Religion, Terrorism and the Limits of Freedom: Sea of Faith Conference

The Auckland Branch of the Sea of Faith Network
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# SOME THOUGHTS ON THE LIMITS OF FREEDOM

## Speaking notes for Jeremy Pope

### What do we mean by 'freedom'?

Some suggest that a just society will do three things:

- It will protect and promote the welfare of all its citizens;
- It will provide a range of freedom for individuals as extensive as possible compatible with equal freedom for all other persons; and
- It will provide rights, opportunities, protections and rewards to all on an equal basis and will not discriminate against any person on irrelevant grounds.

The same thoughts guided Thomas Jefferson (3rd President of the United States), who said in his first inaugural address that -

> Freedom of religion; freedom of the press, and freedom of the person under the protection of habeas corpus, and trial by juries impartially selected. These principles form the bright constellation which has gone before us, and guided our steps through an age of revolution and reformation.

These are principles that most of us would probably accept. But within any society that seeks to be just, a tension will inevitably arise between individual freedom and the right of the state to limit freedom for moral and social reasons.

There are two principles of freedom espoused by the eminent political philosopher John Rawls. The first dictates that each person should have the right to the most extensive basic liberty compatible with a like liberty for others – individual freedoms should be maximised, the boundaries being where the freedoms of others begin.

The second principle is that social and economic inequalities should be arranged so that they are to the advantage of the worst off, and should be attached to careers open to all. In this the state remains neutral as between different ways of life, while promoting, in its economic policies, the well-being of the least advantaged.

In his view, each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot over-ride. He argued that if individuals were behind a 'veil of ignorance' – if this 'veil' denied them knowledge of their race, religion, gender,

social class, talents or the concept of the 'good life' – then they would logically reconcile their positions in ways that safeguarded their individual basic civil liberties.

**How are these freedom's guaranteed?**

Certain human rights are recognised by international law as being so basic – so 'fundamental' - as to be such that they cannot be derogated from. The belief is that these derive from the very condition of being human.

Human rights are seen as being inherent, inalienable, universal, indivisible and interdependent. They are *inherent*, in that they belong to everyone because of their common humanity. They are *inalienable*, in that people cannot give them up or be deprived of them by governments. They are *universal*, in that they apply regardless of distinctions such as race, sex, language or religion. They are *indivisible*, in that no right is superior to another. They are *interdependent*, in that realisation of one right contributes to the realisation of other rights.

Most fundamental of all is the right to life itself. This encapsulates the belief that every human being has an essential right to life, and in particular that a human being has the right not to be killed by another human being. The concept of a right to life is central to debates on the issues of capital punishment, euthanasia, self defence, abortion and war.

The right to life is enshrined in article 3 of the United Nations' Universal Declaration of Human Rights (whose 60th anniversary we celebrate this year). It is reiterated in article 6 of the International Covenant on Civil and Political Rights, making its observance the obligation of every United Nations member state. In each case the wording in identical: 'Every human being has the inherent right to life. This right shall be protected by law. No person shall be arbitrarily deprived of his life.'

The second inalienable human right is the right not to be subjected to torture. Freedom from torture is an inalienable human right. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, ratified by more than 130 other countries since 1984, forbids governments from deliberately inflicting severe physical or mental pain or suffering on those within their custody or control. (This prohibition was even acknowledged by President George W. Bush, whose 2003 assertion that 'The United States is committed to the world-wide elimination of torture' and is 'leading this fight by example' seems somewhat at odds with what his administration has actually been doing on the ground.)

Other civil, political, economic, social and cultural rights accorded international recognition in the Universal Declaration are the right to freedom of expression, the right to an adequate standard of living, the right to decent conditions of work, the right to self-determination and the rights of minorities. These rights and freedoms have to be balanced against the legitimate needs of society - but the right to life and the prohibition against torture are absolutes.

The 'right to self-determination' is addressed in Article 1 of both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). This provides that –

> All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

There is also a generally acknowledged right of 'peoples' to rebel - to shift what some lawyers refer to as the 'grundnorm', the very basis on which the constitution and the laws of the land are founded. A number of countries have constitutions founded on such uprising. We can think of the French Revolution as well as the Boston Tea Party and its aftermath. Such insurrections tend to become respectable and to be recognised internationally once they have succeeded. However, where they fail, they are frequently put down by the forces of the internationally-recognised government.

Today, there are many would see the people of Zimbabwe, now denied the opportunity to change their government peacefully through the ballot box, as being entitled to exercise their right in their present circumstances, to rise and forcefully rid themselves of their internationally-recognised dictator. We have to remembers that when Americans celebrate the 4th of July and the French their Bastille Day, they are, in fact, celebrating the success of their blood-soaked insurrrections.

