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Religion as a Motive – Does Australian Terrorism Law Serve Justice?

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Abstract

This article will examine whether the category of religiously motivated terrorism serves justice in Australia, first considering its lawfulness from a human rights perspective and, secondly, examining its operation in the courtroom. Judicial comment in two cases, the subject of national media attention and complaints to the (New South Wales) NSW Judicial Commission, were used as a basis. This article finds that efforts to establish a 'religious cause' were stifled by complexity and ambiguity about the difference between Islamic adherence and violent extremism. Bias-prone assumptions had observable implications for the judicial assessment of the defendant's culpability and rehabilitation prospects. Moreover, judicial reasoning seemed to overlook evidence of an intent to coerce the government or intimidate the public, treating religious beliefs and motives as a vehicle to establish intent. The article concludes that judicial education could help. Still, those measures would not fix the core of the problem. By removing the motive element, the issues would be avoided while focusing attention on the remaining intention elements. An alternative option is to remove 'religious cause' so that terrorism cases must demonstrate 'ideological or political cause', encouraging more precise and comparable reasoning across offending contexts.

Keywords: Terrorism; religious cause; judicial bias; judicial reasoning.

Introduction

Under Australian law, every terrorist act must have a religious, ideological or political cause (*Criminal Code Act 1995* (Cth) s100.1). It is the only crime in Australia in which one's religion is a material factor in determining one's guilt and in which advancing that religion is publicly heralded as an element of a heinous crime.

This article will examine whether religious cause serves justice in Australia, considering its lawfulness as a limit on human rights, before examining its operation in the courtroom in two cases.

Is Religious Cause a Lawful Limit on Religious Freedom?

Religious cause as a motive element of a crime arguably has implications for human rights[1] and constitutionally protected religious freedom in Australia (Australian Constitution s116). But fundamental freedoms exist within lawful limits. Freedom of religion may be infringed upon when it is provided *by law*, operates *without discrimination* and is *necessary* to protect public order, health, morals or the fundamental rights and freedoms of others (Australian Human Rights Commission 2006). The latter element of necessity encompasses the law's necessity, proportionality and effectiveness in achieving a legitimate end. This paper will assume that the legitimate end is to preserve the function of democratic processes and to discourage and protect the community from violence or the threat of violence. This legitimate end does not include proscribing legitimate advocacy, protest, dissent or industrial action (*Criminal Code Act 1995* (Cth) s100.1 (3)).

Necessity

The specific requirement for a motive (whether political, ideological or religious) has been justified as helping to differentiate terrorism from other crimes done in the pursuit of private ends (*Thomas v Mowbray* [2007] HCA 33 [45]). Some argue that the motive element is redundant because the other intention component of the crime—to coerce a government or intimidate the public—involves 'inherently political or broadly social phenomena' (INSLM 2012: 110).

The Sheller Report (INSLM 2012: 112) argued that motives, including religious cause, should be continued because they reflect popular understanding. Hardy (2011: 350) argued that this logic was unsatisfactory and circular. How could we use that justification when the law's reference to religious cause shaped popular understanding?

Religious cause is not necessary or specified under international law (ICSFT 1999; ICSANT 2005; UN GA Res 49/60 1994; UN SC Res 1566 2004) or international–regional-based instruments (EU 1999; OAU 2002; SCO 2003). The United Nations (UN) and most countries do not include motivation in their definitions (INSLM 2012: 113–114).

Religious cause was born in the United Kingdom (UK) before 9/11(*Terrorism Act 2000* s1). In the aftermath of that horrific event, Australia, New Zealand (*Terrorism Suppression Act 2002* s5.2) and Canada (*Criminal Code*, section 83.01(1)(b)) mirrored the UK's motive requirements.

The UK's rationale for including 'religious' can be adduced from tracing documents at the time. A UK Government-appointed inquiry recommended adopting the working definition of the United States (US) Federal Bureau of Investigation (covering political, social or ideological objectives) (INSLM 2012: 111). US law, unlike the FBI definition, has no motive element (INSLM 2012: 111). The Blair government found 'social' objectives too broad for a legal definition (UK Government 1998). However, the Blair government justified the specific inclusion of 'religious objectives' by pointing to a global rise in 'religious fanaticism' (UK Government 1998: para 2.4). Former Prime Minister Blair has consistently argued for forthright posturing against the 'threat of radical Islam' (Blair 2021).

Scholars have found 'religiously motivated' terrorism (as identified by the defendant or prosecutors) to carry political or ideological motives (Laqueur 2000: 6; Sedgwick 2004: 795; INSLM 2012: 111). Despite their diverse political objectives and contexts, many extremist organisations are grouped by their religious language (Hardy 2011: 349).

The statutory officer appointed to review Australia's terrorism laws, the Independent National Security Legislation Monitor (INSLM), has gone as far as saying that:

> [b]y including motivation as an element, Australia's definition runs counter to the large volume of UN conventions, resolutions and Committee comments which all condemn terrorist acts as criminal regardless of motivation. None of the 13 UN sectoral treaties on terrorism include a requirement for a religious, political or ideological motivation. (INSLM 2012: 114)

Based on this assessment, one could query whether the motive component is authorised under the Constitution's external affairs power.

