the middle ground

THEME 3 RESEARCH PAPER

"ONE NATION, ONE LAW"

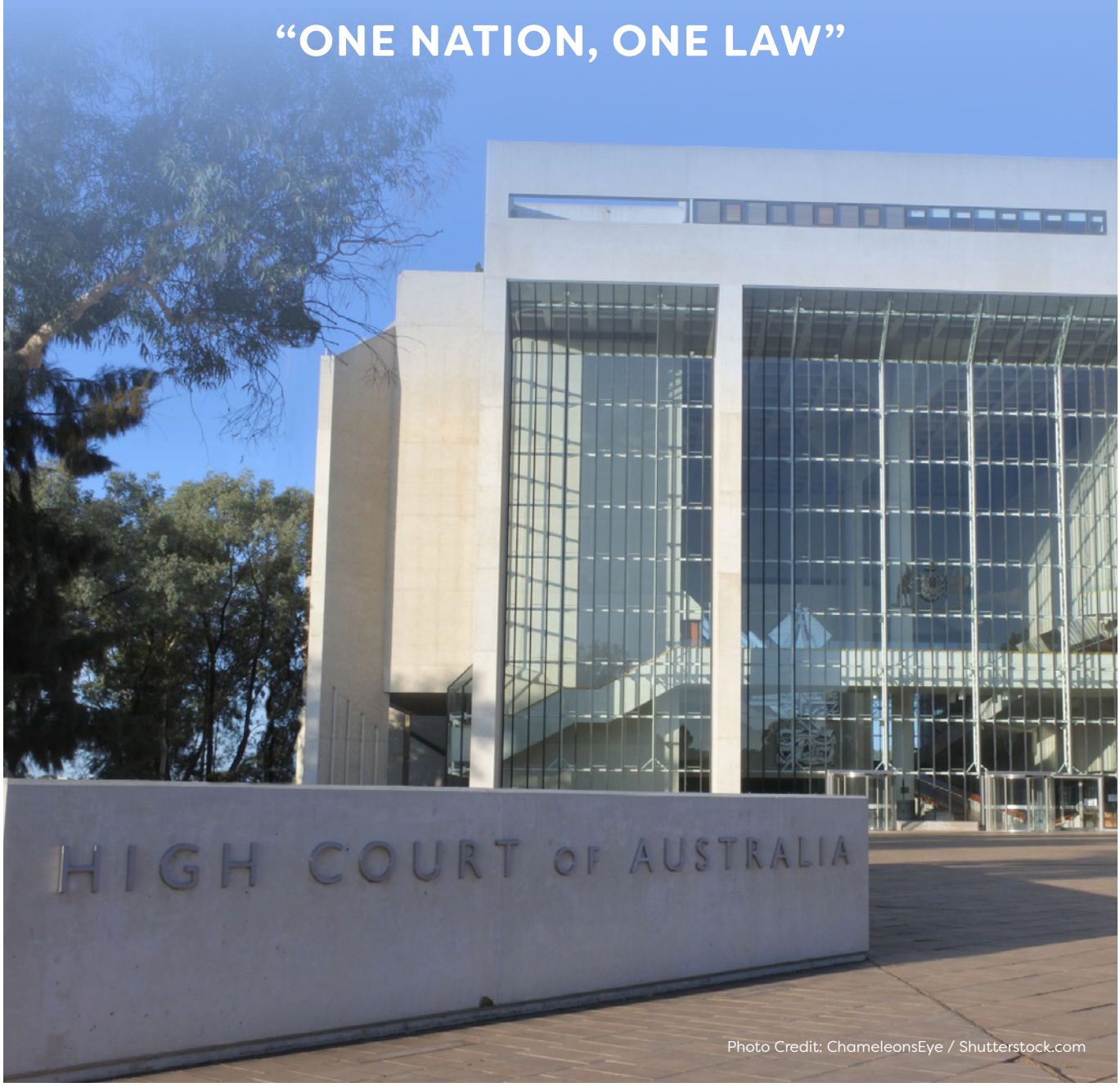
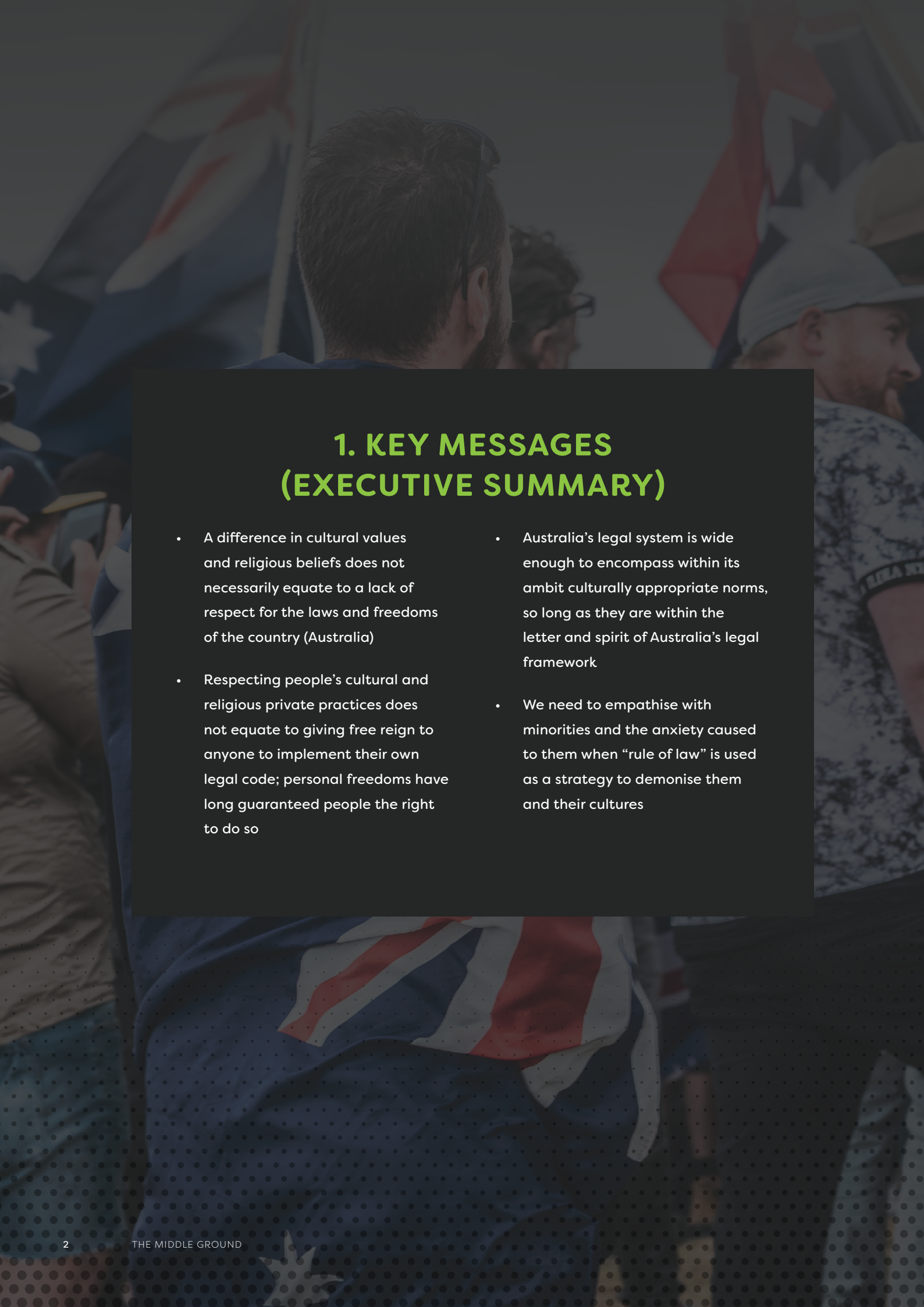


