

RELIGIOUS FREEDOM AND MUSLIM TERRORISM– A RIGHTS-BASED APPROACH

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The High Court of Australia has consistently recognised that the right to religious freedom is not absolute in this country. That being so, not every interference with religion is a breach of section 116 of the Constitution, only those that are considered an “undue infringement of religious freedom”. As former Chief Justice Anthony Mason and Justice Gerard Brennan pointed out, “general laws to preserve and protect society are not defeated by a plea of religious obligation to breach them”.



Religious freedom is therefore a properly qualified freedom. This is the understanding that in 1898 led many of the Australian framers to resist any idea of absolute freedom of religion as posing unacceptable risks to the community. During the convention debates that ultimately led to the draft of the Constitution, there was a suggestion that the federal Parliament should have power to prohibit religious “practices which have been regarded by large numbers of people as essentially evil and wicked”. Edward Braddon, though eventually supporting Henry Higgins’ proposal that ultimately led to the final wording in section 116, had initially sought to amend it by adding the words: “But shall prevent the performance of any such religious rites as are of a cruel and demoralising character or contrary to the law of the Commonwealth”. Similarly, Edmund Barton, who hesitated over Higgins’ proposal but finally voted against it, was troubled by the difficulty of drafting a satisfactory formula to ensure that the constitutional protection would be limited to practices that are not inhuman or barbaric. As Barton pointed out:

The trouble arises when you try to insert a proviso modifying this prohibition. For instance, if it were desired to prevent the application of the clause to any fiendish or demoralising rite, that might be done by inserting the words “so long as these observances are inconsistent with the criminal laws of the state”, [but even] if there were no criminal law in existence at the time with which these observances are inconsistent, it would be possible for the state to pass such a law, and so, to use a common expression, eucr the whole business.

Against the background of qualified affirmation of religious freedom, Justice Latham, in the *Jehovah’s Witnesses* case during the Second World War, turned to a catalogue of the evils and horrors sometimes practised in the name of religion that should not be tolerated at all. Latham fell back on a variation of the classical liberal formula which permits limitations on freedom only in the interests of freedom itself. The particular version of this formula quoted in Latham’s judgment was taken directly from John Stuart Mill’s essay *On Liberty*: “The sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any or their number, is self-protection”. This statement in Mill’s book was taken in the sense of society’s self-preservation. But in fact, as law professor Tony Blackshield explains:

What [Latham] seemed rather to have in mind was the Kantian version, according to which freedom may be restricted only so far as is necessary to ensure an equal freedom for others, or to ensure the underlying preconditions of freedom for all.

Blackshield’s opinion is consistent with Latham’s argument:

The protection of any form of liberty as a social right within a society necessarily involves the continued existence of that society as a society. Otherwise the protection of liberty would be meaningless and ineffective. It is consistent with the maintenance of religious liberty for the State to restrain actions and courses of conduct which are inconsistent with the maintenance of civil government or prejudicial to the continued existence of the community.

The freedom of religion guaranteed by section 116 is freedom within a democratic society based on the enjoyment of fundamental rights and freedoms. Consistently with that philosophy – indeed, in order to secure their continued enjoyment – every democratic society is perfectly entitled to defend itself not only against subversive religious activity certainly in wartime and, in my strongest opinion, also in time of peace. Accordingly, any steps to be taken to outlaw extremist teaching that incites religious violence and disregard of the rule of law are entirely compatible with the freedom of exercise of religion under section 116. Indeed, the whole High Court has agreed with these conclusions in the past, and has rested them on a broadly similar conception of religious freedom that must remain “subject to powers and restrictions of government essential to the preservation of the community” (Justice Rich) or “subject to [such] limitations … as are reasonably necessary for the protection of the community and in the interests of the social order” (Justice Starke).

This is particularly relevant in order to understand the present context of religious extremism. In a case before the Federal Court a couple of years ago, the imam of a Lebanese-Australian mosque was refused a continuation of his temporary permit visa because he had openly encouraged extremism and violence against non-Muslims. The imam and several other members of the mosque challenged the deportation order, arguing in part that it violated Section 116. The Full Court of the Federal Court correctly rejected this argument.