Most international instruments and resolutions focus on the intention to cause death or serious bodily injury to compel the government, an institution or the public to act a certain way (*Criminal Code Act 1995* (Cth), s100.1). The Australian definition also encompasses this intention, but as the coming analysis shows, motive can dominate the other intent elements in judicial reasoning.

Effectiveness

The extent of preparatory offences has helped to avoid terroristic violence. To fully understand the effectiveness of the 'religious cause' aspect, its broader effects on social cohesion, public discourse, media, political movements and community safety must be considered.

The specific category of religious cause may 'more finely target, stigmatise and deter' (Saul 2008: 28) religiously motivated violence. However, the former Australian High Court Chief Justice Hon. Gerard Brennan argued religious cause was not proportional to its objective, in that it 'may easily be misunderstood as targeting the entire group who wish to advance the religious cause of Islam' (Brennan CJ 2007). By making the advancement of religious cause 'an element in a heinous crime', the law drove 'a wedge between elements of our society' and constituted 'a danger to our national security'. In summary, Brennan wrote,

> A law which strikes at terrorist acts should not divide, but unite. It should not foster dissent which festers into an ambition to destroy the values which the law is intended to defend.

Hardy (2011) argued the law had hijacked official and public discourse, with many consequences recorded in community-based and academic research.

Community-based research also paints a grim picture. At a grassroots level, it has created a toxic environment that discourages the participation of Australian Muslims in government, law enforcement, security and countering violent extremism programs and justice settings, reducing the effectiveness of these organs of justice and services (AFIC 2022). The stigma and associated fear of profiling make it much harder for Muslim families to seek help when they need it (AMWHR 2021).

Next, the repeated representation of Islam through the spectre of terrorism has diminished public resilience to racist nationalist narratives, which equate Muslim identity with savagery and incompatibility (Peucker et al. 2018). The equation of Islam and terrorism by a range of authoritative actors has powerfully advanced the idea of the clash of civilisations (Kundnani 2012, cited in Hellyer and Grossman 2019: 21). Recently, it was found that media coverage of terrorism severs the cognitive ability of Australians to accept anti-racism and critical thinking-based education in relation to Muslims (Vergani, Mansouri and Orellana 2022). With this ideological groundwork set by powerful public and official language, any acute escalation of a perceived threat can become politically incendiary. For example, the Lindt siege and its media coverage as an Islamic State of Iraq and Syria (ISIS)-related attack was overwhelmingly a catalyst for anti-Islam movements, providing a pathway for Brenton Tarrant and propelling white supremacist organisations in Australia (Allchorn 2021: 8). Experts have since found that the Lindt siege perpetrator could not have been reasonably found to possess a religious or ideological cause (VIC Government 2017).

Further, a significant number of Australians travelled to Syria to fight for ISIS. Again, this phenomenon was influenced by public discourse. Firstly, the humiliation experienced by Australian Muslims from degrading public discourse arguably created a downward slope towards violent extremist recruiters and became powerful material for ISIS propaganda (Webber et al. 2018: 270). Hellyer and Grossman (2019) queried whether governance-of-religion arrangements that do not respect diversity are more likely to produce radicalisation and violent extremism, pointing to France as an example worth examining. Secondly, the Australian media widely promoted ISIS how it wanted to be promoted—as religious warriors (Williams 2016). More caution now exists among the media about glorifying terrorists or their self-declared causes, following the authorities' lead. 'Patriotic' and 'right-wing' movements are banally referred to as 'ideologically motivated' in line with the law. However, currently, the same logic does not extend to ISIS and al-Qaeda, who are still described by authorities the way they prefer, as religious causes (ASIO). Australia's INSLM has cautioned against laws that glamorise the accused or their 'cause' (INSLM 2012: 119–120).

Legality

The principle of legality provides that laws be defined with sufficient precision (HRC 2018: para.7) so that the community can be certain which conduct crosses the line. Brennan (2007) doubted the legality of 'religious cause', suggesting the law 'leaves itself open to such an interpretation'.

More generally, legal scholars (McSherry 2004: 361) and Commonwealth Government prosecutors (CDPP 2006: ch.5, 5.12; INSLM 2012: 110) say the motive element broadens the normal boundaries of criminal law by conflating the fault element with motive while also adding another layer that must be established. Some terrorism experts say in practice, the motive requirement distracts law enforcement, jurors and judges from the intent that truly defines terrorism—the intent to coerce the government or intimidate the public (INSLM 2012: 118) or the intent to provoke a state of terror (VIC Government 2017: 66).