But first, what are the 'peoples' referred to in the Conventions? The provisions in today's world are wonderfully vague. When they were drafted the Conventions resonated with the times – colonialism (and its nadir, apartheid) was on everyone's mind, and Harold McMillan's 'Winds of Change' were starting to fan liberation across the continent of Africa.

Yet who are 'peoples' and how expansive is the field of 'self-determination'? Unfortunately, there is not yet in international law a recognised legal definition of 'peoples'. It can be said, however, that present international law does not recognise ethnic and other minorities as separate peoples. Rather minorities fall under special international provisions that address the rights of minorities, and these fall short of any right of secession. Moreover, the constitutions of most sovereign states do not recognise the right to self-determination through secession. We may not have a formal written constitution, but if we had a constitution it is a fair bet that ours would do likewise.

The recent events in the Tūhoe country have brought some of these principles to the forefront. Those events are, of course, being investigated by a number of bodies – not least the courts and the Police Complaints Tribunal – but public understanding has been clouded by some of the most sensationalised press reporting we have ever seen. This renders it inappropriate for me to comment today, even – as I do – in a personal capacity.

Two international commentators on the general issue of minorities have observed that some forms of devolution can be appropriate:

> In order to accommodate demands for minority rights and avoid secession and the creation of a separate new state, many states decentralise or devolve greater decision-making power to new or existing subunits or even autonomous areas. More limited measures may include restricting demands to the maintenance of national cultures or granting non-territorial autonomy in the form of national associations which assume control over cultural matters. This would be available only to groups that abandon

> secessionist demands and the territorial state would retain political and judicial control, but only if would remain with the territorially organised state.[1]

There can be no single answer as to how minority group differences in views and values are to be resolved -- only the belief that through the democratic processes marked by tolerance, informed debate, and a willingness to compromise, can free societies reach agreements that embrace the twin pillars of majority rule and minority rights.

In New Zealand we are moving gradually down this path – a continuing process that historians may come to see as being a form of 'de-colonisation'.

As we are all too well aware, in the immediate aftermath of colonisation the Treaty of Waitangi was dismissed by the courts as being a worthless piece of paper. Land was illegally expropriated – at times by force and frequently by fraud. Māori customs were disregarded, sacred sites were accorded disrespect, and human rights abuses perpetrated, such as those at Parihaka and elsewhere. As they had been in Ireland, European names were imposed across the country, eradicating many Māori names (though notably the King Country escaped this process). English was imposed as the only official language, with young Māori being beaten at school if they used their own language. Māori lost their māna, their land and with them their self-respect.

In recent years a very different Aotearoa/New Zealand has been evolving. It may never be impossible fully to redress the undoubted wrongs of our immediate past, but the efforts that all have been making to achieve common ground – Māori no less than Pākehā – bodes well for the future.

**New Zealand's Human Rights law**

In the absence of a written constitution, the freedoms of New Zealanders are protected by our Bill of Rights Act of 1990. This places limits on the actions of those in government (including government departments, the judiciary, state-owned enterprises and local authorities) when they wish to curtail the rights of individuals (and not only people but companies and incorporated societies as well).

The rights covered by our Bill of Rights Act include –

- The life and liberty of the person
- Democratic and civil rights
- Non-discrimination and minority rights
- Search, arrest and detention
- Criminal procedure, and
- The right to justice.

All new legislation is required to be examined by the Attorney-General to see if it is consistent with the rights and freedoms affirmed by the Bill of Rights Act. If there are any inconsistencies, the government of the day is required to provide a justification for the

[1] Aleksandar Pavkovic and Peter Radan, *In Pursuit of Sovereignty and Self-determination: Peoples, States and Secession in the International Order,* Macquarie University Law Journal, 1, 2003.

limits placed on these rights. The Attorney-General must report any inconsistencies with the Bill of Rights Act to Parliament when the legislation is introduced, as the rights and freedoms contained in the Bill of Rights "may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

To meet this test, four criteria must be met:

- The law must pursue an objective that is sufficiently important to justify limiting a charter right.
- The law must be rationally connected to the objective.
- The law must impair the right no more than is necessary to accomplish the objective.
- The law must not have a disproportionately severe effect on the persons to whom it applies

Initially the government and its agencies, and those who perform public functions, were temporarily exempted from full compliance with the Human Rights Act of 1993. This has expired, and now individuals have the right to challenge alleged breaches, and if the government cannot show that the policies, practices or even the law itself is demonstrably justified in a free and democratic society, it will be held to account.