Turning to the landmark *Jehovah’s Witnesses* case, the High Court upheld government regulations that purported to dissolve a religious organisation because of the detrimental effects that such preaching was said to have on morale. These regulations were challenged and the court held (three to two) that the regulations were constitutionally valid and that the religious organisation could be dissolved, at least for the duration of the war. The judgment was based in part on an interpretation of the defence power of the Commonwealth, demonstrating the possibility of reducing religious freedom during times of national emergency and the extent to which provisions protecting the religious groups can be read down by the courts, especially when religious extremism is involved.

When it comes to religious extremism, few organisations compare with Hizb ut-Tahrir. It describes itself as a global political party whose ultimate goal is to create a caliphate to rule all Muslims around the world according to sharia law.

A Hizb ut-Tahrir spokesman, Mr Huthman Badar, claims that Muslims should not have to submit to so-called “forced assimilation” such as pledging support for human rights and democratic values in the citizenship oath or singing the national anthem. Mr Badar believes these things force Muslims to integrate into society, and that the values of Islam are not negotiable, even if they are incompatible with Australian values, laws or culture. Although former Prime Minister Tony Abbott promised to “crack down” on Hizb ut-Tahrir, which is banned in some countries, it has not been proscribed, and the Turnbull government appears to side with those in the security establishment who argue it is best to keep it legal. This is so, even after Hizb ut-Tahrir released a statement declaring that Australian Muslims should refuse to partake in any of the government’s counter-terrorism programs and initiatives, since it believes that cooperation with spy agencies in their fight against terrorism “is outright *haram*” (forbidden).

Orthodox Islamic teaching informs that the *umma* (the Muslim community) cannot be understood as a minority community within a modern state. Rather, the whole of humanity should follow the way of Islam and become part of *Dar-ul-Islam* (the house of Islam) that will ultimately triumph over the *Dar-ul-Harb* (the house of conflict or war). Neither of these “houses” is understood in terms of nationality or ethnicity. Because the *Dar-ul-Islam* is a universal community that must eventually encompass all the earthly governments, to have any legitimacy governments ought to show “their submission to Allah by contributing to the advance of Islam, by showing respect for the higher authority of Shari’ā”.

According to Dr Tariq Ramadan, a well-known Muslim scholar and grandson of Hassan al Banna, who founded the Muslim Brotherhood in Egypt in 1928, sharia “touches all the aspects of existence, from the intimately personal and spiritual, through to the management of interpersonal relations at the societal level”. Such law does not allow for the privatisation of faith and for leaving public governance in the hands of “secular authorities”, because sharia comprises an all-encompassing “moral and pastoral theology and ethics, high spiritual aspiration, and detailed ritualistic and formal observance, it encompasses all aspects of public and private law, hygiene, and even courtesy and good manners”.

In this sense, it is reasonable to assume that a committed Muslim who migrates to a Western society might have no intention of assimilating into the host society. Professing “an all-encompassing way of life in which the whole of reality falls under the sovereignty of Allah”, such an immigrant will demand that “the host society must change in line with their beliefs, or grant them separate rights and privileges”. He may even support the Islamisation of the host society through a process that might range from the *budna* (a temporary truce) to identifying the occupied territory as being either a *Dar-ul-Suh* (the abode of peace by agreement) or a *Dar-ul-Ahb* (the abode of covenanted treaty). Nonetheless, “it is still assumed that these territories and peoples are in tributary relationship to the Muslims”. As noted by Pakistani-born British Anglican bishop Dr Michael Nazir-Ali:

The theory remains that Muslims should either withdraw from the Dar-ul-Harb or, through jihad of one kind or another, seek to turn it into the Dar-ul-Islam ... The classical consensus seems to be that Muslims should not remain in the Dar-ul-Harb. Where exceptions are made, it is demanded, for example, that they should be able to live as distinct and separate communities, and that they should be able to have their own law, their own judges, and even their own governors. Further, they must not contribute to the wealth and strength of a non-Muslim polity and should not serve in the military, especially against Muslims.

