Special Topic Forum: Indigenous Spirituality and the Law

The Voice and Religious Freedom

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I INTRODUCTION

Extensive scholarly and media attention has been directed toward the impending referendum for an Aboriginal and Torres Strait Islander Voice to Parliament ('Voice'). The Voice is a referendum on a proposed constitutional amendment to create an advisory body comprised of Indigenous Australians which can make advisory 'representations' on laws that impact the Indigenous community. Twenty-five years after the High Court's landmark decision in the case of *Kruger v The Commonwealth* ('*Kruger*'),[1] the upcoming referendum concerning the Voice allows us to pause and reconsider how the judicial interpretation of s 116 of the Australian Constitution impacts the rights and protections afforded to Indigenous Australians. Through this article, I will demonstrate that the doctrine of s 116 does not confer on Australian citizens, including Indigenous citizens, the right to freedom of religion in the same way as other countries. Accordingly, this paper will argue that the Voice could provide an important political mechanism to help offset some of the analytical infirmities of the High Court's interpretive approach to s 116 and help better protect Indigenous religious, cultural, and spiritual beliefs. Notably, this article will suggest that the Voice could achieve this by disaggregating the protection of religious freedom into the political process.[2]

II HIGHLIGHTING THE SHORTCOMINGS OF THE JUDICIAL INTERPRETATION OF S 116

The heading of s 116 is 'Commonwealth Not to Legislate in Respect of Religion.'[3] The heading clarifies the purpose of s 116, namely that s 116 was intended to be a safeguard against the passing of religious laws by the Commonwealth. However, the section exclusively applies to the Commonwealth and not to the States. Therefore, the functions of the States, which include areas such as education, health, and aspects of welfare, are not limited or constrained by s 116. Despite these limitations, on its face, s 116 of the Australian Constitution imposes significant limits on the Commonwealth. Section 116 states that:

> The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.[4]

The text of s 116 separates church from state through an exhaustive set of four limitations on the Commonwealth. Section 116 prevents the Commonwealth from establishing a state church, protects the freedom of religion of citizens, prevents the Commonwealth from imposing a

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[1] (1997) 190 CLR 1 ('*Kruger*').

[2] Cecile Laborde, *Liberalism's Religion* (Harvard University Press, 2017).

[3] *Australian Constitution* s 116.

[4] Ibid.

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religious observance on citizens, and prohibits the Commonwealth from creating a religious test as a qualification for public office.[5] However, as I will discuss later in this article, the protection afforded by the section is not exhaustive and resembles a narrow limitation on government power more than a right.

The Court imposes a two-stage limitation on the 'free exercise clause'. The first limitation is that for any statute to be struck down under s 116, it must have the express intention of violating the free exercise clause.[6] In other words, only a law with the express 'purpose of achieving an object which s 116 forbids' violates the provision.[7] If the Court determines that a law has the purpose of violating the free exercise clause, it will then consider whether the law amounts to an undue infringement of religious freedom.[8] To determine whether a law unduly infringes religious freedom, the Court engages in what may be a form of proportionality analysis.[9]

In the case of *Kruger,* by drawing on previous precedent, the Court affirmed the purposive test.[10] In this case, the applicants challenged the *Aboriginals Ordinance 1918* (NT), which was applicable only in the Northern Territory. The Ordinance authorised the removal of Indigenous children for placement in foster care.[11] The Ordinance was enacted under s 122 of the Australian Constitution, which gives the Commonwealth government 'power to make laws for the government of territories.'[12] Even though the Ordinance was repealed, if the petitioners could prove 'contemporaneous illegality' the *Ordinance* would provide 'no authority for the actions taken under it'.[13] A ruling in favour of the petitioners would therefore have opened the door for legal actions against those who acted under the authority of the Ordinance. The petitioners challenged the law on numerous grounds, including s 116. The petitioners claimed that the Ordinance prohibited the free exercise of their Indigenous religion by separating them from the land with which they had a spiritual connection.[14] The Court unanimously held that the Ordinance did not violate s 116 of the Constitution.[15] However, there was significant diversity in each judge's reasoning for their decision.[16] Justice Toohey with whom Brennan CJ and Gummow J agreed, engaged with the purpose of the law.[17]