Terms such as 'religious cause' are not defined in the legislation. In *R v Elomar* (2010), Justice Whealy attempted to spell out the 'religious content of the convictions held by the defendants' (2021: 807):

> (a) First, each was driven by the concept that the world was, in essence, divided between those who adhered strictly and fundamentally to a rigid concept of the Muslim faith, indeed, a medieval view of it, and those who did not.
>
> (b) Secondly, each was driven by the conviction that Islam throughout the world was under attack, particularly at the hands of the United States and its allies. In this context, Australia was plainly included.
>
> (c) Thirdly, each offender was convinced that his obligation as a devout Muslim was to come to the defence of Islam and other Muslims overseas.
>
> (d) Fourthly, it was the duty of each individual offender, indeed a religious obligation, to respond to the worldwide situation by preparing for violent Jihad in this country, here in Australia. ([56]–[57])

This is not a definition of religious cause but evidence of its application, in which a judicial officer has sought to explain the motives declared by the defendants. Whealy J could have provided such an explanation if the law only referred to an ideological cause. Primarily, what Whealy J explained is an ideology, or worldview, to justify violence. It does not equate with orthodox Islam.

The difficulty with 'religious cause' is that it invites judges to make findings about a religion's teachings in the context of terrorism. Rather than showing a violent ideology with religious tones, a judge can become engaged in showing a religion with violent tones. Of course, religious evidence is a much broader category than evidence of violent ideology. As this article will explore, how religious cause is precisely understood as a distinct legal concept from an ideological cause is complex and uncertain. This undermines the legality of this law.

Discrimination

Muslim parents report tremendous stress explaining public discourses on terrorism and political violence to their children (Bedar et al. 2020: 22). Public discourse corrosively impacts Muslim youth (Bedar et al. 2020: 22), community policing (Shahram 2021; AHRCR 2021; Cherney and Murphy 2016: 480), Muslim public safety (Iner 2022) and how Muslim identity is shaped in the national psyche, leading to hate incidents against community members and mosques (Iner 2019: 9). Australian Muslims face exceptionally high rates of negative sentiment (Markus 2020: 82–83).

So, what may be the implications for Muslim defendants? In 2017, an expert panel reviewing Victoria's terrorism legislation raised concerns that 'religious cause' could 'inflate the impact' of a Muslim defendant's actions (VIC Government 2017: 66). This article sheds light on those claims.

The coming analysis of the terrorism cases shows how intent can be overlooked in a judicial discussion about a religious cause. Moreover, the fact that religious cause connects to a defendant's historical and intrinsic identity distinguishes it from how ideological cause may be prosecuted for a non-religious defendant. Evidence about the defendant's religiosity is relevant, material and admissible. Australia's INSLM wrote, '[the] requirement to prove religious motive in terrorism offences comes too close to pursuing a case against a religion' (2012: 115), explaining that outside terrorism:

> [i]t is routine that a judicial admonition will be given to the jury explaining that such [religious] beliefs may supply a statement of motive but it neither contributes to, nor tells against, guilt. This is not the case for terrorism offences, where the jury must be satisfied beyond a reasonable doubt that the accused was motivated by their religious etc beliefs.

Justice Whealy (2021) provided candid reflections on the trials of *Lodhi* and *Elomar,* over which he presided, where jury bias could raise 'its threatening head'. His Honour wrote:

> The accuseds' Muslim dress, their beards, their sometimes threatening appearance, their desire to adjourn for prayer; their observance of religious days. All required careful directions to the jury.

Of course, bias against a particular belief system or its community of followers carries greater consequences in terrorism planning cases in which a person is often punished for their ideology. Pyne (2011) wrote:

> In the absence of any harm, in the absence of a concrete plan to cause it and in circumstances where the seriousness of the offence is gauged primarily by referring to the intent of the offender and where, in turn, that intent is discerned by reference to the ideological material found in a person's home. (172)

In Australia, an individual can be prosecuted under s 101.6 of the *Criminal Code* for doing 'any act in preparation for, or planning, a terrorist act' even if a terrorist act does not occur. The words 'any act' covers behaviours that would not constitute any level of harm (Blackbourn 2021). Weinberg (2021) wrote that 'the types of conduct that can give rise to preparation or planning for a terrorism offence under the Code fall well short of conduct that is capable of amounting to an attempt' (770). As former INSLM, James Renwick (2021) stated:

> The legislation is designed to bite early, long before the preparatory acts mature into circumstances of deadly or dangerous consequence for the community. The anti-terrorist legislation, relevantly for the present matter, is concerned with actions even where the terrorist act contemplated or threatened by an accused person has not come to fruition or fulfilment. Indeed, the legislation caters for prohibited activities connected with terrorism even where no target has been selected, or where no final decision has been made as to who will carry out the ultimate act of terrorism. The maximum penalty of life imprisonment testifies to the seriousness with which the present offence is to be regarded.

Thus, the consequences are severe if there is discrimination in how this law is applied.

The Sentencing Framework in Terrorism

The High Court in *Veen v The Queen (No 2)* summarised the factors for terrorism sentencing, namely, 'protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform' (495). The Hon Weinberg (2021: 768) explained that sentencing in terrorism cases is far from straightforward. Where general sentencing principles apply, a judge will have regard for the objective gravity of the offence, which includes consideration of the actual harm suffered by any victim. In contrast, in terrorism sentencing, the absence of a victim or harm has been found to not be a mitigating circumstance (*Lodhi v The Queen* (2007) 179 A Crim R 470; Weinberg 2021: 770). The amateurish nature of a conspiracy has been found to not reduce the moral culpability of offenders (Weinberg: 770), standing in 'stark contrast in which judges ordinarily deal with sentencing for attempt' (770).

