

However, the influence of the criminal law should not be underestimated. It can be utilised as an effective tool to combat racially motivated crime. An offence of racially aggravated assault similar to that introduced in the UK will clearly denounce racially motivated offenders while sending a strong message to the rest of society that racist violence will not be tolerated. This will act, not just as an important symbolic gesture, but as a justified and important response to the seriousness of racial violence.

THE SHARIAH – IGNORE IT? REFORM IT? OR LEARN TO LIVE WITH IT?

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I. Who Needs to Understand the Shariah?

Muslims do, obviously, but they are not the only ones. Australians, from the Prime Minister and Treasurer down to the ordinary citizen in the street, have little knowledge of Islam. While many would recognise the term “Shariah” and note its negative associations, few have any real knowledge of what it is and its place in the Muslim world view. However, outside Australia, and in Muslim countries in our region of international interest, demands for adoption of the Shariah are growing.¹ At home, incidents such as the London bombings of July 2005 have served to focus the attention of the government on the potential problems of an alienated minority of Muslim citizens in the context of combatting terrorism. In this article I suggest that in order to build international relations with our neighbours, to combat the threat of terrorism both here and abroad, and in the interests of building a harmonious society at home, it is important that politicians and the public at large throw off the prejudices of the past and gain a greater understanding of the principles of Islam and the place of Shariah in Muslim societies.

The Shariah as a legal system is very much misunderstood. In recent months we have seen the Treasurer, Peter Costello, stating that those who want to live under Shariah should go and live somewhere else.² In an interview in the week just prior to the Cronulla riots, the Prime Minister, Mr Howard showed an unfortunate lack of knowledge of the correct meaning of the term “*jihad*” when he equated it to Islamic extremism,³ adopting a popular stereotype which fails to convey the correct meaning.⁴ What is called “*jihad*” in the popular press is a perversion of the term. In most cases the word “terrorism” would be a better alternative.

¹ For example, in Indonesia a number of newly resurgent Islamic parties such as the Prosperous Justice Party (PKS) and the Crescent and Star Party (PBB) have called for an increased commitment to the Shariah. In Malaysia the main Islamic opposition party, PAS, has long advocated the Shariah as the legal system, but has been blocked from introducing it in the PAS controlled state of Kelantan by the Federal government.

² Peter Costello, “Worth Promoting, Worth Defending—Australian Citizenship, What it Means and How to Nurture it” (Speech delivered to Sydney Institute, Sydney, 23 February 2006).

³ “Howard hits out at ‘jihad’ Muslims” *The Australian* (Sydney), 20 February 2006.

⁴ *Jihad* means literally “struggle”. Its primary meaning is the struggle to control undesirable tendencies within one’s own person, and/or to rectify evils in society. According to the scholars, *jihad* by force of arms may only be used as a last resort and as a defensive measure.

There have also been numerous attacks on Muslims and Islamic religion and culture by such luminaries as Rupert Murdoch,⁵ Cardinal George Pell,⁶ and former secretary of the Treasury, John Stone.⁷ Some of them have asserted that because of the nature of Islam, Muslims are incapable of integrating into Australian society and are therefore unacceptable as migrants. Any media reference to people in any country relating to the recognition of Shariah inevitably brings condemnation from Australian commentators who associate it only with the *hudud* punishments and ill treatment of women.

The Pew Global Attitudes report released in June 2006 gave the results of a comprehensive survey conducted in thirteen countries on the ways in which the Muslim and non-Muslim general public viewed each other.⁸ Most of the results were depressing. People in the West generally saw Muslims as being fanatical, violent, intolerant and disrespectful of women. Majorities in Muslim countries saw Westerners as being selfish, immoral and greedy as well as fanatical and violent. A small ray of good news was that Muslims who lived in Western countries generally regarded their non-Muslim fellow citizens in a more positive light. The survey was not conducted in Australia but we might expect that results would have been similar here.

In research published in *Studia Islamika*,⁹ Kevin Dunn investigated Australian public knowledge of Islam and found that less than one fifth of respondents had a reasonable or better knowledge of Islam, and one third of respondents admitted that they knew nothing about Islam. A majority of these (fifty six per cent) admitted feeling threatened by a religion they knew nothing about. Of those who claimed some knowledge thirty eight per cent made criticisms which reflected the "key stereotypes" of violence, fundamentalism, intolerance and repression of women. Only a very small minority displayed an accurate knowledge of Islamic belief and practices. This lack of knowledge and willingness to embrace popular media stereotypes is unfortunately reflected in the speeches of many of the political, religious and intellectual elite in Australia.

The vast majority of mainstream Australians therefore have very little knowledge of the Shariah (Islamic law) and the knowledge they do have is, according to Kevin Dunn's findings in the abovementioned article, mostly

negative. Even in the legal profession, the response is still often very similar to that expressed by Mr Justice Frankfurter in the US case of *Terminiello v Chicago*¹⁰ in which he described the Islamic system of justice as that of a *qadi*¹¹ (Islamic judge) sitting under a palm tree dispensing justice according to his personal whim. According to H. Patrick Glenn¹² much blame for this attitude towards the Shariah in Western countries can be laid at the door of Max Weber who stated authoritatively that "*Kadi* justice knows no rational 'rules of decision' . . . whatever."¹³ Comments made in the media about the civil law based Indonesian criminal justice system at the time of the Schapelle Corby and "Bali 9" trials show that legal orientalism¹⁴ is alive and well in Australia and extends even more emphatically to any consideration of the Shariah.