Justice Toohey held that to determine the purpose of a law for s 116 claims, the Court must look at law-making and not the administration of the law.[18] Accordingly, an anti-religious purpose must be evidenced from a reading of the statute and not its application.[19] Additionally, Toohey J sided with the position taken by the Court in *Krygger* and held that to show that a law was in contravention of s 116, the purpose of the law must directly operate to prohibit the

[5] See Luke Beck, 'The Constitutional Prohibition on Imposing Religious Observances' (2017) 41(2) *Melbourne University Law Review* 493.
[6] Carolyn Evans, *The Legal Protection of Religious Freedom in Australia* (Federation Press, 2012).
[7] *Kruger* (n 1) 40.
[8] *Adelaide Company of Jehovah's Witnesses Incorporated v The Commonwealth of Australia* (1943) 67 CLR 116, 131.
[9] Evans (n 7) 92.
[10] *Kruger* (n 1).
[11] Ibid.
[12] *Australian Constitution* s 122.
[13] Sarah Joseph, '*Kruger v the Commonwealth* and the Stolen Generations' (1998) 24 *Monash Law Review* 486, 487.
[14] Ibid.
[15] Ibid.
[16] Ibid.
[17] Evans (n 6) 91.
[18] Joseph (n 13) 488.
[19] Kruger (n 1) 86.

right to free exercise.[20] In this case, Toohey J determined that the purpose of the law did not directly operate to prohibit free exercise and, accordingly, held that there was no violation of s 116.

The limitations imposed on the application of s 116 make it an ineffective provision for rights protection. This is apparent when the doctrine of s 116 is compared to the US Supreme Court's jurisprudence on the Religion Clauses of the First Amendment. While the Australian and American constitutions share many textual similarities concerning the constitutional regulation and protection of religion, the US Supreme Court has held that the First Amendment regulates any state action that affects religion, including policy that does not expressly restrict religious freedom.[21] In other words, the United States Constitution protects religious citizens from the unfair effects of laws regardless of the legislature's intent. In order to protect the religious freedom of citizens from the disparate impact of laws, the First Amendment of the United States Constitution further provides avenues for religious communities to claim conscientious objections to generally applicable laws, and to assert their right to autonomy concerning the internal functioning of their church.[22] This makes the provision significantly more effective than s 116. The narrow protection afforded by s 116 means that it cannot operate to restrict state action effectively, and there are numerous avenues for the government to curtail religious freedom.

III Concluding Remarks about the Voice and Protecting Indigenous Spirituality

While the scope of protection afforded by s 116 is narrow, the High Court defines religion broadly for the purpose of s 116. Accordingly, Indigenous practices, sensibilities, and belief structures would qualify as being religious for the purpose of the Australian Constitution. This position was clearly stated in the case of *Kruger*. An analytical assessment of the High Court's cases also yields the same conclusion. In the case of the *Church of the New Faith v Commissioner of Pay-roll Tax (Vic)*,[23] which concerned whether Scientology was a religion, Acting Chief Justice Mason and Justice Brennan rejected the trial judge's decision, which held that Scientology was a 'sham religion'.[24] Instead, Justices Mason and Brennan adopted a wide definition of religion which included within it non-theistic beliefs.[25] Justices Mason and Brennan held that religion is: 'First, belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct to give effect to that belief, though canons of conduct which offend against the ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion.'[26] While the definition of religion is subject to

[20] Ibid 86.
[21] See Dan Meagher and Benjamin Saunders 'Taking Seriously the Free Exercise of Religion under the Australian Constitution' (2021) 43(3) *Sydney Law Review* 287; Alex Deagon, 'The Influence of Secularism in Free Exercise Jurisprudence: Contrasting US and Australian Interpretations' (2020) 13(1) *International Journal for Religious Freedom* 123.
[22] For a judicial account of religious autonomy in the United States Constitution, see generally *Kedroff v St. Nicholas Cathedral* 344 US 94 (1952). See also Alex Deagon, 'The Religious Questions Doctrine: Addressing (Secular) Judicial Incompetence' (2020) 47(1) *Monash University Law Review* 60. For a detailed account of conscientious exemptions, see generally Stijn Smet, 'Conscientious Objection through the Contrasting Lenses of Tolerance and Respect' (2019) 8(1) *Oxford Journal of Law and Religion* 93.
[23] (1983) CLR 120.
[24] Ibid 141.
[25] Ibid 136.
[26] Ibid 136.

some variation in the judgments, the majority of judges concur that religion includes a broad range of theistic, non-theistic, and atheistic beliefs.