One of the key questions facing Western societies is how the Muslim community will adapt to living as minority communities in non-Muslim polities. Most Australian Muslims are not radical Islamists trying to impose a totalitarian version of their faith, but are law-abiding citizens who are just trying to live their lives in peace. By definition, of course, “moderate Muslims” do not subscribe to the radical Islamist agenda. It is a pity, however, that such people, perhaps out of fear of retaliation or because of sheer passivity, comprise a silent majority of the Muslim community. Christopher Caldwell notes that public condemnation of terrorism by the Muslim community in Western societies “has never been frequent or full-throated enough to assure their fellow citizens”. According to law professors Rex Ahdar and Nicholas Aroney, since September 11, 2001,

governments eagerly awaiting firm denunciations by Muslim community spokesmen of Al-Qaeda terrorist attacks have been consistently disappointed The extent to which this silence represents tacit acquiescence and support for the radicals remains a moot point.

Dr Abdullah Saeed may explain why this is occurring. Dr Saeed is the Sultan of Oman professor of Arabic and Islamic Studies at the University of Melbourne, and he argues that, broadly speaking, Australian Muslim views fall into three different categories. First, there are those Muslims who are radical Islamists and so they completely reject any compliance with the law of the land, reasoning that “a Muslim cannot be bound by a national constitution that allows interest, alcohol, and [any] other behaviour which contradicts Islamic teachings”. Second, there are those who are “undecided as to whether they want to be full members of Western societies”. Such people are reluctant to recognise any law that violates sharia. Finally, there are Muslims who seem quite happy to live in Australia because they think the legal system in this country is already “Islamic” enough, insofar as it accepts basic Islamic notions of justice and morality, and it allows the Muslim community to exercise their religious duties in accordance to Islamic law.

Dr Saeed believes that most Muslims in Australia fall into the third category, that is, they agree to respect Australia’s “secular law” and think it can be tolerated “provided ... that the law of the land supports [Islamic] notions of justice ... and allows Muslims religious freedom to practise their fundamental beliefs”. The media and politicians also refer to such people as “moderate Muslims”. Nonetheless, as Daniel Pipes, a well-known expert on Islamist ideology and President of the Middle East Forum, points out:

Muslims present a disproportionately large source of problems, as becomes clear when they are compared with Hindu immigrants, who are roughly the same in number but generally fit quietly into the West. Violence is the headline topic relating to Muslims, whether it’s large-scale plots (Paris) or sudden jihad syndrome lone wolves (San Bernardino), but violence is hardly the whole problem. Muslim hostility towards non-Muslims takes many other forms such as teaching Islamic supremacism in mosques, spewing anti-Semitism in the streets and threatening anyone who dares to publicly criticise Islam. Issues concerning women include female genital

mutilation, honour killings, polygyny and forced marriages. Islamic mores lead to strong antipathies against seeing -eye dogs, mixed swimming pools, and homosexuals.

Pipes explains that, to deal with Muslim immigration in a responsible manner, Islamists should be legally prohibited from entering Western countries. In Pipe's opinion, Muslims who embrace the Islamist ideology should not be allowed to immigrate because they seek to apply Islamic law, oppress women, and establish a worldwide caliphate. They make up, he says, about 10 to 15 per cent of the Muslim population. According to him, countries like Australia "should engage in serious research into all would-be visitors and immigrants, not the pro-forma review that prevails these days". Doing so, Pipes concludes, "requires money and time as well as creative inquiries to smoke out ideological proclivities, but each person entering the country must be checked to make sure no Islamists are allowed in at all, even for brief visits".

The escalation of global tensions and, in particular, increasing tensions in the relationships between Muslim and non-Muslim Australians may eventually force the Commonwealth to face Islamist teachings more squarely and to make the decision to ban the immigration of Islamists. There is indeed a greater need for Australian governments, federal and state, to prioritise counter-terrorist policy and, one would hope, to make this a bipartisan effort. And if it eventually becomes less and less likely that the radical actions of this faction within the Muslim faith can hardly be prevented because of the intrinsic nature of such a religious doctrine, probably the best way to reduce the risk of terrorism is by further tightening Australia's immigration policy. Of course, this would not be agreed to by the usual suspects of the radical Left.

The unspeakable terror in places as varied as London, Nice, Orlando and Sydney underlines the problem that no matter how small the percentage of radical Muslims, we can hardly tell who they are among the Muslims in our countries. Remarkably, of the twenty-one men already arrested and jailed in this country for terrorist-related activities, twelve were born overseas. Seven more were born in Australia to Lebanese families. What is more, the past three successful terrorist attacks on Australia's soil – the Lindt Café siege, the shootings of police accountant Curtis Cheng, and the stabbing of two police in Melbourne – were all carried out by Muslim immigrants who had successfully applied for refugee status. Islamic State's most influential recruiter in Australia, Muhammad Ali Baryalei, was a Muslim refugee that the government allowed to stay in the country.