Reviewing Victorian and NSW cases, Weinberg noted that:

> principles of general deterrence and protection of the community had to be given paramount weight. Personal circumstances which, in other circumstances, might be regarded as powerfully mitigating would be afforded far less weight. (775)

Youth is not a significant mitigating factor, and the interests of rehabilitation are outweighed by the need for general deterrence, denunciation and retribution (*DPP (Cth) v Besim* [2017] VSCA 158 [116]).

Justice Peter Johnson (2020: 58–59) summarised the principles for sentencing terrorist offenders:

> In considering the nature and gravity of terrorist offences, courts in Australia have utilised a number of factors referred to by the UK Court of Appeal … [which] are:
>
> (a) the degree of planning, research, complexity and sophistication involved, together with the extent of the offender's commitment to carry out the act(s) of terrorism;
>
> (b) the period of time involved, including the duration of the involvement of the particular offender;
>
> (c) the depth and extent of the radicalisation of the offender as demonstrated (inter alia) by the possession of extremist material and/or the communication of such views to others; and
>
> (d) the extent to which the offender has been responsible, by whatever means, for indoctrinating or attempting to indoctrinate others, and the vulnerability or otherwise of the target(s) of the indoctrination, be it actual or intended.

A judge's interpretation of the defendant's *commitment* to terrorism and the *depth and extent of their radicalisation* are salient features of that list. How researchers in the field of countering terrorism, psychologists and judges would make judgements on these features are very different. Judges weigh the evidence and make judgements of character and credibility. On the other hand, researchers' analysis looks across various domains: ideological, cognitive, behavioural and social (see Evaluative Framework below).

The Terrorism Trials

In early 2016, police arrested a married couple, Sameh Bayda and Alo-Bridget Namoa, for planning and preparing a terrorist attack. Pegged as the 'Islamic Bonnie and Clyde' by the Australian media, both were 18 years old. A few months later, police arrested 18-year-old Tamim Khaja in a separate incident. NSW Supreme Court Justice Fagan would adjudicate both cases.

Mr Khaja pled guilty to planning and preparing a terrorist attack in Sydney, either at the US consulate, an army barracks in Western Sydney, or a court complex at Parramatta. Mr Khaja was sentenced to 19 years imprisonment. In the first matter, his Honour found the couple guilty of conspiring to commit random terror attacks on non-Muslims on New Year's Eve 2015, including violent robbery. Mr Bayda was sentenced to four years imprisonment and Ms Namoa to three years and nine months.

In both cases, evidence suggested ISIS propaganda affected the defendants. However, their motives were attributed to 'the ideology of Islam'. When assessing Khaja's motive, his Honour said, 'ISIS is something of a red herring' (TOP 2018: 60).

The Complaints

Fagan J's commentary made the national news (Spicer 2018). The Australian National Imams Council and the Lebanese Muslim Association made formal complaints. Referring to the 2018 sentencing of Khaja, the Commission found no wrongdoing. It reasoned that his Honour's comments 'related to the particular offender before him and the beliefs, whether well-founded, orthodox or otherwise, which motivated that offender to prepare to commit a terrorist offence' (Earnest J, 2018). The Judicial Commission pointed to passages where Fagan J said he was not making judgements about the 'Muslim religion' (TOP 2018: 33) or the Muslim community (*R v Khaja (No 5)* [2018] NSWSC 238 para 76). Indeed, there were moments in which Fagan J appeared to draw a distinction: In *R v Bayda; R v Namoa (No 8)* [2019], Fagan J distinguished 'jihadist' from 'moderate Islam' and acknowledged 'jihadist propaganda' (*R v Bayda; R v Namoa (No 8)* [2019] NSWSC 24, paras 36–37). Still, as this article shows, his Honour vigorously argued Islam was the ideology that motivated the terrorist crimes, building support for this idea in more than 10 instances in the *Khaja* sentencing transcript, more than 15 instances in the *Khaja* written judgment and more than 20 instances in the *Bayda and Namoa* judgment.

The Evaluative Framework

Several primary sources were analysed for signs of bias: a transcript from a sentencing hearing and two written judgments.

This article uses definitions of bias referred to by the Australian Law Reform Commission (2021), including cited references. Like all human decisions, judges' decisions are 'influenced by heuristics (or mental shortcuts), cognitive biases' and social biases (Barry 2020: 4). According to the Hon Justice Mason (2001), judges must critically reflect on their thinking to resist bias (2001: 676).

There are two main types of bias. Cognitive bias presents through mental shortcuts, whereas social bias is grounded in stereotypical beliefs about a group based on race, religion or another attribute (ALRC 2021b: 6–7). Confirmation bias is a form of cognitive bias that refers to the tendency to interpret information to confirm and reinforce pre-existing beliefs and opinions (Barry 2020: 15–18). Representative bias, another form of cognitive bias, is the tendency to make assumptions about something or someone belonging to a particular category (Barry 2020: 22).