Photo Credit: ChameleonsEye / Shutterstock.com



1. KEY MESSAGES (EXECUTIVE SUMMARY)

- A difference in cultural values and religious beliefs does not necessarily equate to a lack of respect for the laws and freedoms of the country (Australia)
- Respecting people's cultural and religious private practices does not equate to giving free reign to anyone to implement their own legal code; personal freedoms have long guaranteed people the right to do so
- Australia's legal system is wide enough to encompass within its ambit culturally appropriate norms, so long as they are within the letter and spirit of Australia's legal framework
- We need to empathise with minorities and the anxiety caused to them when "rule of law" is used as a strategy to demonise them and their cultures

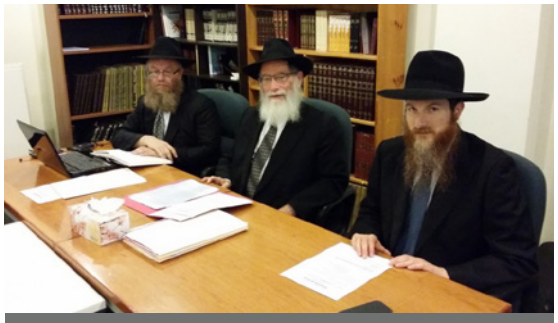
2. CONTEXT: THE CORE OF OUR NATION AT RISK?

Central to the religious freedom debate in Australia has been whether allowing different religious groups to perform their rites and rituals takes away from a singular 'Australian way of life'. Their adherence to, and by extension respect of, Australian culture, language and norms has often been the subject of scrutiny and has led many asking for a focused effort to assimilate these religious and ethnic groups. Apart from cultural aspects, a more emphatic and sensationalized piece of this nationhood debate has been whether these groups have a respect for the law, and more fundamentally, are committed to the notion of a singular and undisputed Australian law. This particular theme, the third in *The Middle Ground* project, examines this issue in more detail.

A telling and clear example of how this discourse has manifested - often times quite explicitly - within Australia's political culture is the far right political group, the One Nation party.

Their very name, One Nation, comes as a response to a constructed threat that to a large degree, a 'singular' Australian nation is at risk. As far back as 1996, Pauline Hanson drummed up fears of being "swamped by Asians" who purportedly "have their own culture and religion, form ghettos and do not assimilate" and later in 2016 called for a Muslim immigration ban due to a similar similar concern for "Australia's way of life" being "threatened". This rhetoric displays a clear protectiveness over an Australian way of life, and more specifically, a concern over the law losing its fundamental force.

Through the 2000s, shock jock campaigns of the threat of nascent parallel legal systems began gaining prominence in the media. For instance, the 2011 Gillard government debate around a new multicultural policy saw uproar following a suggestion by the Australian National Imams Council to merely recognise certain negotiated aspects of Islamic law into existing Australian legislation. Whilst the submission was very defined and limited in its scope and ultimately surrendered itself entirely to the will of the legislature, key media outlets began speaking of 'Sharia on our Streets' as a looming threat. The Aboriginal First Nations people have also featured in numerous national discussions about the ways in which Aboriginal customary law can be incorporated - or accommodated - in a culturally sensitive way. Similar discussions - albeit far less heated - have occurred in the context of the Jewish halachic law, which sees the Din Torah as a form of rabbinical arbitration by a recognised Beth Din. A recent Court of Appeal decision in Ulman v Live group Ltd is the latest example of how this tension has played out in not only broader society, but also within the nation's judiciary.

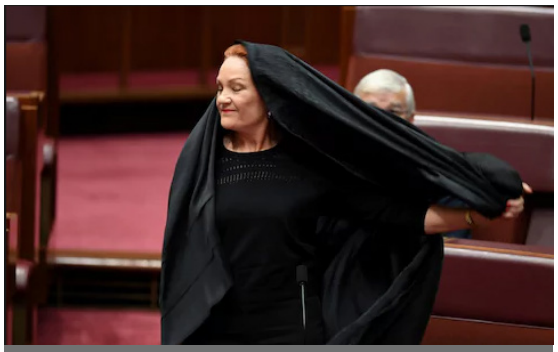


The Beth Din is a rabbinical court operating in Sydney since 1905

Underlying these concerns is a fear that if certain practices are to be allowed, Australia

would slowly but surely morph into a completely different nation.