II. What is the Shariah?

The Shariah is one of the world's great legal systems, an alternative to the common law in much the same way as the civil law system or the socialist legal systems are alternatives chosen by some countries as their law. It is the sole living survivor in the modern world of a universalistic legal system based on religion that for its adherents is revealed. This itself is enough to condemn it in the eyes of those who regard any nexus between religion and law as anathema. But in Muslim countries where religion is generally held in higher regard than it is in Australia, the religious basis of the law is accepted and by a majority regarded as essential. The Shariah consists of foundation texts—the *Quran* and *Hadith*¹⁵—and secondary sources represented by the writings of the jurists over the ages, the most important being the founders of the four Sunni *madhabs* (schools of law).¹⁶ The Shia have their own schools of law, the Ithna-Ashari and Ismaili being the major

10 *Terminiello v Chicago* (US Supreme Court, 1949:11), quoted in L. Rosen., *The Justice of Islam* (2000) 3.

11 *Qadi* is sometimes transliterated from the Arabic script as *Kadi* or *Kathi*.

12 H. Patrick Glenn, *Legal Traditions of the World* (2004) 176.

13 Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (1968) 976, quoted in Glenn, *ibid*.

14 The term "orientalism" has been extensively explained by Edward Said in *Orientalism* (1978). In this context it implies an attitude of superiority towards other legal systems.

15 The record of what the Prophet Muhammad said, did or approved of in his capacity as a prophet, as recounted in the *hadith*, the written record of the Prophet's sayings.

16 The Hanafi school developed from the teachings of Imam Abu Hanifa (702–772) who emphasized the use of reason and *shura* (consultation) instead of uncritical reliance on tradition. Followers of the Hanafi school are today found in Turkey, the Indian sub-continent and throughout the Middle East. The Maliki school was founded by Imam Malik (b. 717) He placed emphasis on the practices of the people of Medina as being the most authentic examples of Islamic practice. The Shafi school developed from the teachings of Imam As-Shafi (b. 772) who was renowned for his moderation and balanced judgment. He is considered by many to be the greatest of all Muslim jurists. His school is predominant in South East Asia. Imam Ahmed ibn Hanbal, the founder of the Hanbali school, adopted a strict view of the law. The Hanbali school today is predominant in Saudi Arabia, and the Wahabi revivalist movement which is active today is an offshoot of the Hanbali school.

5 Channel 9, "Murdoch on Muslims", *A Current Affair*, 25 June 2006 <http://ninemsn.video.msn.com/v/en-au/v.html?i=39&g=b3158ee0-975b-42da-b0d0-09f96d031e12&p=aunews_aauaca&t=m164> at 30 September 2006.

6 George Pell, "Islam and Western Democracies" (May 2006) *Quadrant*, Vol L No 5.

7 John Stone, "The Muslim Problem and What to Do About It" (Speech delivered at Quadrant Dinner, Sydney, 28 June 2006).

8 Pew Research Centre, "The Great Divide: How Westerners and Muslims View Each Other" (22 June 2006) Pew Global <<http://pewglobal.org/reports/display.php?ReportID=253>> at 11 September 2006.

9 Kevin Dunn, "Australian Public Knowledge of Islam" (2005) 12(1) *Studia Islamika* found at <<http://www.bees.unsw.edu.au/school/staff/dunn/A25.pdf>> at 20 June 2006.

ones and their own sources of jurisprudence. The Shia believe that only their Imams¹⁷ can interpret the Shariah correctly.¹⁸

In the modern world, the Shariah is the exclusive legal system of only a very few countries. The majority of Muslim countries, as a legacy of colonialism or through deliberate Westernisation as in Turkey, have mixed legal systems. They almost always retain the Shariah in matters such as family law and inheritance, but have adopted aspects of the civil law or common law systems in areas of public law.

The concept of Shariah is much wider than the Western definition of law. Thousands of Australian Muslims observe the Shariah in their everyday life, following the rules of personal hygiene, ensuring that the food they eat is *halal*,¹⁹ refraining from prohibited acts such as gambling, drinking alcohol, lending money for interest or engaging in extra-marital sex. Many of these rules are shared with the Judaic *Halakah* which for Muslims has been superseded by the Shariah and which rarely attracts notice or criticism. Muslims observe Shariah law in their everyday lives without raising any notice from among the non-Muslim community. While Shariah rules concerning women's dress have attracted negative comment from politicians who would like to ban the *hijab*²⁰ or find it "confronting",²¹ there is normally little public concern about what people are eating or the way in which they conduct their daily lives. It is the more sensational aspects of Shariah which attract public and media attention—the stoning of men and women to death for adultery, the cutting off of hands for theft and the death sentence passed for apostasy—although these are subject to restrictions, are controversial among Muslim scholars and in any event, represent only a small part of the Shariah and are not practised in Australia or in the majority of Muslim countries.

The bulk of the Shariah is not in any way sensational. It contains rules concerning issues such as religious obligations, marriage and divorce, family relationships, relationships with neighbours, inheritance, rules of war and

peace, the treatment of minorities, business transactions and economic activity.

III. Shariah Economics and Banking

In many Muslim countries the most important aspect of Shariah is in its application to the banking sector. Islamic banks now operate in more than seventy five countries and control about US\$230 billion in capital.²² In the South East Asian region, Islamic finance is well established in Malaysia and is growing in Indonesia. It is represented in Australia by the Muslim Community Co-operative (MCCA) which accepts deposits and makes loans on Shariah principles using a partnership process for transactions rather than charging interest. *Riba* (interest) is forbidden by Shariah on the grounds that it is an unearned gain which exploits the poor and gives an unfair advantage to wealthy people who are able to rely on lending money for their income rather than by engaging in productive work. Financial speculation is also banned. Observant Muslims may therefore invest in equity based investments but not in any investment which carries a fixed rate of interest, or which involves a great deal of uncertainty. Investment in shares is acceptable, but debentures and futures are not because they involve payment of a predetermined rate of interest in the case of debentures and unacceptable risk amounting to speculation in the case of futures.