Accordingly, in the case of *Kruger*, it was clarified that Indigenous practices and spiritual beliefs qualify as religious for the purpose of rights protection. However, as demonstrated earlier in this article, regardless of the breadth of protection afforded by s 116, the narrow interpretation of the provision means that it is very unlikely that the Constitution can limit laws which impact Indigenous belief structures. Unlike in other constitutions, notably the European legal order and US constitutional jurisprudence, Indigenous communities cannot rely on freedom of religion to provide an exemption to the effect of a generally applicable law that restricts their religious freedom.[27] Due to the nature of religious sensibilities and their corresponding need for special accommodations, this function is critical for religious minorities who are underrepresented in the political process.

Despite the ineffective nature of s 116, the Voice provides an avenue for Indigenous communities to assert their objections, clarifications, and requests to Parliament more effectively. The Voice could have the impact of disaggregating the protection of religious freedom into the political process.

Cecile Laborde has extensively analysed the merits of disaggregating religious freedom. Laborde argues that due to the analytical difficulties in protecting religious freedom, the right is better protected by several different rights instead of being protected uniquely by one purpose-built provision.[28] Laborde argues that religion can be split into seven constituent features: '1. Religion as a conception of the good life; 2. Religion as a conscientious moral obligation; 3. Religion as a key feature of identity; 4. Religion as a mode of human association; 5. Religion as a vulnerable class; 6. Religion as a totalising institution; 7. Religion as inaccessible doctrine.'[29] Once the key features of the concept of religion are explained, Laborde argues that each feature can be individually protected under different constitutional provisions.[30] Laborde then proceeds to demonstrate how some of the features of religion can be accurately protected by freedom of speech, freedom of association, non-discrimination laws, and the democratic process.[31] While the disaggregation approach has not been tested practically, it has received a lot of theoretical attention. Speaking to the merits of this approach, Winnifred Sullivan observes that:

> Forsaking religious freedom as a legally enforced right might enable greater equality among persons and greater clarity and self-determination for religious individuals and communities. Such a change would end discrimination against those who do not self-identify as religious or whose religion is disfavoured.[32]

When applying the framework of disaggregation to Australia, it is important to note that due to the absence of a Bill of Rights in the Australian Constitution, any disaggregation of religious freedom must happen through the political process.

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[27] Smet (n 22).
[28] Cecile Laborde, 'Religion in the Law: The Disaggregation Approach' (2015) 34(6) *Law and Philosophy* 581. See also James Nickel, 'Who Needs Freedom of Religion?' (2005) 76(4) *University of Colorado Law Review* 941, 964.
[29] Laborde, 'Religion in the Law: The Disaggregation Approach' (n 28) 594–5.
[30] Ibid.
[31] Ibid.
[32] Winnifred Sullivan, *The Impossibility of Religious Freedom* (Princeton University Press 2005) 28.

The Voice provides an avenue to disaggregate the protection of religious freedom of Indigenous Australians into the political process. Through its 'representations', the newly formed constitutional body could advocate for some Indigenous practices and beliefs that qualify as religious to be protected more effectively through legislation. This form of political dialogue is a critical component of preserving the principle of representative democracy, which is a central part of the values of the Australian Constitution.[33] Cheryl Saunders notes that the significance of representative democracy lies in its capacity to act as 'a foundation for an approach to the protection of rights that so far has relied almost entirely on the allocation of power between institutions of government, rather than on rights instruments that limit what the institutions collectively may do …'[34]

As such, in certain situations where minority communities, due to their unique cultural and religious heritage, exist outside the standard vocabulary of political discourse, special accommodations can help highlight their needs more effectively in political decision-making.[35] The Voice provides this avenue to Indigenous Australians. It will go a long way in ensuring that their right to religious freedom, amongst other rights, is better protected under the system of representative democracy enshrined in the Constitution.

[33] Cheryl Saunders, *The Australian Constitution: A Contextual Analysis* (Cambridge University Press, 2010).
[34] Ibid 110.
[35] Ibid 113.