Hence, otherwise innocent and private rituals have gained the scrutiny of the media and far right politicians for somehow obstructing the rule of law. For instance, One Nation's persistent campaign to ban halal food - in part - comes from a concern that a whole new system of law - in this case food safety law - is being imported into Australia.



One Nation senator Pauline Hanson iconically wears a Burqa into Parliament to make a statement about the oppression of Islamic law on women in Australia

Photo: Reuters

Interrogating the responses to a perceived threat to the rule of law, as this paper does, in no way seeks to undermine the importance of the rule of law itself. Many Australians believe that the law has made possible social cohesion and a fundamentally civil society. It is further argued that the law represents the political will of Australian individuals - as made possible through democracy - a political institution central to the Australian conception of a 'good life'. It is understandable why calls for any form of religious pluralism incites a sense of protectiveness and zeal over this system. However, a survey of Australia's existing legal infrastructure reveals that beyond hot button reactions, there is room for 'accommodation' without threatening the power or legitimacy of Australia's nationhood. Despite this, the discourse as of late has operated without nuance and has, at times, demonised entire religious groups and questioned their commitment to Australia itself.

INHERENT TENSIONS: RECONCILING THE RULE OF LAW WITH THE FREEDOM OF RELIGION

The rule of law is a complicated doctrine that - whilst is clearly central to Australian civil society - is inherently in tension with other equally central doctrines such as the freedom of person, freedom of choice and freedom of religion that are inherent to any liberal democratic society.

As early as key thinkers such as Montesqui and Dicey in the British and Australian legal system, the notion of the rule of law was posited as foundational in a liberal society, central to notions of equality and as the force which allowed for the continuation of civil society. Briefly, it emphasises that everyone - including government, citizens and, importantly for this paper, minorities - are all subject to the same law and are held accountable to follow this law by independent institutions.

However, it is important to understand these systems of accountability in light of the fundamental purpose of the law in liberal democracies; the need for the law to protect individual freedoms.

Central to this pursuit is to enable human

beings to make choices - including religious choices - in pursuit of their own conception of the good life. Freedom of religion advocates argue that religious law - so long as it doesn't deprive others of its choices - can coexist with Australian secular law given it secures this individual choice that the law should seek to afford, whilst also respecting the ultimate sovereignty and overriding capacity of the nation's legislature.

Lakemba Mosque on Open Mosque day. Like many religious practices, the Muslim prayer operates in the private sphere

Photo: News Corp Australia

A further function of the law in democratic systems is to represent the political will of its people. Given Australia is an undeniably multicultural society - purely on a statistical level - it is clear that in representing the will of its people, the law also needs to - in some form or capacity - represent its minorities and make room for their values in the legal system. The extent or capacity of this accommodation rests entirely upon policy judgments, but it is inevitable, if Australia is to boast a functioning democracy, that it must take into account some reasonable level of pluralism.

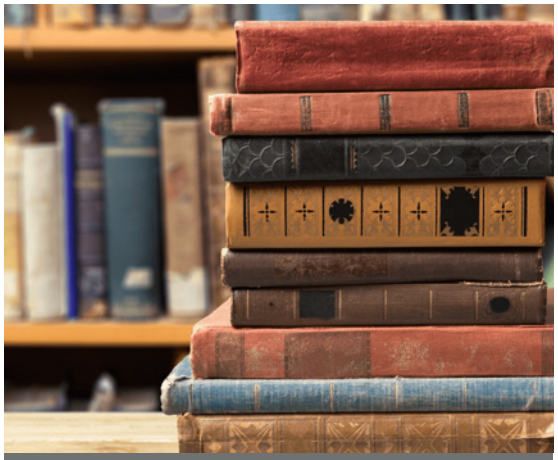
This is especially the case when it comes to surveying the way private religious ritual - and not specifically religious law - operates in the Australian context. All ethnic and religious groups have their own endogenous rituals, sense of music and art which operate within the private sphere. This manifests through varying food requirements, different cultural symbols, different rites at the time of marriage and others. It is important to note here that these private rituals do not bear the same dilemma that accommodating public aspects of alternative laws do. It is a most fundamental guarantee of our system, alongside other liberal democratic systems, that private religious practices are to be allowed in so far as they do not harm anyone else nor clash with the official law of the country. Significantly, in cases where there is a clash with the official law of the country, there are no minorities that ask for their ethnic law to prevail over Australian law. In fact, most religious systems including Islam, Christianity and Judaism endorse following the 'law of the land in which you live'.