Apart from the ordinary business of banking, Islamic finance in the region has expanded to include the issue of Islamic bonds (*sukuk*), insurance (*takaful*), pawnbroking (*rahn*) and an Islamic stock exchange index which resembles the "ethical investment" principle which is promoted in the West. All these are conducted according to Shariah guidelines. These are areas in which it can be demonstrated that the Shariah is flexible and is able to adapt to the conditions of modern life.

IV. Interpreting the Shariah

The Shariah is therefore much more than a system of primitive punishment and family law. The Shariah is as complex as the common law and understanding it requires years of study and competence in Arabic, the language of revelation. Many misunderstandings result from inadequate translations of texts or the taking of particular statements out of context.²³ Many other misunderstandings result from attributing certain tribal practices to the Shariah when in fact they are not authorized by it at all. John Stone's speech referred to above cited the possibility of any Muslim

17 The Ithna-Ashari branch of the Shia recognises twelve Imams, Ali and his eleven descendants. The Ismaili branch recognises only seven Imams.

18 Mohammad Hameedullah Khan, *The Schools of Islamic Jurisprudence* (1991) 127.

19 Lawful, permitted and if meat, slaughtered in accordance with Islamic guidelines, which require cutting the animal's throat with a sharp knife so that it dies quickly and does not suffer unduly. The *Quran* (2:172-3, 6:145, 5:4) provides a detailed list of forbidden foods.

20 In particular, Liberal Party backbenchers Bronwyn Bishop and Sophie Panopolous. Bronwyn Bishop described the *hijab* as "being used by the sort of people who want to overturn our values as an iconic emblem of defiance and a point of difference." Yaxley Louise, *Bronwyn Bishop Calls for Hijab Ban in Schools* (2005) *The World Today* <<http://www.abc.net.au/worldtoday/content/2005/s1448343.htm>> at 11 September 2006.

21 AAP, "Muslim Garb 'confronting': PM" *The Age* (Melbourne), 27 February 2006, <<http://www.theage.com.au/news/national/muslim-garb-confronting-pm/2006/02/27/1140999493121.html>> at 11 September 2006. The Prime Minister's comment was in relation to what he called "the full garb" not simply the wearing of a headscarf. However, in response to Bronwyn Bishop's call to ban the wearing of *hijab* in schools, he said that a ban was "impractical", leaving the unspoken suggestion that he would really like to ban it if the means were available.

22 Mehmood-Ul-Hassan Khan, "Islamic Banks—A Viable Emerging Business" *Investor's Business and Financial Journal* June 2006 at <<http://www.jang.com.pk/thenews/investors/jun2006/p7.htm>> at 11 September 2006.

23 An account of the history of mistranslations of the *Quran* can be found in A. R. Kidwai, "Translating the Untranslatable: A Survey of English Translations of the *Quran*" Soundvision.com <<http://soundvision.com/Info/quran/english.asp>> at 11 September 2006 and in (1987) *The Muslim World Book Review* Summer 7(4) 66-71.

woman who wished to marry outside her own community risking “not merely social and familial ostracism but outright violence, even death by way of honour killings”. So called “honour killings” are a cultural practice, not by any means exclusive to Muslim countries. They are not authorised by the Shariah which requires the consent²⁴ of both parties to marriage and explicitly forbids killing any person except by due process of law. Likewise, female “circumcision” or female genital mutilation is often attributed to Islam, but it too is a custom practised not only by some Muslims but also by some Christians and animists largely in Sub-Saharan Africa. In its extreme form, which involves excision of the clitoris and cutting of the labia, it is not commonly practised in most of the Islamic world, although a symbolic form, a scratch or slight cut is part of the custom of some communities.

As in other legal systems, there are differences of interpretation and emphasis resulting in different laws in different places and traditions. At one extreme there is the narrow interpretation of the foundation texts adopted by the Taliban in Afghanistan which prohibited music and modern innovations such as television, and severely curtailed women’s rights. The Taliban interpretation of Shariah, and indeed the narrow interpretation adopted in Middle Eastern countries such as Saudi Arabia, is a world away from the “Islam Hadhari” (Civilisational Islam) adopted as government policy in Malaysia. In a speech at Victoria University at Wellington on 31st March 2005, the Malaysian Prime Minister, Dato’ Seri Abdullah Badawi listed ten principles of Islam Hadhari. They included faith in God, a just and trustworthy government, a free and independent people, vigorous pursuit and mastery of knowledge, balanced and comprehensive economic development, protection of the rights of minority groups and women, protection of the environment and cultural and moral integrity. It should be noted, however, that there remains a distinct gap between these lofty ideals and their implementation in practice. In Malaysia, religion is a matter for the states, and some states have enacted restrictive legislation which can scarcely be regarded to be in keeping with the spirit of “Islam Hadhari.”²⁵

In Indonesia also, the interpretation of Islam practised by the majority is moderate and Islamist political parties have not been able to attract a sufficient following to win much influence in parliament. According to Professor Azyumardi Azra,²⁶ the most Islamically oriented conservative party, *Partai Keadilan Sejahtera* (PKS), was able to gain only seven per cent

24 In the Shafii school, there is a limited exception to the rule that the consent of both parties must be given. In this tradition it was considered acceptable for the marriage of a minor virgin to be contracted by her father or paternal grandfather. The principle was upheld in the Malaysian case of *Syed Abdullah Al-Shatiri v Shariffa Salma* (1959) 25 MLJ 137, but it may be now that this principle has become obsolete.

