia in *Toben v Jones* in 2003³⁴ affirmed that s 18C was a valid law under the *Australian Constitution*, they did not address the *ICCPR* question, and even if they had done, any observations they made would have been obiter dicta and not binding since the Australian Federal

Government has not made the *ICCPR* part of Australian domestic law despite their promises to do so. The reason s 18C was valid under the *Australian Constitution* was because the full Federal Court considered it was consistent with the provisions of the *International Convention on the Elimination of All Forms of Racial Discrimination 1966* (the Race Convention) which Australia had sought to implement in domestic law.³⁸ My following suggestion is that if Australia were to keep its commitment to similarly implement the provisions of the *ICCPR* in domestic law and to interpret those provisions in the strong objective manner I have outlined above, then s 18C would be invalid from the date of that implementing legislation.

Why would s 18C be inconsistent with the *ICCPR* if the *ICCPR* were implemented in domestic law? Because it cannot be said that a law which outlaws speech that merely offends on grounds of race is necessary to implement the provisions of the Race Convention in a manner that is consistent with Freedom of Speech under the *ICCPR*. I suggest that although the full Federal Court found that s 18C was reasonably adapted to the purpose of implementing the Race Convention as the only applicable international instrument then binding in Australian domestic law,³⁵ that finding would not be available if the *ICCPR* was also a part of Australian domestic law and was interpreted objectively. That is because the balance that the *ICCPR* requires be struck in favour of freedom of speech before it can be limited, is a manifestly higher standard that the full Federal Court observed in respect of the implied freedom of political communication under the *Australian Constitution*. That is not to say that the full Federal Court correctly interpreted the nature of the implied freedom of political communication under the *Australian Constitution*,⁴⁰ but a different balance would have to be struck if the *ICCPR* had a place in Australian domestic law as the federal government has promised.

So what has this got to do with Singapore? Like Australia and the US, Singapore is subject to international law whether it accepts it as binding and follows its imprimatur in domestic law or not. To the extent that Singaporean freedom of religion and

example *Kokkinakis v Greece* 14307/88; [1991] 17 EHRR 397; [1993] ECHR 20.

³³ See for example Krygier, above n33, 208.

³⁴ *Toben v Jones* (2003) 199 ALR 1. ³⁸ I observe that there are compelling arguments that this interpretation is inconsistent with the implied freedom of political communication developed in High Court jurisprudence since 1992 (see for example Forrester J, Finlay L and Zimmerman A, *No Offence Intended: Why 18C is wrong*, Connor Court Publishing, 2016). While

fascinating, that debate is beyond the scope of the current paper that is focused on international law with regard to freedom of speech including freedom of religious speech.

³⁵ *Toben v Jones* (2003) 199 ALR 1, 35 [144] per Allsop J. Note that Carr J found that it [wa]s for the legislature to choose the means by which it carrie[d] into or gl[a]ve effect to a treaty" (ibid 10 [20] citing the *Industrial Relations Act Case* (1986), 487) and

speech jurisprudence is inconsistent with the *ICCPR*, it should be reformed as an example to other Asian nations and in the interests of consistent international freedom. However, because Singapore has a completely different religious and security climate than Australia, the balancing would not be the same. To interpret freedom of speech under the *Singaporean Constitution* in a manner consistent with the *ICCPR*, the Singaporean courts would have to determine whether any limitations on freedom of speech including religious speech, had been validly passed as laws by the legislature including whether they were objectively “necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.”⁴¹ Yong CJ’s rejection of the submission in *Chan Hiang Leng Colin v PP* in 1994⁴² that there had to be a ‘clear and present danger’⁴³ to public order before freedom of religion could be restricted, is not consistent with the *ICCPR*. His honour preferred Malaysian precedents to find instead that “religious beliefs and practices which tend to run counter to [the security of the country]

Kiefel J simply concurred with Carr J on the constitutional issues arising.

⁴⁰ See the discussion at n38 above.

⁴¹ *ICCPR* Article 18(3).