Mainstream politicians have offered the narrative that immigration to Australia comes with the caveat that immigrants need to abide by the law and in the long term, seek to assimilate into Australian society.

However, the idea that accommodation of different laws prevents this assimilation operates on a false conception of what accommodation looks like. Reasonable attempts to ask for accommodation of religious laws within existing Australian systems - as have come out of the Muslim communities, Jewish communities and others, have in no way threatened 'one law for all'. Calls for accommodation merely recognise that given the nature of a multicultural liberal society, individuals from disparate religious groups are compelled to act - due to social

reasons and varying ideas of a 'good life' - according to different norms. Accommodation simply seeks to formalise these into arbitrative mechanisms that the court doesn't necessarily co-opt, but simply respects.

A good example of how this model has worked is the accommodationist path the courts have taken with respect to Muslim marriage ceremonies. Whilst the courts do not enshrine the 'Nikah' (traditional Muslim marriage contract) as a valid marriage contract, they have at times considered its existence using neutral principles in scenarios of dispute resolution. Within these processes, the state doesn't afford any preferential treatment to Muslims, but rather applies existing legal frameworks to analyse the dealings between the two parties to come to neutral - yet individualised and just - ways of understanding the Nikah contract. It is clear that in this case, there has been no threat to Australian law by asking for accommodation, nor a fragmentation of Australian identity.



At the core of the debate is the inherent tensions between the rule of law and the freedom of religion - both enshrined within Australia's constitution.

Similarly, the system of rabbinical arbitration in the Jewish community is another instance of a working model of accommodation. Whilst the superiority of the secular courts is maintained, the Beth Din is seen as a valid mode of arbitrating between Jewish parties - who are religiously compelled to settle their disputes through this system. However, as stated in a recent Court of Appeal case, if it is clear in any particular case that the Beth Din or its operators are attempting to wholly circumvent the law or abuse the national court system - it is clear and reasonable that 'accommodation' here has stepped too far.

A further concern in allowing for this accommodation has been a supposed separateness that is introduced within an otherwise unified national identity.

It is argued that through accommodation or any form of legal pluralism, Australia forfeits its right to singular nationhood. In truth, the bulk of the nation's identity is not threatened by singular instances of legal accommodation. In the face of official languages, core curricula in schools, citizenship requirements and more, the call for accommodation of religious or ethnic minorities in no significant way prevents civic participation. On the contrary, greater accommodation encourages civic engagement as citizens feel as though their concerns and cultural sensitivities are being respected and heard in the politico-legal square of Australian society.

THE IMPACT OF A WEAPONIZED RULE OF LAW

Whilst these complexities inherent within a multicultural society should call for circumspect and nuance, the national conversation as of late has instead been characterised by

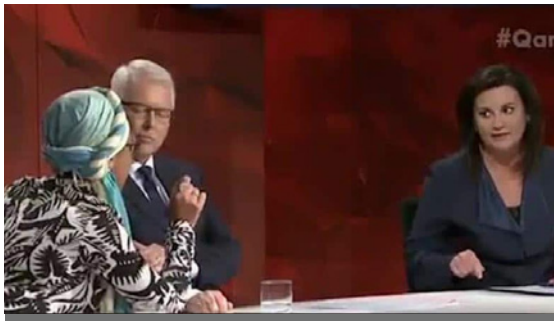
polarisation and misinformation. Tropes of law abiding native citizens have been placed in contest with the image of a 'shady migrant' seeking to quietly import their own country's law into Australia. These tropes have made it difficult for the conversation to progress any further and for real workable solutions to be entertained.