"The problem is that we do not really know who to trust among a group of immigrant people who largely despise our democracy, culture and laws, and who do not understand the principle of "separation of powers". As a matter of national security, John Stone, a former senior public servant and senator, recommends that the federal government "should reduce, to the point of virtually halting, further Muslim immigrant inflow". As he points out, "we are under no obligation to allow into Australia people who are likely to form a distinct and alien group here". Here it is worth reminding the words of the late Sir Harry Gibbs, formerly Chief Justice of the High Court of Australia:

While it would be grossly offensive to modern standards for a state to discriminate against any of its own citizens on the grounds of race, a state is entitled to prevent the immigration of persons whose culture is such that they are unlikely readily to integrate into society, or at least to ensure that persons of that kind do not enter the country in such numbers that they will be likely to form a distinct and alien section of society, with the resulting problems that we have seen in the United Kingdom.

In the United Kingdom, a study commissioned by Policy Exchange reveals that four out of ten young British Muslims wish to live under sharia law. In answer to the question, "Do you think the bombing attacks were justified or not?", some 6 per cent regarded them as "on balance" justified, while another 6 per cent avoided the issue, responding "Don't know". Further, in answer to the question, "Do you personally have any sympathy with the feelings and motives of those who carried out the attacks?", 24 per cent answered affirmatively, with more than half of them expressing "a lot" of sympathy. Again, another 6 per cent took refuge in "Don't know". Finally, 13 per cent expressed open sympathy to terrorist groups such as Hamas and Hezbollah. In answer to the question, "How loyal would you say you personally feel towards Britain?", 16 per cent felt "not at all loyal" or "not very loyal". According to Munira Mirza, one of the academics conducting the survey:

The emergence of a strong Muslim identity in Britain is, in part, a result of multicultural policies implemented since the 1980s which have emphasised difference at the expense of shared national identity and divided people along ethnic, religious and cultural lines.

Australia's Muslim community, it is claimed, is predominantly of a more moderate variety. Our Muslim community, it is claimed, has a majority from Asian countries such as Malaysia and Indonesia, where the Muslim faith is apparently exercised with moderation. But the problem with such an argument is that, before the attack on the Lindt Café in Martin Place, the closest threat seemed actually to come from Indonesia's Jemaah Islamiyah, which was implicated in the Bali bombings. The group's spiritual leader, Abu Bakar Ba'asyr, visited Australian nine times from the mid-1990s, "with the apparent object of creating a local network".

Furthermore, a revealing 2004 survey by the *Jakarta Post* and Associated Press has shown significant support for radical Islam in Indonesia. It found, among other things, that although "59 per cent of respondents disagreed with the attacks" carried out in Bali, "16 per cent supported those attacks" and a further 25 per cent "did not have an opinion". Further, the survey revealed that a large majority of Indonesians "support the establishment of laws based on the Koran". Since Indonesia's population is around 250 million, of whom around 200 million are Muslims, it is therefore possible to argue that apparently about 30 million Indonesians support the Bali bombings.

Australia has a population of approximately 24 million and around 500,000 of its people are Muslim. The number of Muslims in this country has risen dramatically over the last thirty years. Over 300,000 of them normally use Arabic at home. While security measures are not specifically directed against the broader Muslim community, terrorists are, of course, drawn exclusively from this religious group.

Needless to say, most Muslims are not terrorists but, unfortunately it is equally obvious that most terrorists consider themselves to be Muslims. Although jihadists are not drawn exclusively from the first-generation Muslim immigrants, a large Muslim immigration invariably provides a larger recruiting ground for terrorist and other Islamist militants. Consequently, the influx of asylum-seekers from dysfunctional majority-Muslim countries and the constant influx of Muslim immigrants to Australia naturally exacerbate the threat of terrorism. Given the continuing threat of terrorism, the need to recruit support from the Muslim population is increasingly stressed. Government agencies have been engaged in substantial contacts with Australia's Muslim community. This is a "difficult task ... [that] has yet to reach successful conclusion", says Dr James Jupp of the Australian National University. According to him, "any official attempts to consolidate Muslims behind counter-terrorism are likely to be frustrated in a welter of differing traditions and loyalties". In fact, the most troubling aspect of counter-terrorism measures is the erratic behaviour of Muslim leaders who regularly preach hatred against "enemies of the faith" and who often excuse terrorism by blaming the West for supposedly inviting such attacks on innocent lives. However, as Dr Ian Spry QC reminds us:

There has been a tendency amongst left-liberal groups in the community to champion the cause of Muslims in Australia and to dismiss concerns about aggressive statements by some Imams, the fact of Islamic terrorism in many parts of the world and specific threats by terrorists that they will target Australia or Australians.