Keeping an eagle eye on all of this is the Human Rights Commission. It is our role to champion fundamental human rights as a framework for a fair and just society for all the people of New Zealand – to the point where we are empowered to receive complaints of suspected violations. Alongside this, is the Office of Human Rights Proceedings (independent from the Commission) that can and does provide free representation for citizens wishing to take the government to court.

Our general mandate is to protect human rights in general accordance with United Nations Covenants and Conventions. To accomplish this, the Commission employs a range of activities. It provides education in human rights, it inquires into and reports on human rights matters, and it helps to resolve disputes relating to discrimination in all its manifestations. We receive complaints over a nationwide help-line, and provide fast and frequently effective advice to those in need. Where problems so require, complaints can go to our mediation service, where skilled mediators work with the parties and generally get agreement on mutually acceptable ways forward.

Most importantly, we scrutinise all bills that come before Parliament, and whenever there is a human rights dimension we make representations to the relevant Select Committee. We are also empowered to intervene in court proceedings to ensure that a court has a full appreciation of the human rights dimensions of the case before it.

We also have responsibility for the development of a national plan of action for the promotion and protection of Human Rights in New Zealand. This draws in many actors, both within government and within civil society, and can be seen on our website.

The Commission is not the entirety of our national human rights architecture. The Privacy Commissioner and the Office of the Ombudsman have separate but important functions. Nevertheless, the Human Rights Commission is central to the protection of our rights and freedoms. Thus an essential part of our role is monitoring the performance of other institutions. At regular intervals too, we participate in the presentation to the United Nations

Human Rights Committee in which New Zealand reports on its observance of its international human rights obligations.

So it is that we have a society in New Zealand aspiring to be just and fair; to respect individual human rights to the greatest extent possible without intruding on the rights of others; and a society that, overall, strives to weights itself towards providing protection for the weak and the disadvantaged.

**An obsession with risk**

In the context of our discussions here I would like to suggest that the greatest challenge to human rights and to our way of life today is an obsession with risk – and its flipside, risk-avoidance.

Franz Kafka wrote in *The Trial* that 'It's often safer to be in chains than to be free'. And if we dare to be free, we must surely accept the danger that goes with it. For not only is each one of us 'free', but everyone else is free as well, and at risk of abusing the space that freedom allows.

We see the 'fear of freedom' everywhere in our society today, even to the extent that branches must be cut from trees for fear of children being free to climb and so fall out of them. No longer are there what once were called 'Acts of God': human failure lies behind every misfortune and someone, somewhere must be 'held to account'.

In our rush to blame and to hold to account everyone imaginable whenever anything untoward takes place, we seem to forget that dreadful things happen, even in free societies, and the society that tries too hard to prevent them from occurring risks losing its freedoms. Perhaps it is safe, but it may also be in chains.

I spent some years working in the field of corruption in the developing world. What I came across time and again was the way in which – for fear of being considered corrupt – honest officials would not take decisions, but rather would refer matters to their superiors. The end result was, of course, congestion and delay. Public officials paralysed into doing nothing – although they may have been able to sleep at night! I frequently recalled Ivan Goncharov's famous nineteenth-century Russian aristocrat, Oblomov, who recognised that things only started to go wrong when he got out of bed in the morning – and so the safest course to adopt was simply to luxuriate in bed all day.

The events of 9/11 and its aftermath prey on our obsession with risk and have triggered a veritable bonfire of cherished freedoms. The outrage itself needs no elaboration. 2,973 people drawn from 90 different countries died -a number more than equalled by the deaths of US servicemen and women in the continuing occupation of Iraq. It is common knowledge that Iraq was in no way connected to the events of 9/11; yet untold thousands of its people have been killed and maimed. The principal mastermind of the atrocity is still at large.

The US administration's response was not to treat 9/11 as a matter of law enforcement – one in which the culprits would be tracked down and brought to justice under due process. Instead, 'war' was declared on an abstract noun – on terrorism' – and a study for the US

Army has come up with no fewer than 109 different definitions of terrorism covering a total of 22 different definitional elements.

It remains a curious proposition. How can we ever know when the war has been won? Who, precisely, is the enemy? We wound up with a 'war' that had no 'prisoners of war'… And no time frame for them to be released… In the process, in the United States and elsewhere, habeas corpus, along with due process, has been thrown out of the window. Core values of a free society have been summarily jettisoned, and only now – years later – is the US Supreme Court finally coming to terms with the need to repair the damage.