This article's suggestions about bias are tentative, acknowledging that this analysis would have best acted as a starting point for inquiry by the NSW Judicial Commission. Both complaints were dismissed. The second complaint's dismissal came without reason, written, in camera or otherwise, to the complainant.

Additionally, this article draws from the literature on countering violent extremism, demonstrating that behavioural (Smith and Guenther 2021: 89), ideological (Davey and Ebner 2019) and social (Aly and Striegher 2012: 859; Cherney et al. 2020: 97, 100, 101; Harris-Hogan and Barrelle 2020: 1393–94) factors contribute to a person's transition to extremist violence. Social and behavioural factors are also critical to disengagement (Barrelle 2015), which is relevant to assessing the scope for rehabilitation.

This field of literature would benefit from additional scholarship that engages in close readings of the law and judgments to see how judges reason about the motives of terrorist offending. This article only begins to fill that gap in the scholarship.

Analysis of *R v Khaja*

The sentencing hearing for Mr Khaja took place in the Supreme Court on 16 February 2018. This article analyses the transcript of proceedings and written judgment.

The Seriousness of the Crime

Religious cause forms one part of the intent, but the legislation also requires an intention to coerce or influence through intimidation a government or to intimidate the public or a section of the public (*Criminal Code Act 1995* (Cth) s100.1). The judicial officer must canvas the seriousness of the crime by determining the strength of intention.

However, the strength of the latter intention was only a focus of Fagan J's deliberations insofar as it was implied in the defendant's religious cause.

Erasure of ISIS Propaganda Evidence

On his path to establishing the source of the defendant's beliefs, his Honour only considered evidence confirming his view about the Quran as the source of radicalisation. While noting the degree of ISIS-related propaganda in evidence, his Honour indicated it was unnecessary to set it out entirely (TOP 2018: 5) and found it not to be of enormous importance (TOP 2018: 5). The most significant evidence was 'what the offender said himself in his conversations with undercover operatives that he thought were of like mind and were working with him' (TOP 2018: 5). The defendant told undercover operatives, 'My motivation for this … doesn't come from watching YouTube videos or anything. It comes straight from the verses of the Koran' (TOP 2018: 35). His Honour sought evidence that confirmed his view and dismissed evidence that displaced his view rather than attempting to logically reconcile both.

His Honour also referred to former cases to imply that the defendant's state of mind was typical of Muslim perpetrators (TOP 2018: 5):

> This country has been effectively under attack for 15 years by no less than 40 young Muslim men seeking really with a pretty uniform recitation of ideology to kill as many unbelievers as they could and to impose upon the country Sharia law. That seems to be the consistent, as it were, unifying thread of ideology. (TOP 2018: 27–28)

Fagan J stated that 'the ideology that underlines [violent jihad] is Islam', noting 'that is what has been underlying each of these offences' (TOP 2018: 27–28). This formulation provides fertile ground for representative bias (assuming a Muslim defendant has the same intention as other Muslim defendants).

Like Tony Blair's formulation of 'radical Islam', Fagan J's conclusion homogenised the specific motives of Muslim perpetrators. It eliminated discussion on the role of ISIS or al-Qaeda ideology, grievances attached to foreign policy and social or behavioural factors. Countering violent extremism experts strongly caution against this reductive approach (Frazer and Jambers 2018: 2; Hardy 2011: 349).

His Honour did not entertain any mitigation argument from defence counsel about online brainwashing by an overseas third party involved with ISIS. With an illogical chain of causality, his Honour inferred that the offender was radicalised by being 'essentially brought up on the Koran' and being 'stigmatised' (TOP 2018: 31–32). Defence counsel Mr Temby QC pointed to the small number of terrorists compared to the number of Muslims in Australia to counter Fagan J's reasoning (TOP 2018: 32). However, Fagan J's view was firm. His Honour failed to explain how Khaja's family socialised him towards violence while admitting that information was missing about the family. These cognitive shortcuts suggest he was only interested in confirming an established view (confirmation bias) based on a view about a Muslim mindset (representative bias).

The Probative Value Placed on Remarks to Peers

His Honour took the defendant's comments, an 18-year-old, amongst perceived peers as conclusive evidence that the Quran was his inspiration. Bravado amongst young men is common. If he were frank, did that prove that the Quran radicalised him, or was it ISIS material and other social factors that radicalised him about the Quran? In the records this author analysed, his Honour never broached this question.

Requiring Disavowal of the Quran

When deciding whether the defendant was sincere about resiling from his extremist views, his Honour implied it is impossible for a Muslim to resile from violent extremism because his religion inspires it (TOP 2018: 49).

Further, in his published judgment, Fagan J reasoned that only disavowal of the Quran's violent passages would demonstrate he was no longer a threat and that respected Islamic scholars needed to lead the way in doing this (*R v Khaja (No 5)* para 78).