⁴² *Chan Hiang Leng Colin v PP* [1994] SGHC 207; [1994] 3 SLR (R) 209. ⁴³ *Chan Hiang Leng Colin*’s counsel cited a

Malaysian case (*Tan Boon Liat v Menteri Hal Ehwal Dalam Negeri, Malaysia* [1976] 2 MLJ 83 (High Court)) as his authority for this interpretation of the limitation in the *Singaporean Constitution*.

had to be restrained.”³⁶ He did not accept that any balancing of individual freedom of religion was required although it is arguable that he chose scales which set the balance in favour of state interests rather than the individual as the *ICCPR* requires.³⁷

However, Yong CJ’s narrow interpretation of Article 15 of the *Singaporean Constitution* is consistent with what the Australian High Court has said about s 116 of the *Australian Constitution*. It is also arguably consistent with what the US Courts

³⁶ *Chan Hiang Leng Colin v PP* [1994] 3 SLR (R) 209, 235 [64].

³⁷ *Ibid* 233, [58-59]. No evidence was called suggesting *Chan Hiang Leng Colin*’s expression posed any direct threat to national security. ⁴⁶ *Reynolds v US* 98 US (8 Otto) 145 (1878).

³⁸ For example, see *Sherbert v Werner* 374 US 398 (1963) where the Supreme Court overturned a State law which denied unemployment benefits denied to a Seventh Day Adventist woman who would not work on Saturdays, and *Wisconsin v Yoder* 406 US 205 (1972) where the

have been saying about the free exercise of religion under the First Amendment since the decision in *Employment Division v Smith* in 1991. In Part III I shall therefore discuss that overall consistency against my suggestion that the *ICCPR* requires a broader objective approach and the more general jurisprudential idea that human rights guarantees should be interpreted generously so that minority interests are not sacrificed on the altar of inchoate majoritarian security demands.

Part III – Balancing in a manner consistent with the rule of law

The first time the US Supreme Court adjudicated the meaning of the Free Exercise clause in their First Amendment was in *Reynolds v US* in 1879.⁴⁶ In that case, the Court held that while the polygamist being prosecuted was entitled to freedom of belief and opinion under the clause, the First Amendment did not prevent the federal government from passing laws that criminalized his religious practice. That narrow view was varied beginning with the Warren Court in the 1960s until 1990. During that period, the Supreme Court held that the State could not interfere with religious practice unless it had a compelling reason to do so and there was no less intrusive way to achieve its otherwise legitimate goals.³⁸ But in its decision in *Employment Division v Smith* in 1990,³⁹ the Court returned most of the way to the *Reynolds* decision in 1879 when it found once again that a neutral law of general applicability did not offend the Free Exercise clause. Religious speech gets more space than religious manifestation in the US since US jurisprudence arguably protects freedom of speech more than any other country in the world. However, even freedom of speech is under threat from the logic that was used by US federal District Court Judge Vaughan Walker in his decision in the *Schwartzenegger* decision referred to above in Part I.⁴⁹

In Australia, there was no ‘Warren court’ period where the High Court was generous towards the free exercise of religion. Indeed, there have only been two cases where the free exercise of religion clause

Supreme Court held that the State’s interest in educating Amish children was outweighed by their parents’ religious wish to continue their education after the 8th grade outside the state school system.

³⁹ *Employment Division v Smith* 494 US 872 (1990) where the State of Oregon was allowed to deny unemployment benefits to an employee dismissed for smoking peyote in Native American Church services because the law was not targeted at that religious observance. ⁴⁹ See above n26 and related text.

was considered closely by the Court,⁴⁰ and in one, it was interpreted so narrowly that a conscientious objector still had to do his military service. Some commentators have described the High Court's treatment of the conscientious objector's argument as dismissive.⁵¹ Certainly 70 years later in the *Church of the New Faith* case,⁵² the High Court's treatment seemed more respectful towards freedom of religion since religion itself was given a broad ecumenical definition. In that case, the Church of Scientology was as entitled to the same exemption from Victorian state payroll taxes as any other church that believed in a supreme being or principle and adhered to a code of conduct as part of its religious practice. But the breadth of the Court's definition of religion did not signal a marked change since the concession that some civil liberty flowed from s 116 in the *Stolen Generations* case was as crowded with qualifications as ever.⁴¹ In the *Stolen Generations* case, the High Court held that the Northern Territory laws in question did not offend s 116 because they had not been passed with the intention of prohibiting the free exercise of religion and, in any event there had not been sufficient evidence at the trial to prove such interference anyway.