Any suggestion of accommodation - even if made with clear caveats and restrictions - has caused great public outcry and vitriol. 'Accommodating Muslims under common law', a book published by academics at the University of Sydney was followed by a nation wide media circus, with exposes published first by the Sydney Morning Herald's 2017 article titled 'AUSTRALIA'S SHARIAH UNIVERSITY'. The debacle even caused Simon Birmingham, the then education minister to chime in, stating opportunely that 'Religion has no place in the law" and that "we all operate under the one legal framework in Australia'.

What the media circus failed to consider, was that the book was written in heavily academic tones and did not ask for any sort of parallel legal system.

Rather, it surveyed how the law has currently accommodated different cultural groups, and suggested ways forward that could balance these multiple competing and difficult doctrines - namely the rule of law and religious freedom in Australia. However, the polarity latent within the national conversation failed to see these nuances and instead dismissed the recommendations in the book entirely.

It is clear that this overzealousness of the rule of law has shrouded the judgment of key media outlets and politicians, and has led them to caricature reasonable requests for accommodation in select aspects of the law. Hence, through weaponizing the rule of law for arguable political gain, they have demonised entire religious communities and ethinc minorities and have called into question their commitment to Australia as a nation, often with deep undertones questioning their very citizenship.



A heated conversation between Politician Jacqui Lambi and Activist Yassmin Abdel Mageid on ABC's QandA over the call for a Muslim Ban.

Photo: News Corp Australia

MOVING FORWARD: AUSTRALIA'S LEGISLATIVE SYSTEM HAS ROOM FOR RESPECT

The national discourse needs to move away from its existing polarisation and shock-jock reactions when speaking about accommodating ethnic minorities or religious groups in meaningful ways. It is clear that this topic draws on deep rooted convictions in the national consciousness such as the rule of law, religious freedom and freedom of the person and whilst it may be difficult to offer a definite reconciliation between these competing doctrines, it is uncontroversial to assert that this conversation - and the legislative system at large - has room for respect.

An obvious room for change is the recognition that private religious practice in no way can be said to threaten the rule of law. Freedom of religion in Australia guarantees the ability to carry out culturally specific rituals if these rituals do not harm anyone.

In the case of accommodation, it is important to recognise that accommodation does not - at least in the reasonable models so far suggested - equate to a denial of the singularity of Australian law.

What it does ask for, however, is the opportunity to engage in meaningful dispute resolution outside of the courts, as well as for certain religious groups to be dealt with by the courts with an understanding and appreciation of their religious practices. At the core of the call for accommodation, hence is not replacing the law with another law, but rather in recognising the complexities latent within other communities in Australia.

Alternative Dispute resolution processes have immense potential in lessening the burden on the mainstream court system.

Much benefit can be derived from a willingness to see beyond the headlines and consider potential legal arrangements for different minority groups. Alternative Dispute Resolution, for instance, is endorsed by the existing civil statutory scheme. The Civil Procedure Act 2005 enshrines the need for just, quick and cheap resolutions to disputes. In pursuit of this, at the start of any litigation, lawyers first need to explain the alternatives to litigation including various Alternative Dispute Resolution mechanisms such as mediation, arbitration and others. These mechanisms become ways for reducing the burden on the existing court systems, which already suffer from long rolling lists of hearings. Hence, it would be against the interests of the Act - and the judicial system more broadly - to shun potential opportunities for culturally specific resolution mechanisms.

Ultimately, these multicultural policies - as explored above - do not in any real capacity threaten the binding nature of the official state law of Australia. Rather, they seek to accommodate disparate populations and create a more cohesive and engaged society without undermining the singular nationhood of Australia.

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