The defendant told a psychiatrist, 'At the time, I believed ISIS was justified on religious grounds. I had no religious background to challenge their teachings.' Fagan J doubted the defendant's sincerity. It is open to a judicial officer to form a view about a defendant's reliability. But here, the failure to identify and reconcile contradictory evidence is possibly a sign of bias.

On the one hand, the defendant's comments to undercover operatives that the Quran inspired him are taken at face value. Later, the same defendant said he had no religious knowledge and was confused by ISIS propaganda, which fundamentally displaces the first premise. Throughout his commentary, his Honour treated the former as accurate and the latter as false without seeking to corroborate either inference with other factual evidence, most likely because his Honour had already formed a view that now

could only be confirmed (confirmation bias) that Khaja as a Muslim was holding a Muslim offender mindset (representative bias).

Not Seeking Scholarly Advice on Religious Teachings

Fagan J pushed back against the defence counsel's view that he should not be embarking on personal Quranic interpretation, saying the Crown's case alleged a terrorist plan 'to further the Islamic religion'. Therefore, his Honour was 'bound to try to identify what is the source of this depraved belief' (TOP 2018: 35).

His Honour did not seek the view of an Islamic scholar as to whether it would be possible or necessary for the defendant to disavow verses of the Quran. This decision was possibly shaped by egocentric bias (Barry 2020: 24–25; Guthrie et al. 209: 1518): seeking to maintain a view rather than seeking scholarly expertise.

It was also problematic that his Honour used English translations to determine religious teachings. Muslims do not learn Islam by reading English translations. Essentially, it is learned in Arabic and interpretation and discussion by scholars (known as Tafseer) are vital to religious education.

His Honour admitted being 'left to inference' with the Quran (TOP 2018: 28). Fagan J inferred that Muslims could read violent passages of the Quran as contemporaneous instruction. According to his literal reading of the translations in evidence, the passages were framed that way, unlike violent passages in the Bible (TOP 2018: 35).

The INSLM warned 'religious cause' could lead the judiciary down this path, stating '[the] State should not have any role in lending official efforts to distinguish between orthodox and unorthodox, approved and unapproved, religion' (INSLM 2012: 118).

Discounting Mitigating Factors

Because of his view that the Quran radicalised the defendant, his Honour seemed inclined to discount other mitigating factors, leading him to rate the defendant's culpability as 'very high' (*R v Khaja (No 5)* [2018] NSWSC 238 [69]). The defence counsel raised mitigating factors such as Khaja's immature age at the time of offending and that Khaja had not acquired an accomplice or a weapon or settled on a plan (TOP 2018: 79). The defence counsel presented evidence about the defendant's experience growing up, including a history of anxiety and mental disorder, a parent who suffered mental illness and his struggle at school (TOP 2018: 51–54). Psychiatric evidence suggested Khaja had latched onto extremism the way that other youths latch onto drugs or alcohol.

On rehabilitation considerations, an expert psychiatrist reported that the defendant had denounced his actions, stating, 'As a Muslim, I believe in Jihad, but ISIS is far from those beliefs … I denounce any allegiance to ISIS … Anyone that pledges allegiance to ISIS is in sin' (TOP 2018: 59–60). During the sentencing hearing, the defence counsel explained that jihad had a broad meaning in Islam, including internal struggle. His Honour did not accept this (TOP 2018: 82), illustrating how religious and violent extremist schema can blend in the courtroom. This presents unique challenges for Muslim defendants.

The Inflationary Potential of Religious Cause

Fagan J gave little weight to the expert psychiatrist's statements during the sentencing proceedings, focusing on the intrinsic nature of violent jihad within the defendant's religious identity to assess his culpability. Indeed, subjective circumstances and mitigating factors, including rehabilitation considerations, are to be given less weight in terrorism cases because general and specific deterrence are deemed more important (Johnson 2020: 145). But religious identity and evidence did inflate the impacts of the defendant's actions.

Drawing on the defendant's Muslim identity, family history and personal interpretation of religious texts, it was open to a judicial officer to:

(1) assess the strength of the intention and, thus, their culpability (rather than evidence of actual plans for violence)
(2) minimise or not need additional evidence on the social or behavioural dimensions of radicalisation (because their road to violence is inherent from 'growing up Muslim' and reading the Quran)
(3) form the view that the individual has not recanted their extremist beliefs because those beliefs are part of the defendant's religion in the judge's opinion.

Analysis Of Judgment For *Bayda And Namoa*

Fagan J's judgment in a different case published on 31 January 2019 is now considered (*R v Bayda; R v Namoa (No 8)* [2019] NSWSC 24).

The Conflation of ISIS and Religious Motive

His Honour noted that Mr Bayda (defendant) read al-Qaeda and IS propaganda online (*R v Bayda; R v Namoa (No 8)* para 25) and watched ISIS videos (para 48). He learned consistent messages from Bukhari House (para 45). New to Islam, Ms Namoa (co-defendant) was socialised in violent ideology through ISIS material. Mr Bayda testified he was motivated to say those things to get his co-defendant to marry him (para 30) and could not get out of the car to attack people on the night he intended to commit a violent robbery (para 31). Fagan J accepted evidence that 'jihadist propaganda' inspired Mr Bayda and his friends to plan a street attack on non-Muslims (para 36). However, Fagan J also identified the defendants' ideology as 'Islam' (para 106) and the 'the teaching and propaganda of Allah's command to kill unbelievers' (para 113).

