



# DISCRIMINATION: ON RECOGNITION OF RIGHT TO CULTURE

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## I Introduction

It is a fundamental right of every person to enjoy their culture, customs, and religious forms of expression.<sup>1</sup> Indeed, the right to freely exercise religion is one of the few freedoms expressly guaranteed by the Australian Constitution.<sup>2</sup> Recognition and protection of cultural rights are essential to the enjoyment of individual rights and the achievement of social justice.<sup>3</sup>

In a multicultural country like Australia, the right to culture can be a controversial issue. This article argues that in a liberal democratic society, a multicultural population's right to culture should be respected and this respect ought not infringe on the human and cultural rights of any other group. This position will be addressed with respect to three key issues:

- 1 The place of Aboriginal customary laws and cultural practices in the process of criminal sentencing;
- 2 Freedom of expression – in particular, the right for Muslim women to wear a burqa;
- 3 The impact of racial anti-vilification laws and the limits they impose on the freedom of speech.

## II Criminal sentencing

### How does Australian law treat Aboriginal and Torres Strait Islander people's right to culture?

Aboriginal and Torres Strait Islander peoples have unique cultural rights, and as the first peoples of Australia, they are essential to our national character.<sup>4</sup>

In the past, indigenous law and culture have been relevant as a mitigating circumstance<sup>5</sup> in sentencing, as reflected in a number of Northern Territory decisions. For example, where an offender believed, based on 'the old people's ways', that setting fire to a house was the only way to set a dead friend's spirit at peace, the Court showed leniency.<sup>6</sup> In *R v GJ*,<sup>7</sup> a man who anally raped a 14-year-old girl because she had been promised to him in marriage was given



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only a suspended sentence upon serving a one-month term of imprisonment. The case resulted in amendment of the *Crimes Act 1914*<sup>8</sup> to prevent judges from considering Aboriginal customary law to excuse, justify, authorise or

impact on the seriousness of criminal behaviour in sentencing. This move has been seen to impair Australian indigenous people's right to culture.<sup>9</sup>

## Role of right to culture

### **Should criminal sentencing take into account the customary traditions and cultural practices of Aboriginal and Torres Strait Islander peoples?**

Australian legal theorists have argued that the removal of consideration for aboriginal customary law in sentencing removed one of the few interfaces between aboriginal customary law and the western legal system in Australia.<sup>10</sup> Tom Calma, the former Aboriginal and Torres Strait Islander Social Justice Commissioner, made the point that recognition of Aboriginal customary law is an important form of empowerment for the Indigenous community.<sup>11</sup> Removing consideration of customary law further alienates aboriginal people from the Australian legal system. This has significant implications considering that the rate of imprisonment of Aboriginal and Torres Strait Islanders was 14 times higher than for non-Indigenous Australians at 30 June 2011.<sup>12</sup>

Conversely, court leniency based on cultural considerations has resulted in horrendous violation of basic human rights. Past decisions where the cultural background of the offender have been considered by the court appear to have shown 'sensitivity' towards Aboriginal men in matters of violence against women and children.<sup>13</sup> In *R v GJ*, Chief Justice Martin makes the assumption that 'traditional culture' sanctioned violence.<sup>14</sup> Such matters make it difficult to justify customary law and cultural practice excusing criminal behaviour.

### **Laws that deal with criminal sentencing of indigenous peoples**

An effective approach, recommended by the Australian Human Rights Commission, is that the *Crimes Act*<sup>15</sup> be amended so that Aboriginal customary law is only excluded from sen-

tencing decisions that involve violence or sexual abuse. This would shift the emphasis to inclusion as opposed to exclusion of Aboriginal customary law while maintaining protection of human rights.<sup>16</sup>

In my view, this is a good example of legal practice that appropriately deals with the criminal sentencing of Indigenous peoples. It should endorse the prevention of discrimination, protect the sacred rights of their Aboriginal culture and customs, and extend to the sensibilities of the believers. However, this should not affect sentencing decisions that concern any denial or violation of other human rights and fundamental freedoms, such as the right to adequate standard of domestic living and safety from violence.

Laws that allow courts to take into account cultural practice as a reason for lessening the seriousness of criminal behaviour that infringes on these rights are ineffective.

## III Freedom of expression – the burqa

### **Should our law recognise the right to culture for Muslims?**

The Muslim religion holds that it is important for believers to wear clothing that communicates modesty and reserve.<sup>17</sup> Muslims differ on the necessity of the burqa: in some countries women are required to wear a burqa when in public, in others the burqa is banned in places such as schools.<sup>18</sup>

The question to be addressed is: does affording women the right to culture demonstrate Australia's liberal democratic culture of freedom or are we sending the message that it is acceptable for a woman's identity to be removed, potentially limiting rights and responsibilities as an Australian citizen.<sup>19</sup>

In the Carnita Matthews case, a magistrate found a woman guilty of making a deliberately false statement and sentenced her to six months' jail. Ms Matthews appealed, saying there was no proof the person in the burqa

who made the statement was her. The judge found it was impossible to confirm the defendant's identity as the same as the person who committed the crime, showcasing that the custom impacted on the effective operation of the law.<sup>20</sup> In my view, the laws of the state should be implemented in a culturally appropriate way, by for example, having the woman's identity confirmed by a female officer.