To summarise – despite the pretense that the US and Australia respect the rule of law where the free exercise of religion is concerned, the evidence suggests otherwise if Article 18 of the *ICCPR* is accepted as the gold standard. Though two Australian High Court judges have confirmed that grants of human liberty are to be interpreted generously⁴² so that the free exercise clause in s 116 of the *Australian Constitution* could have been read consistently with Article 18 and without implied limitations, to date the High Court has always found implied limits on the free exercise of religion even though those limits do not appear in the text of the *Constitution*.

Arguably, the US Supreme Court settled in a similar place when they found that a neutral law of general

applicability did not offend their Free Exercise clause in *Employment Division v Smith* in 1990. That means that Chief Justice Yong's decision in *Chan Hiang Leng Colin v PP* in 1994 was consistent with the enduring jurisprudence of freedom of religion in Australia and in the US. It also means that all three sets of jurisprudence are inconsistent with the standard of freedom of religion set out in Article 18 of the *ICCPR*.

In the words of Chief Justice Yong, the discord concerns how religious manifestation and expression can be legitimately restrained. His finding again was that “religious beliefs and practices which tend to run counter to [the security of the country] had to be restrained.”⁵⁵ The US Supreme Court has found that the government may restrain religious practice by any neutral law that did not single out the religious practice in question for attention.

Paraphrasing the language of Justice Rich of the Australian High Court in 1943, the Australian position remains that religious practice can be lawfully restrained to prevent the “cloak[ing]...subversive opinions or practices and operations dangerous to the common weal”.⁴³ In contrast, Article 18 of the *ICCPR* says that the freedom to manifest religion including in speech, may only be limited by law when that law is objectively “necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.”⁵⁷ The difference is the *ICCPR*'s necessity requirement. Even if one argues that ‘necessity’ does not need to be interpreted objectively, it has to mean more than that the government just has to be reasonable when it interferes with religious freedom.

In Singapore beliefs and practices may be restrained by law whether that restraint is necessary or not. Though the Appellant's ‘clear and present danger to national security’ submission in *Chan Hiang Leng Colin v PP* may have suggested a bar higher than the

⁴⁰ In *Krygger v Williams* (1912) 15 CLR 366 the High Court denied that an adherent of the Jehovah's Witness faith was denied free exercise of religion by being compelled to undergo compulsory military training; and in *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth (Jehovah's Witnesses Case)* (1943) 67 CLR 116, the High Court denied that regulations passed to disestablish the Jehovah's Witness church in South Australia interfered with the free exercise of religion though the regulations were struck down on other grounds. ⁵¹ Blackshield and Williams (*Australian Constitutional Law & Theory*, Federation Press, 2014, 1174) say that Griffith CJ and Barton J “impatiently

dismissed the suggestion that s 116 was infringed” in the appeal in *Krygger* (above n50) and that their “grudging approach in *Krygger* was reinforced in the *Adelaide Company of Jehovah's Witnesses* case in 1943 (ibid). ⁵² *Church of The New Faith v Commissioner of PayRoll Tax (Vic)* (1983) 154 CLR 120.

⁴¹ *Kruger v Commonwealth (Stolen Generations Case)* (1997) 190 CLR 1.

⁴² Barwick CJ and Murphy J in *DOGS case* (1981) 146 CLR 559 (per Barwick CJ at 577, and per Murphy J at 622 and 632-634). ⁵⁵ Above n44.