25 For example, in 1997 three Muslim women were arrested and fined for revealing their *aurat* (parts of the body which should religiously be covered) by taking part in a beauty contest contrary to s 31 of the *Selangor Syariah Criminal Enactment* 1995.

26 Professor of History and Rector of Syarif Hidayatullah State Islamic University (UIN) Jakarta.

of votes in the 2004 election, and that on a platform, not of campaigning for the introduction of Shariah, but for fighting corruption and the establishment of good governance²⁷. Although there have been outbreaks of violence between Christians and Muslims in Indonesia, the causes have been more complex than simply religious disputation, although this has played a part. Economic deprivation and socio-political issues have also provided a fertile field for inter-communal hostility.²⁸

There is no one monolithic interpretation of Shariah and even within specific Muslim societies there can be a wide range of opinions on interpretation, some scholars adhering strictly to conservative interpretations (*taqlid*), others searching for new ways to interpret traditional rules to bring them into line with the perceived needs of modern societies, and there are also all shades of opinion in between. Unfortunately, some sections of the Western media usually generalise from the most extreme examples to the bulk of the Muslim world, thereby cutting the ground from under moderate reformers and tarring everybody with the same “fundamentalist” brush.

Many modern scholars feel that there is a need for re-evaluation of traditional understanding and practice of legal rulings in the light of modern conditions, provided that this can be done without abandoning the sacred principles laid down in the *Quran* and the *Sunnah* (sayings and rulings of the Prophet Muhammad). Interestingly, among the writers and scholars who are leading the intellectual debate are American or European converts like Sheikh Abdel Hakim Murad (Tim Winter),²⁹ and Hamza Yusuf Hanson.³⁰ There are also Muslims who have grown up or lived for a long time in Europe, Britain or the United States. One of these scholars is Tariq Ramadan, a second generation Swiss citizen, whose major sphere of interest is in ways of reaching accommodation between Islamic belief and practices and European citizenship for those who have Europe as their home.³¹ Another is Khalid Abou El-Fadl³² who studied Islamic law in Egypt and Kuwait but now lives and teaches in the United States. He has challenged traditional interpretations of the *Quran* and *Sunnah* and has proposed a more rational and up to date interpretation of such matters as women’s rights.³³ He rejects interpretations of Quranic verses and hadith

27 Azra Azyumardi, *Indonesia, Islam and Democracy* (2006) 215–16.

28 See Azra Azyumardi, “Islam and Christianity in Indonesia: The Roots of Conflict and Hostility,” in Joseph A Camilleri (ed) *Religion and Culture in Asia-Pacific: Violence or Healing* (2001).

29 An English convert to Islam and lecturer in the School of Divinity at Cambridge University. He has researched and written extensively on Muslim-Christian relations and the orthodox Muslim response to terrorism.

30 Hamza Yusuf Hanson is the founder of the Zaytuna Institute in California, which promotes the study of the Islamic sciences. He is a well known lecturer on Islamic topics through the use of modern technology and in person.

31 Two relevant works include: Tariq Ramadan, *To be a European Muslim* (1999) and *Western Muslims and the Future of Europe* (2004).

32 Professor of Law at University of California, Los Angeles.

33 For example: Khalid Abou El-Fadl, *Speaking in God’s Name* (2001).

which are demeaning to women, for example those which state that women have defective intelligence and those which make women responsible for all *fitnah* (corruption of morals). He shows that these interpretations which are contrary to empirical evidence, stem from weak hadith of doubtful authenticity.

Also in the United States is the African-American Muslim feminist, Amina Wadud, who shocked the Muslim world in 2005 when she led a mixed congregation in prayer.³⁴ Her major achievement has been a careful reinterpretation of those verses of the Quran which deal with women,³⁵ demonstrating that the traditional male interpreters may have adopted interpretations which suited them as men in a patriarchal society rather than alternative but valid interpretations which were kinder to women.

There are many others. Paradoxically, those Islamic scholars who live and write in Western countries are better able to do so because of the relative lack of censorship and repression which unfortunately dogs those who still live in Muslim majority countries where secular or religious dictators enforce obedience to the government line or the teachings espoused by their particular tradition. Nevertheless there are some such as Yusuf al-Qaradawi³⁶ who now lives in Qatar, whose opinions are highly respected. Western politicians and media commentators would be better advised to acquaint themselves with the views of these scholars rather than listening to and publicising the loudly expressed views of persons such as Irshad Manji³⁷ and Ibn Warraq³⁸ who are at best on the extreme margins of the Muslim world and carry no credibility within it.

V. The Progress of Women in Muslim Countries

The position of women is something which seems always to attract negative attention from the western world. In fact, Muslim women were entitled to legal rights far in advance of those of women in Europe right up to the latter part of the 19th century when British women gained the right to own and control their own property and the right to divorce. However, by this time women's rights in practice had been severely diminished in the Muslim world. In recent years Muslim women have been striving

34 Islam has no priests but the position of imam (leader of congregational prayers) is traditionally reserved for men. A woman may lead a congregation which is entirely composed of women but not a mixed congregation.

35 Amina Wadud, *Qur'an and Woman* (1992).

36 Yusuf al-Qaradawi is a Sunni Muslim cleric and scholar whose best known book is *The Lawful and Prohibited in Islam* which discusses the principles of *halal* and *haram* in the Shariah. He is known for moderate opinions and is the head of the European Council for Fatwa and Research.

37 Irshad Manji is a lesbian feminist journalist who grew up in an Indian Muslim immigrant family in Canada. She has advocated radical changes in Islamic thought and practice in her 2004 book *The Trouble with Islam*. She has received much publicity in Western countries, but her views are generally rejected in the Muslim world.