## Role of right to culture

### Should Australian law ban the wearing of burqas or would this undermine the right to culture freedom?

Cases such as Mathews, can lead to significant political reactions like the introduction of a bill to ban the burqa. Given that the Australian Constitution restricts the Commonwealth from making laws that prohibit the free exercise of religion<sup>21</sup> a number of legal hurdles would be involved in the passage of such a bill. Nevertheless, Prime Minister Julia Gillard and Opposition Leader Tony Abbott agree that the burqa is confronting. Recently, Prime Minister Gillard stated that "we want to make sure we're teaching...in our societies generally that men and women are equal."<sup>22</sup>

Such views may create anxieties and lead Australians to, question whether recognising rights to expression of culture requires the community to tolerate traditional practices of other cultures even if they violate the principles of individual rights and sexual equality guaranteed in the Constitution.<sup>23</sup> Further, a philosophical discussion has led many critics to worry that the logic of multiculturalism could lead to other practices such as performing clitorectomies<sup>24</sup> on young girls, compulsorily arranged marriages, or talaq divorces.<sup>25</sup>

### Settling on a law that can properly address this disagreement

I tend to agree with Prime Minister Gillard when she stated that: "we should be punishing the crime rather than banning an article of clothing."<sup>26</sup> Banning the burqa may not necessarily



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eliminate the gender-based crimes Australian law seeks to prevent. Rather, a ban may only further marginalise and stigmatise the women concerned, sacrificing fundamental rights and freedoms in the process.<sup>27</sup>

An effective law would enforce punishment against people who discriminate against women who wear a burqa. For example, the Equal Employment Opportunity Commission in the US specifically states that refusing to hire someone because of a concern that customers or co-workers may be “uncomfortable” with the hijab, is illegal.<sup>28</sup> Many states and municipalities have additional laws protecting employees from discrimination, threats, and harassment that relate to the burqa or hijab, and I would tend to reason that such laws will adequately deal with the multicultural issues Muslim women face in Australia.

#### IV racial anti-vilification laws

##### Should our law recognise a right to culture through racial anti-vilification laws?

Racial anti-vilification laws prohibit acts that could incite or encourage hatred, serious contempt, or severe ridicule towards people because of their race.<sup>29</sup>

Can culture which limits the freedom of speech be justified in a modern liberal state? Can we justify protecting people from all kinds of racial vilification or blasphemy? To answer, it is relevant to discuss the judgment in *Catch the Fire v Islamic Council*<sup>30</sup> Two pastors who conducted a seminar appealed a decision that they had engaged in conduct to incite hatred against and contempt for the Islamic faith as outlined in Section 8 of the *Racial and Religious Tolerance (RRT) Act 2001*.<sup>31</sup> In the Court of Appeal, Judge of Appeal Nettle stated that the Act cannot and does not purport to mandate religious tolerance – people are free to attempt to persuade other people to adopt their point of view.<sup>32</sup> Meanwhile, Judge of Appeal Neville turned to the meaning of s18D of the *Racial Discrimination Act*<sup>33</sup> (RDA), quoting Justice French in *Bropho*<sup>34</sup>: “[s18D] protects freedom of speech and expression in

areas defined in...the section”, so long as it is exercised in good faith.<sup>35</sup>

#### Role of right to culture

##### Should there be racial anti-vilification laws that limit the freedom of speech or should the human right of freedom of speech prevail?

As per Judge of Appeal Neave, people should be free to attempt to persuade people of their point of view, just as people are free to follow the religion of their choice. The seminars conducted by the appellants should be discharged of offensive behaviour under s18C of the RDA as they fell under s18D(c): “an expression of a genuine belief held by the person making the comment”,<sup>36</sup> and were “said or done reasonably and in good faith.”<sup>37</sup>

#### Law that deals with racial anti-vilification

It is suggested that such a law should aim to protect religious groups from offence as well as promote the importance of free speech in the formation of public opinion. This can be justified somewhat by Judge of Appeal Neave’s comment that the legislation in question<sup>38</sup>:

“aims to strike a balance between protecting freedom of speech and protecting people from vilification ...It would be inconsistent with this aim to interpret the legislation so as to make it impossible for people to proselytise for their own faith or to criticise the religious beliefs of others.”<sup>39</sup>

Legislation with unclear provisions amounts to ineffective law, as it fails to adequately monitor anti-vilification. In my view, litigation in *Catch the Fire*<sup>40</sup> revealed the inadequacies of the legislation. The vagueness of the provisions made it easy to be caught under them, which was the source of a lengthy, long-winded judgment with<sup>41</sup> varying reasoning by the three judges. To lessen the ambiguity of the legislation, it is suggested the provisions make clear what exactly can

constitute “incited hatred”, “serious contempt” “revulsion”, and “severe ridicule”.

## V Conclusion

This essay considered whether laws that promote or protect cultures can be justified in a modern liberal State such as Australia. Such laws were discussed using three examples.

This essay asserts that a right to cultures should be recognised, but the extent to which such a right plays a role in resolving cultural disputes is limited. Cultural rights should play a role that promotes equality to all members of society,

and should not conflict with other human rights. In summary, it was contended that Aboriginal customary law should be preserved, but should be given less weight in matters concerning violence or sexual abuse which clearly encroach on human rights. Second, that burqas should be allowed as a form of expression (despite perceptions that they oppose sexual equality and can result in inefficiency of the law) providing issues are addressed in a culturally sensitive, yet effective, manner. And finally that laws should not offer complete protection from racial anti-vilification in all cases where it restricts the freedom for people to express their opinions.

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