The Turnbull government seems lukewarm to the problem. It needs to take a much more effective stand against Muslim leaders who regularly preach hate and who refuse to unequivocally denounce terrorist advocacy within their religious circles. The last electoral campaign coincide with a string of terror raids and major terrorist attacks across the globe. At no point did our Prime Minister use his authority to make the case to fight against radical Islam. Instead, Malcolm Turnbull refuses to utter the terms "Islam" and "terrorism" in the same breath, probably because he believes that Islamic teaching is not the source of the problem and that criticising the more troubling aspects of the Muslim religion can make the country less safe.

Apart from revisiting misleading assumptions about the source of terrorist activity, and changing our immigration policy in order to protect Australia from religious extremism, other measures to be adopted should include the repeal of all laws that prohibit the strong criticism of religious doctrine. This includes the ill-conceived and poorly drafted Victorian Racial and Religious Tolerance Act (2001), which makes it a crime to voice any comment deemed "offensive" to a religious group. These laws create undue fear and intimidation among people who simply wish to express their ideas and opinions. They are based on moral relativism and they can be used as a weapon by Islamists to silence criticism of their radical beliefs by claiming that they, rather than their extreme beliefs, have been attacked. This might also explain why so many Australians seem reluctant to join public the moral conversation, seeming to fear what others and even their own government might do in return.

Fortunately, the constitutional validity of policies combating Islamist activity is greatly assisted by the fact that, unlike other Western democracies, Australia does not have a bill of rights. Some of the justifications for the absence of a constitutionally entrenched bill of rights in Australia point to the historical context of its constitution-making which was not, as compared to the United States, brought about by revolution against tyranny. One of the primary reasons why the Australian Constitution does not have a bill of rights is because the framers believe its insertion would conflict with the common-law tradition of inalienable rights to life, liberty and property, a concept they had inherited from England. Hence, one Chief Justice of the High Court, Sir Anthony Mason, commented:

the prevailing sentiment of the framers [was] that there was no need to incorporate a comprehensive Bill of Rights in order to protect the rights and freedoms of citizens. That sentiment was one of the unexpressed assumptions on which the Constitution was drafted.

Under the system of government created by the Australian founders one proceeds on the assumption of full rights to life, liberty and property, and then turns to the positive law just to see whether there are any exceptions to the general rule of freedom for all. According to law Professor James Allan, "this lack of a bill of rights is the most obvious way in which the Australian Constitution differs from the US Constitution". After comparing this constitutional model with the American one, the late Australian constitutional lawyer, W. Anstey Wynes stated:

The performance of the Supreme Court of the United States has become embroiled in discussions of what are really and in truth political questions, from the necessity of assigning some meaning to the various "Bill of Rights" provisions. The Australian Constitution ... differs from its American counterpart in a more fundamental respect in that, as the ... Chief Justice of Australia [Sir Owen Dixon] has pointed out, Australia is a "common law" country in which the State is conceived as deriving from the law and not the law from the State.

Surely, one might say, people have the right to express their opinions without being bullied and censored by those who don't agree with them. If so, politically oriented speech that addresses the negative implications of Islamist teaching must be easily characterised as constitutionally protected speech for the purposes of the implied freedom of political communication. Indeed, the text and structure of the Constitution give rise to the general proposition that there is an implied freedom to discuss religious matters openly, particularly when these matters involve serious public interest. That being so, it is important to remember that religious freedom is not an absolute right, and that the Australian government is constitutionally obliged to protect our community from any violent extremism. Our government is perfectly entitled to prohibit the immigration of anyone who poses a threat to our national security, or who demonstrates a considerable disregard for basic human rights and the protection of our democratic values.

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