38 Ibn Warraq is a pseudonym for an Indian-born US-based, author who describes himself as an apostate from Islam. He has written several books strongly critical of Islamic tradition and practices, the best known being *Why I am Not a Muslim* (1995).

to regain their Islamic rights, with more success in some countries than others. In the legal field, Iranian women suffered a setback when female judges, including Nobel prize winner, Shirin Ebadi, were removed from the bench after the 1979 revolution. On the positive side, Muslim women serve as judges in the Shariah courts in Indonesia and are now able to be Shariah judges in Malaysia also. In Morocco, a recent decision has allowed women to train as preachers in the hope that they will guide the underprivileged away from religious extremism.³⁹ In Kuwait, after years of campaigning for change, women have finally been allowed to vote and to stand as candidates in elections.⁴⁰

A constant battle needs to be waged against those who seek to set the clock back in the name of Islamic orthodoxy. In an effort to prove their Islamic credentials in a quick and obvious way, these groups, on gaining power, rush to legislate to enforce dress rules upon women and to restrict their activities outside the home. General Zia ul-Haq's "Islamisation" of Pakistan's criminal law in a patriarchal interpretation has seriously prejudiced Muslim women who are unfortunate enough to be raped, by requiring them to produce four just male witnesses to the offence to prove it.⁴¹

Another current example is the controversial Indonesian Anti-Pornography bill which represents a crack down on "Western type decadence", banning, among other things, kissing in public, sensual dancing, erotic art works and semi-nudity in public. It is strongly supported by a vocal Islamist lobby but opposed by some women's and artists groups and people in regions such as Bali and Papua who fear its effect on tourism and local cultures. The bill illustrates a struggle between forces which see themselves as "moral" and "Islamic" and those who prefer to maintain the secular identity of the Indonesian state.⁴²

VI. The Shariah and Family Law

Virtually all Muslim majority countries (except Turkey) have retained the Shariah as family law and their system of inheritance. However, many have chosen to codify the rulings, usually using Common Law or Civil Law precedents as a basis. There have been some more radical changes also. Tunisia has legislated to ban polygamy, and other countries have controlled it by requiring the approval of the Shariah court and adherence

39 "Morocco Introduces 50 Women Muslim Preachers" (2006) Islam Online <http://www.islamonline.com/cgi-bin/news_service/world_full_story.asp?service_id=2175> at 26 June 2006.

40 Gorvett Johnathon, "Battles Loom after Reformists Win" (2006) Aljazeera.net <<http://english.aljazeera.net/NR/exeres/8311C23B-9A68-4B1D-B735-02AC6C90022E.htm>> 11 September 2006.

41 "Small Mercy for Pakistan's Women" *Aljazeera.net* (2006) <<http://english.aljazeera.net>> at 10 July 2006.

42 See, "Alliance Fails to Coax PKS on Porn Bill" (8 July 2006) AsiaMedia: Media News Daily <<http://www.asiamedia.ucla.edu/article-southeastasia.asp?parentid=48745>> at 11 September 2006.

to specified conditions. In countries like Malaysia, Islamic feminist groups such as Sisters in Islam agitate for a fairer deal for Muslim women in domestic life and divorce. Recently, they with other women's groups in Malaysia, managed to block the passage of a new Islamic Family Law bill which would have relaxed restrictions on polygamy and given men greater control over their wives' assets.⁴³

In 2004 Morocco passed new family law legislation giving equality in family responsibility and in the prerogative of divorce to husbands and wives jointly, removing provisions which required wives to obey their husbands and placing stringent conditions on polygamy. Additionally wives became entitled to retain custody of children, even on remarriage or moving away from the area where the husband resides. These are quite radical changes in the traditional interpretation of the Shariah.

In Western countries, including Australia, many Muslims abide by Shariah rules in family matters, regardless of the non-recognition of Shariah by their local legislatures. However, dispute resolution and the obtaining of a religious divorce when required can be difficult. A solution which has been suggested,⁴⁴ is the establishment of a council of religious scholars who could arbitrate disputes in accordance with Quranic recommendations. Precedents for this already exist in the Jewish rabbinical "courts" which have existed in Western countries for many years.

VII. Reinterpreting the *Hudud* Laws

Those criminal offences and their punishments which are specifically set out in the *Quran* are known as *hudud*.⁴⁵ There are five specific *hudud* offences—*theft (sariqa)*, highway robbery (*hirabah*), drinking alcohol (*sharb*) unlawful sexual intercourse (*zina*) and false accusation of unchastity (*qazf*). Some scholars claim that apostasy (*riddah*) should also be included as a *hudud* crime. The prescribed punishments for these crimes are drastic by modern standards, including amputation of limbs, scourging and the death penalty for adultery by a married person.

While the Quranic rulings concerning *hudud* cannot simply be abolished, because the *Quran*, as a revealed book, cannot be altered by human agency, contemporary scholars such as Mohammad Hashim Kemal, and Chandra Muzaffar, Abdullahi Ahmed An-Na'im and Tariq Ramadan⁴⁶ regard them as prescriptions which should only be enforced in an ideal

Islamic society, such as that which is believed to have existed in Medina at the time of the Prophet. In the present time, the imposition of such penalties is unjust and in practice in the countries which still impose them they fall predominantly on the poor and on women. Nevertheless there is public support in some Muslim societies for a literal enforcement of *hudud* laws, but Tariq Ramadan sees the insistence on maintaining *hudud* laws as an active part of the criminal law, at least in part as a result of Western pressure to abandon them, it being believed that they need to be actively retained as a bulwark against what local people see as Western immorality and decadence.⁴⁷ It should be noted that very few Muslim countries enforce the criminal law of the Shariah. Those that do include Saudi Arabia, Iran, Sudan, some provinces in Nigeria and Pakistan.