Religiosity in Islam and the Propensity for Violence

Fagan J noted in Bayda's testimony that his father did not possess the Quran or attend a mosque. His Honour accepted this meant a lack of family religiosity. But he also inferred that while Bayda's father 'may never have had any occasion to inquire what Islam has to say about people of other faiths', Bayda had:

> encountered the differences between Australia's liberal society and the teachings of Islam. Learned instructors in the religion have taught him, from the Quran and from the example of the Prophet as they recount it, that it is a Muslim's religious duty to resolve the differences with violence. (*R v Bayda; R v Namoa (No 8)* para 84)

This reasoning would offend practising Muslims in Australia: it appears to operate on the premise that religiosity in Islam leads to barbarism and that exposure to Australia's liberal society teaches Muslims to distance themselves from Islam. It also equates 'learned instructors in the religion' with those espousing violence. Social bias about Muslims and their religion is possibly illustrated here.

It would have been open for Fagan J to reach this alternative conclusion on the evidence: Bayda was more vulnerable to ideological radicalisation because he lacked religious knowledge and a religious upbringing and education. This conclusion would have been supported by research about religiosity and religious literacy as protective factors (Aly and Striegher 2012: 859; Beller and Kröger 2018: 345; Patel 2011). Khaja also spoke about the effects of religious illiteracy in his evidence.

Positioning the Quran as a Source of Terrorism

Justice Fagan, throughout his judgment, attempted to establish the Quran as the source of terrorism. His Honour did not contextualise the intentional ways violent extremist literature interprets and frames Quranic passages.

Justice Fagan began by quoting a Crown expert witness whose expertise is 'international relations and Middle East studies'. Dr Rodger Shanahan is a former army officer and Middle East politics commentator and expert, not an Islamic scholar.

Fagan J highlighted Dr Shanahan's comments that Islam is a total system including legal and political structures, placing it within a discussion about IS propaganda calling for violence against non-Muslims (*R v Bayda; R v Namoa (No 8)* para 68). Soon after, Fagan J openly expounded that terrorism is grounded in the Quran:

> The propagandists whose writings are in evidence in this case and terrorists who respond to their call (like the offenders now before the Court) cannot sensibly be regarded as mere anti-social deviants. It could not be clearer that jihadi propagandists and terrorists are motivated by religion and are able to identify scriptural support for their actions. They consistently invoke belligerent verses of the Quran. (*R v Bayda; R v Namoa (No 8)* para 72)

Fagan J later referred to ISIS propaganda as incompatible with the 'standards of the civilised world' without acknowledging that it is incompatible with Islamic values (para 77). Moreover, in the same paragraph, his Honour assumed that the Quran radicalised the defendants and conflates Quranic and extremist instruction.

Fagan J referred to the previous case he presided over, considered in this article, as another case in which the Quran motivated terrorism (*R v Bayda; R v Namoa (No 8)* para 78).

Then, Fagan J finally brought the subtext to the surface—that the Australian Muslim community is responsible for repudiating violent passages of the Quran that were, according to his logic, causing terrorism. His Honour suggested the Muslim community indirectly contributed to 'social division and mistrust' by ignoring 'incitements to violence' in the Quran. He called for 'explicit repudiation of verses which ordain intolerance, violence and domination … [that] embolden terrorists to think they are in common cause with all believers'. Fagan J expounded this argument in an extraordinary piece of obiter (*R v Bayda; R v Namoa (No 8)* paras 79–81).

Religious Cause and Seriousness of the Crime

Again, like in the earlier case of *Khaja*, Fagan J returned to religious cause to measure the inherent degree of seriousness of Bayda and Namoa's crime, stating:

> where the ideological cause sought to be advanced is that of Islam, the crime involves an intention to intimidate the Australian public and/or Commonwealth or State governments, with the objective of destabilising the existing constitutional order. (*R v Bayda; R v Namoa (No 8)* para 105)

Putting to one side that a Supreme Court officer defined 'advancing Islam' in a way that Muslims would find deeply offensive, his Honour's construction of religious cause as 'the objective of destabilising the existing constitutional order' sounds more like a *political* motive.

Resiling from Religious Beliefs

This case differed from the *Khaja* decision in that the defendants renounced Islam and converted to Christianity. Unlike his pessimistic view of Mr Khaja, Fagan J was more favourable to their chances of rehabilitation, noting:

> I find them both genuine in their renunciation of fanatical beliefs. The need for general and specific deterrence is reduced. The realistic objective of facilitating rehabilitation is correspondingly more important in sentencing them. The offenders have expressed remorse and contrition, which I also find genuine. The public interest will best be served by moderation in sentencing. (*R v Bayda; R v Namoa (No 8)* para 120)

This conclusion is remarkable, given that general and specific deterrence is a primary consideration in terrorism sentencing.