⁴³ *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth (Jehovah's Witnesses Case)* (1943) 67 CLR 116, 149-150. ⁵⁷ Article 18(3).

necessity standard in the *ICCPR*, the Court's finding that religious practice or expression which runs counter to an undefined requirement of national security, falls below the international standard and undermines freedom generally. The same conclusion follows an analysis of the US and Australian jurisprudence. In the US, the idea that a neutral law that is generally applicable trumps any manifestation of religious liberty, neuters the international standard on two counts. First, it does not limit state intrusion into religious practice or expression to matters of "public safety, order, health, or morals or the fundamental rights and freedoms of others"; and secondly, it does not impose the necessity requirement under Article 18(3) of the *ICCPR*. The only legislation that is forbidden to the state in the US under the Supreme Court's interpretation of the Free Exercise clause in *Employment Division v Smith* is legislation that directly targets religious practice. It is difficult to accept that the US framers would have considered that finding protected the church from the state at all as seems to have been the original intent.

In Australia, Rich J's statement that "opinions or practices subversive of the common weal" may be legitimately restrained, may be worse because it is so pregnant with subjectivity and because it anticipates the regulation of mere opinion which is non-derogable under all of the international human rights instruments.

The additional subjectivity problem in Rich J's formulation is that it denies the existence of a fixed religious freedom standard in Australian constitutional law. The purpose of the *ICCPR*'s necessity limitation standard on the other hand, is to insist that freedom of conscience, belief and religion are foundational and may not be challenged on the basis that they are "subversive of the common weal" without formal proof. Rich J's analysis and the apparent unwillingness of the High Court to accept that s 116 at least implied a fixed religious freedom standard, is a part of the reason why Keith Mason has suggested that the section has become "a dead letter"⁴⁴ reflecting the views of Murphy J in the *DOGS* case,⁴⁵ though for different reasons.

Conclusion

And so I conclude that the protection intended for the free exercise of religion by international law does not yet exist in the United States, Australia or

Singapore. While all three countries provide a measure of protection for the free exercise of religion under their constitutions, in each case that protection allows the governments to abrogate that freedom any time they choose to do so. All of these countries theoretically have the legislative power to pass laws that provide the protection intended for the free exercise of religion under the *ICCPR*. In the US, the reason for the decision not to pass such legislation would appear to be that it seems futile after the Supreme Court struck down the last attempt to create such protection in *City of Boerne v Flores* even though Congress had unanimously passed the *Religious Freedom Restoration Act 1993*.⁶⁰ The recent election of Republican President Donald Trump with the power to restore a conservative majority to the Supreme Court, may encourage better legislative protection of free exercise of religion in the future.

In Australia, better protection of religious freedom is a matter of political willpower. Despite recommendations from the Human Rights and Equal Opportunity Commission in 1998 that such legislation is necessary,⁴⁶ members of the Commonwealth Parliament always fear that such legislation will see them lose their seats at the next election. At present, that is because religious freedom legislation would protect the unpopular Muslim minority and might also protect Christian interests above those of the gay and lesbian lobby that seeks the legalization of same sex marriage.

In Singapore, the government does not want to increase free exercise protection because it does not want to protect religious extremists who potentially threaten the nation's security.

All three countries have practical reasons not to improve the protection of religious freedom in a manner that accords with the *ICCPR* standards even though they have the power to pass laws that accord with the *ICCPR*, but they lack the faith to do so. If these three western nations cannot manifest faith in *ICCPR* standards and international law in general, there seems little hope for other countries where the dictates of personal liberty make human rights protection more essential.

⁴⁴ Keith Mason, *Constancy and Change: Moral and Religious Values in the Australian Legal System*, Federation Press, 1990, 118.

⁴⁵ *DOGS case* (1981) 146 CLR 559, 631 [38]. ⁶⁰ *City of Boerne v Flores* 521 US 507 (1997) where the *Religious Freedom Restoration Act 1993* was passed to reinstate the compelling interest test which was struck down by

the Supreme Court in *Employment Division v Smith* in 1990, was itself struck down.

⁴⁶ *Article 18, Freedom of religion and belief*, Human Rights and Equal Opportunity Commission, Australia, 1998.