In relation to the *hudud* offence of apostasy, it is argued that the *Quran* imposes no earthly penalty and the *hadith* (record of the Prophet's ruling) which has been relied on by the jurists to support the death penalty has been misconstrued since the principal cause behind the *hadith* in question was an incident of treason rather than simply a desire in the person concerned to change his religion. There are several texts in the *Quran* which support freedom of religion and forbid forced conversions.⁴⁸ All texts must be read in the light of their context and the Quranic imperative to maintain justice in all circumstances.

VIII. Does the Shariah Condone Terrorism?

The answer to this question is "no". Shariah rules concerning the conduct of war and what is permissible or not permissible in fighting were formulated early in the history of Islam.⁴⁹ The majority of jurists agreed that war should only be undertaken in self defence or in defence of others who are being oppressed. In the conduct of war, non-combatants especially the civilian population and specifically mentioned, Christian priests and monks, should not be harmed. Also the crops and animals of the enemy should not be destroyed nor the environment degraded. Contemporary scholars have classified suicide bombing as *hirabah* one of the *hudud* crimes which merits execution when victims are killed.⁵⁰

It is easy to think that Muslim riots, civil unrest, suicide bombings and terrorism are all the result of a twisted ideology which originates in the doctrine of Islam. In fact, the reasons are not so simple. Many complex social and political conditions may contribute to an atmosphere in which civil unrest is ignited. The Paris riots, for example, grew out of poverty and unemployment and a sense of hopelessness among migrants in the suburbs. Moreover, scarcely any attention has been given to the political

43 A revised bill is currently in the drafting stage.

44 For example by Wasif Shadid and Sojerd von Koningsveld, "Loyalty to a Non-Muslim Government" <www.interculturelecommunicatie.com/download/loyaliteit.pdf> at 24 June 2006, and J Hussain, Submission on Civil and Religious Divorce (2001).

45 From the Arabic word *Had* (plural *Hudud*) meaning limit, because they are outside the limits set by Allah.

46 Kemal, *Punishment in Islamic Law* (1995); Muzaffar, "Hudud Central to Islam?"

(December 1992) *Aliran Monthly*; An-Na'im, *Toward an Islamic Reformation* (1996); Ramadan, "An International Call for Moratorium on Corporal Punishment, Stoning and the Death Penalty in the Islamic World" 30 March 2005, www.tariqramadan.com <http://www.tariqramadan.com/article.php?id_article=264&lang=en> at 11 September 2006.

47 Ramadan, *ibid* 4.

48 For example, *Quran*, 2:256, 109:6

49 See for example, Al-Mawardi, Abu'l-Hasan, *Al-Akham as-Sultaniyyah*, The Ordinances of Government, 11th CE. Asadullah Yate translator 1996.

50 Murad Abdal Hakim, "Islam's 'Heart of Darkness'" (2006) <<http://www.thetablet.co.uk/cgi-bin/register.cgi/tablet-01057>> at 24 June 2006.

causes of terrorism—the foreign policies pursued by the United States and its allies in supporting repressive dictators in the Muslim world, invading Muslim countries on spurious justification and using double standards and hypocrisy in their dealings in the Middle East. Suggestions by the likes of US President George Bush that the motives of terrorists are that “they hate our freedoms” are simplistic.

Perhaps some of the reason lies in the concept of the *umma*, the universal bond of brotherhood and sisterhood which is experiencing a revival among Muslims regardless of their race or secular nationality. Injury to one part of the *umma* is keenly felt by other Muslims perhaps thousands of miles away and personally unaffected by the injustice. Thus the oppression of the Palestinians by Israel is a constant cause of grief and anger in the Muslim world, as was the slaughter of the Bosnians by Serbs in the 1990s, the destruction of Chechnya, and the invasion of Iraq by the “coalition of the willing” in 2003. Bitterness about these incidents has encouraged young Muslims to be recruited into terrorist groups in order to take revenge.

IX. The Shariah and Citizenship—Obligations of Muslims in a Non-Muslim State

The concept of nationality is not one which is supported by the Shariah in principle. The concept of the global *umma* is found in traditional Islamic scholarship which rejected tribalism (*asabiyyah*) and required all believers to recognise each other as brothers and sisters in the universal family of Islam. In his last sermon the Prophet Muhammad emphasised that in Islam, no Arab is better than a non-Arab and vice versa and that whoever should be the leader of the community must be respected and followed regardless of his race or ethnicity.

In practice, the ideal of the *umma*, the worldwide community of Muslim believers, soon gave way to individual kingdoms and empires ruled by secular minded individuals who nevertheless called themselves Caliphs and claimed leadership of Islam. The early jurists divided the world into *darul Islam* (the abode of Islam) and *darul harb* (the abode of war), a place ruled by non-Muslims in which Muslims might be persecuted. Detailed rules were devised for the governance of Christian and Jewish minorities living in a Muslim state and Muslims were advised to avoid living in a non-Muslim state except in extraordinary circumstances. There was no substantial Muslim presence in Western countries until the 20th century.⁵¹ Classical Islamic jurisprudence did not need to contemplate the situation where large numbers of Muslims settled permanently in secular or Christian states. There is now agreement among the majority of scholars that the categories of *darul Islam* and *darul harb* have now become obsolete although they are still accepted by a minority.

51 Wilfried Hofmann Murad, “Muslims as Co-Citizens of the West . . . Rights, Duties and Prospects” (2002) www.islamonline.net <<http://www.islamonline.net/english/Contemporary/2002/05/Article3.shtml>> at 11 September 2006.