In *Khaja*, the defendant grew up Muslim. In *Bayda and Namoa*, the defendants were not Muslim (Namoa) or not religiously Muslim (Bayda). Fagan J noted that they came to this crime through 'indoctrination' (*R v Bayda; R v Namoa (No 8)* para 120), suggesting leniency for ideological brainwashing.

One should avoid being reductive with this comparison. However, given his Honour's lack of confidence in differentiating between religious and violent ideological beliefs, the couple did not have to prove they were no longer a threat.

A later Federal Court judgment revealed Namoa 'did not abandon her Islamic faith', as she had claimed in sentencing with Fagan J. This shows the risks of basing judgments on a misunderstanding of Islam and Islamic religiosity. The media again seized on this judicial commentary to link the Islamic faith to violence (Lyons 2022).

Judicial Impartiality Measures

Terrorism conspiracy offences carry severe penalties, often for young offenders. To maintain community confidence, the NSW Judicial Commission should consider any complaints in-depth, with a hearing, and always provide reasons for decisions. The Commission's response to the complaints about Fagan J's comments markedly failed to restore community confidence in the justice system's impartiality. It represented a missed opportunity to engage directly with Justice Fagan and his response. This points to the importance of the Judicial Commission having and accessing expertise from individuals representing Australia's culturally diverse community to analyse and weigh these complaints.

Readers may question whether the discussed examples establish bias or merely point to a judge grappling with complex conceptual interrelationships and the application of 'religious cause'. This question is valid and would have been valuable for investigation by the Judicial Commission.

In April 2021, the Australian Law Reform Commission produced a consultation paper on judicial impartiality (2021). The NSW Judicial Commission should consider these recommendations for terrorism trials:

(1) research into the impacts of implicit bias

(2) intensive and court-specific sessions on implicit bias and judicial decision-making for judges
(3) endorsement and promotion of an equal treatment bench book
(4) strategies to address challenges faced by appearing lawyers from diverse backgrounds
(5) disaggregated reporting of feedback from court users on experiences of bias
(6) where appropriate, rotation of judges between different areas of the jurisdiction where implicit biases are most likely to be reinforced by repeated exposure to the same issues (ALRC 2021a).

Conclusion

However, judicial impartiality measures will not be adequate to address the more fundamental problems with the law.

Fagan J's determination to prove that the Quran radicalised the defendants was brought about by our formal laws. Australia's terrorism definition situates Islam and its sacred texts as the cause.

Moreover, when demonstrating religious cause, distortions in judicial reasoning appeared. Social bias appeared. Representative bias and confirmation bias was probable. There were signs that a Muslim defendant's religious identity or the judicial officer's approach to religious and expert evidence inflated the impact of the defendant's actions. This then impacted the assessment of the defendant's strength of intention, culpability and ongoing risk to the community.

Justice Fagan conceived the religious cause of 'advancing Islam' in a way that encompassed intent to coerce the government or intimidate the public. Therefore, the strength of the defendants' religious cause became the de facto route to establish the strength of intention to coerce or intimidate.

Australia's justice system needs to deliver comparable, consistent and just outcomes across the ideological spectrum of terrorism.

Australia's INSLM has explained that the advantage of removing motive from the legislation would be:

> that the judge will instruct the jury, most likely at the beginning of a trial and again at the end, that they are not to regard the religion itself as nefarious. The jury will be instructed that they are not to regard the profession of a religious belief as a mark of criminality and they are to concentrate on the intimidation or coercion questions for which the material is being put to them. (118)

Removing the motive element in its entirety also reduces the chances of motive becoming a substitute for intent in judicial reasoning—a phenomenon that appears to disproportionally disadvantage Muslims: there is strong judicial support for punishing 'violent jihad' even when plans are not progressed (Pyne 2011). The same may not be said for non-Muslim offenders, in which police and judges may go to greater lengths to defend free speech, regardless of how 'offensive' it may be (Deery 2015). The law's conflation of motive with intent opens the door to bias. Removing the motive element would also bring Australian law more into line with international legal norms (INSLM 2012: 113-114).

Criticism will be that removing 'religious cause' downplays the role of religion. From a sociological or political perspective, discussing religious texts and how they are used in violent extremism is valuable. Disciplines outside law provide nuanced frameworks for that analysis. However, the test for a good law differs from the test for a good discussion. A good law is necessary, effective and proportionate in achieving a legitimate aim.

If the law retains an emphasis on the motive in terrorism, the roads to demonstrating the motive must be fair. Removing 'religious cause' will not wholly guard against bias or complexity in the courtroom. But it would enable more direct comparisons of reasoning and evidentiary thresholds. It may also encourage more precise identification of motive.

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[1] Freedoms of thought, conscience and religion (*International Covenant on Civil and Political Rights* (ICCPR) 1976, art 18), expression (ICCPR 1976, art 19), equality before the law without discrimination (ICCPR 1976, art 26) and rights of ethnic, religious or linguistic minorities (ICCPR 1976, art 27).

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