Following the fall of the Ottoman Empire and the abolition of the Caliphate in 1924, Western colonialism triumphed over nearly all Muslim territories. The Muslim masses were split into separate nation states at the whim of the conquerors. This has given rise to much trouble in the modern era because of disparate groups being forced to live together and other groups such as the Kurds being divided between a number of separate nations with no regard for cultural cohesion. In South East Asia, ethnically Malay Muslims have been lumped together with Thai Buddhists in southern Thailand and Filipino Christians in the southern Philippines, forming constantly restive minorities in those countries. Even after independence from colonial powers, the Muslim world remained a patchwork of separate nation-states. Some groups within the Muslim world, such as Hizb ut-Tahrir,⁵² are still striving to reverse this happening and to restore the Caliphate at the head of an Islamic state, but success remains extremely unlikely for them at present.

A more recent phenomenon has been the mass migration of Muslims to live and work in Europe, Britain and the United States. There are now significant Muslim minorities in France (5.5 million), Germany (3.2 million) Britain (1.5 million)⁵³ and the US (estimates vary between five and eight million).⁵⁴ In Australia, according to the 2001 census, there were 281,578 Muslims, about 1.5% of the population. Large Muslim populations and the current climate of fear of terrorism has given rise to concerns about whether Muslims can live peacefully as citizens in the modern secular state. Riots in France in October and November 2005, the assassination of the Dutch film maker Theo van Gogh in Holland in 2004, and the London bombings of 7 July 2005 have all added to the fear of Muslim citizens as potential terrorists. The increasing tide of Islamophobia, however, has had negative consequences not only for law-abiding Muslim citizens who suffer discrimination and vilification from officialdom, the media and fellow citizens, but also for prospects of harmonious co-existence in the modern state. The creation of a feeling of alienation and of being an unwanted second class citizen is a powerful motive drawing disaffected young Muslims into extremist organisations.

In 2004 the Islamic Human Rights Commission in the UK commissioned a series of reports looking at the importance of citizenship and civic values in the British Muslim community.⁵⁵ The majority (eighty per cent) of

52 See Hizb ut-Tahrir, which according to its website, has the objective of establishing an Islamic state <<http://www.hizbuttahrir.org.uk/postnuke/pn/modules.php?op=modload&name=Sections&file=index&req=viewarticle&artid=6&page=1>> at 11 September 2006.

53 Wolfgang Polzer, “More than 53 Million Muslims in Europe” 22 October 2005, [Worldnetdaily.com](http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=46965) <http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=46965> at 11 September 2006.

54 Fareed H Numan, “A Brief Statement” December 1992, *Islam101* <http://www.islam101.com/history/population2_usa.html> at 11 September 2006.

55 Saied R Ameli, Manzur Elahi, Arzu Merali, “Dual Citizenship: British, Islamic or Both? Obligation, Recognition, Respect and Belonging” (2004) at <<http://www.ihrc.org/>> at 11 September 2006.

respondents saw no contradiction between being good Muslims and good UK citizens; the majority felt there was no serious respect for Muslims either from the government or majority society; respondents generally appreciated the religious freedom accorded to them in Britain, but at the same time felt under continuous pressure to defend Islam because of factors such as negative media coverage, lack of legal protection from discrimination, feeling rejected by the majority society and government and that while accepted as British citizens in theory, they were still in practice considered “outsiders” by the mainstream population. While forty one per cent felt a sense of belonging to Britain, twenty seven per cent felt no sense of belonging. The alienation of the Muslim and particularly the Lebanese community in Australia has been documented in works by a number of authors.⁵⁶

X. The Shariah and the Muslim diasporas

Generally, Muslim lawyers/theologians have not yet reached a consensus on the formulation rulings dealing with the implications for the Shariah of Muslims living as permanent minorities in secular states.⁵⁷ Some who agree that the traditional categorisation of the world into *darul Islam* and *darul harb* are obsolete have proposed a third category of *darul aman* (a place of security), meaning that Muslims can live in this society without threat to their life or religion) or *darul 'ahd* (place of covenant) which conceives a covenant between Muslim and non-Muslim inhabitants whereby the former agree to abide by the laws of the state and the latter guarantee freedom and security. Some others such as Tariq Ramadan consider that this kind of categorisation is no longer appropriate in the modern world.⁵⁸

The majority agree that there is no longer any religious objection to Muslims living in a non-Muslim state, and some would go as far as saying that the political and religious freedoms granted to citizens of such countries as Britain and the United States would better entitle those countries to be brought into the classification of *darul Islam* than some Muslim countries today. The scholars agree that Muslims should obey the law of the countries they live in, pay taxes, and join the army in defence of that country, even if it is engaged in a war with an unjust Muslim country. In cases where the war is unjust from an Islamic viewpoint, they should choose the option of conscientious objection. According to the influential opinion of the grand sheikh of the university of al-Azhar,⁵⁹ they may take

up citizenship and swear allegiance to the head of state. They may join political parties, trade unions and similar organisations provided that they do not endorse measures which are contrary to Islamic teaching.⁶⁰

Murad Hofmann says that normalising the presence of large communities of Muslims in the West raises the questions of the extent to which they can integrate or assimilate without losing their identity and their faith.⁶¹ While Muslims cannot compromise their religious obligations, for example to pray, to fast in Ramadan and to observe Islamic rituals, there is room for adaptation in dress (especially men's dress), eating habits and some social customs. It is not compulsory for men to be bearded or wear Arab style dress and some “touches of fashion” can make Islamically appropriate women's dress more acceptable to the views of the mainstream population. “Islamic dress” in any event need not be a bar to participating in ordinary sporting and social activities.⁶²

However, integration is a two way street. Muslims can try as hard as they like to become part of the community, but the mainstream community must reciprocate. If politicians and the media continue to encourage members of the public to fear and denigrate their Muslim neighbours, the prospects for community harmony are slim. There is some indication that the Howard government, motivated by fears of local extremism, has begun to take note of this. A Muslim Community Reference Group (MCRG) was set up in 2005 to advise the government on matters affecting the Muslim community. Measures to engage particularly “troublesome” youth are being put in place, funded by the Federal government.⁶³ Steps are also being taken to set up a national Council of Imams which can advise authoritatively on religious matters, and which will discourage the propagation of individual opinions from people with radical or extremist ideologies.

A new and welcome government initiative is the provision of Commonwealth funding to set up a centre of excellence for Islamic education in Australia in conjunction with an as yet unnamed Australian university.⁶⁴ This centre would provide for the teaching of Islam in an Australian context and would contain subjects relevant for the training of Muslim religious leaders. Until now, Australian Muslims who have wished to study the Shariah in any detail have had to go overseas to do

60 Quoted in Wasif Shadid and Sojerd von Koningsveld, above n 44.

61 Hofmann, above n 34.

62 An Islamically acceptable women's swimsuit is now being marketed in Australia. The author knows of a Muslim woman who, wearing *hijab* and tracksuit, regularly crews a sailing boat with its Jewish owner on Sydney Harbour. Some New South Wales sporting clubs have modified their dress rules to allow Muslim women to play.

63 For example, the “Youth Fusion” project which has engaged a young English speaking Sheikh, from the United States, to engage young people by offering them programs which reinforce both Islamic and Australian values and develop leadership skills.

64 Minister for Science, Education and Training, and the Parliamentary Secretary to the Minister for Immigration and Multicultural Affairs joint media release, “8m for Centre of Excellence for Islamic Education National Action Plan” (16 July 2006)

<<http://www.dest.gov.au/Ministers/Media/Bishop/2006/07/B002160706.asp>> at 11 September 2006.

56 See Scott Poynting, Greg Noble and Paul Tabar, *Bin Laden in the Suburbs* (2004); Ghassen Hage, “Post-script Arab-Australian Belonging after September 11” in Ghassen Hage (ed), *Arab-Australians Today* (2002); HREOC, *Isma-Listen: National Consultations on Eliminating Prejudice against Arab and Muslim Australians* (2004); Tanja Dreher, “Targeted” *Experiences of Racism in New South Wales after September 11, 2001* (2005).

57 Jocelyn Cesari, “Muslim Minorities in Europe: The Silent Revolution” <<http://www.euro-islam.info/PDFs/silentrev.pdf>> [6] at 11 September 2006.

58 Ramadan Tariq, *Western Muslims and the Future of Islam* (2004) 67.

59 Al-Azhar in Cairo is one of the oldest universities in the Muslim world and the fatwas issued in its name have a special authority.

so. Young men were being offered scholarships to study in Saudi Arabia where Wahabi influence is dominant. The availability of study in Australia should reduce the possibility of young Australian Muslims being exposed to radical influences.

More needs to be done. It is not equitable to ban Islamic books while permitting non-Muslim agitators to dominate the air waves encouraging attacks on Muslims.⁶⁵ The Federal and New South Wales governments have so far resisted calls for legislation which bans religious vilification such as the Victorian *Racial and Religious Tolerance Act 2001*.⁶⁶ Such legislation would send a message to the public that vilification is not acceptable, and to Muslims that their rights are being considered equally with those of the non-Muslim community. Building a harmonious society requires mutual respect, tolerance and understanding.

65 Tanya Nolan, "Anger over Media Coverage of Cronulla Violence" (15 December 2005) <<http://www.abc.net.au/worldtoday/content/2005/s1531918.htm>> at 11 September 2006.

VARIETIES OF RELIGIOUS INTOLERANCE

Ngair Naffine*

There is a much greater distance between religious and secular ethics than is usually recognized . . . the old habits do serious moral harm. For instance, look at all the fuss that's made about research on human embryos . . . [And they allow] us to take far less seriously the horrible cruelty we inflict on our fellow creatures. If the world is not as religions claim it is, there is real harm in acting as though it were.

Janet Radcliffe-Richards¹

This paper is about Christian "Religionists", those whose guiding principles of life are based on a Christian religious belief, and their varying degrees of tolerance towards those of a different religious persuasion. More particularly, it is concerned with the ways in which Religionists seek to control the lives of those who are not of their faith, as well as those who have no faith at all. This is the "religious intolerance" at issue: specifically, this paper considers the ways Religionists wish to inhibit, through legal means, the operations of our society. It is therefore about freedom *from* religion rather than freedom *of* religion. It seeks to establish the discriminatory use of the law for religious purposes.

The point of view adopted here is essentially that of a secular lawyer for whom any belief in supernatural beings is difficult to fathom. The approach is therefore largely Humean and so the idea of a supernatural being is regarded as implausible.² Hume wrote, however, with some disdain about those he regarded as the credulous faithful: those who were too willing to dispense with the requirements of proof and observation and to accept uncritically the untested assertions of religious prophets.³ He tended to characterise them as naïve and unquestioning. That is not the approach here and indeed I would want to acknowledge the integrity, intelligence and seriousness of purpose of many of those who struggle with complex theological and moral issues entailed in religious belief. The critical concern here is with those who commonly impose their systems of belief on the world beyond the confines of their own faith.

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¹ Janet Radcliffe-Richards "Darwin, Nature and Habits" in Julian Baggini and Jeremy Stangroom (Eds), *What Philosophers Think* (2003) 31.

² In his *Dialogues Concerning Natural Religion*, David Hume is famously sceptical of the idea of a supernatural being, one which has never been witnessed by the senses. See also JCA Gaskin, *Hume's Philosophy of Religion* (1978).

³ Hume was particularly scathing about those who believed in miracles.

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