The international 'laws of war', too, were torn up. The question of definitions of torture much exercised the minds of US lawyers at the Pentagon. Documents have recently come to light that show that in October 2002, ten Defence Department lawyers and officials met at Guantánamo to decide precisely which interrogation techniques would finally extract information from the hard-shelled terrorism suspects they believed they might be holding there.

Also in attendance was a CIA counter-terrorism lawyer, Jonathan Fredman, who apparently stated that exceptionally aggressive methods could be used that would not risk US officials being charged with torture. Reports relate that Fredman expressed the opinion that 'Torture is basically subject to perception. If the detainee dies, you're doing it wrong.' A military lawyer responded by asking for documentation 'to protect us.'

That documentation was provided by other senior administration lawyers - most crucially at the Justice Department, where the word went out that interrogators in the field could inflict cumulatively intense pain as long as it stopped short of 'organ failure' or 'death.' It was asserted that any coercive technique up to that decisive point - having been authorised secretly by the Justice Department - would not violate international laws against torture, and would not lead to prosecution of the interrogators.

This 'perception' of legality—swiftly adopted by the President and his administration—spread to US prisons in Afghanistan and Iraq, the military bases holding enemy combatants in the United States, and deep inside the CIA's secret 'black sites' still holding prisoners around the world.

So, in the name of 'Operation Enduring Freedom' we have a situation where those denied due process and habeas corpus are also subjected to treatment short of actual death. Among the casualties in this process we must list fundamental freedoms and internationally-guaranteed human rights.

Also in the aftermath of 9/11 came a flood of anti-terrorism measures around the globe, and the attack being used as a justification for greatly enhancing police powers of detention and enforcement. Thus 'Operation Enduring Freedom' appears to have delivered an abiding curtailment of freedoms in many parts of the world, inflicting further collateral damage on our traditional values, rights and freedoms. Surely a triumph for Osama bin Laden in his professed wish to undermine the values of American and other western societies.

In Britain, the government suspended core human rights in the wake of 9/11, allowing it to detain foreign nationals indefinitely without charge or trial. The government there even

argues it is entitled to rely on evidence produced by torture elsewhere. Now, just last month, it has extended to 42 days the period of time in which anyone can be held in detention without trial. This to howls of dismay from the press and in the face of criticism from the government's own former Lord Chancellor, Lord Falconer and former Attorney General, Lord Goldsmith. The limit here, we may be thankful, other than in immigration matters, is just 48 hours (not days!).

For its part, the United States, within ten weeks enacted the curiously-named USA PATRIOT Act – signed into law on 26 November. (The acronym actually stands for 'Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act'.)

The Act expands the authority of US law enforcement agencies for the stated purpose of fighting terrorism in the United States and abroad. Among its provisions, the Act increases the ability of law enforcement agencies to search telephone, e-mail communications, medical, financial and other records; eases restrictions on foreign intelligence gathering within the United States; expands powers to regulate financial transactions, particularly those involving foreign individuals and entities; and enhances the discretion of law enforcement and immigration authorities in detaining and deporting immigrants suspected of terrorism-related acts. The Act also expands the definition of terrorism to include domestic terrorism, thus enlarging the number of activities to which the USA Patriot Act's expanded law enforcement powers can be applied.

It was passed into law in 2001 by wide margins in both Houses of Congress and was supported by members of both the Republican and Democratic parties. Despite widespread congressional support, it has been criticised for weakening protections of civil liberties.

In particular, opponents of the law have criticised its authorization of indefinite detentions of immigrants; searches through which law enforcement officers search a home or business without the owner's or the occupant's permission or knowledge; the expanded use of authorisations that allow the FBI to search telephone, email and financial records without a court order; and the expanded access of law enforcement agencies to business records, including library and financial records. (The monitoring of the titles of the books that people are taking out of public library is surely Orwellian.)

Since its passage, several legal challenges have been brought against the Act, and Federal courts have ruled that a number of provisions are unconstitutional.

Many of the Act's provisions were to expire at the end of 2005, but supporters of the act pushed to make its sunset provisions permanent, while critics sought to revise various sections to enhance civil liberty protections. This time round the 'reauthorisation' Act was soundly criticised by Senators from both the Republican and Democratic parties for ignoring civil liberty concerns, but none-the-less it was signed into law.

The truth is that none of these measures would have prevented 9/11 from taking place. It was essentially a low-tech operation, conducted by a small group of people, and financed simply by using cash cards to make withdrawals from bank machines. Its cost, all up, was probably much less than $400,000.

The reaction of the United States administration to 9/11 in 2001 can be compared with the aftermath of the destruction of Pan Am flight 103 over the Scottish town of Lockerbie, in December 1988. The death toll then was 270 people from 21 countries, including 11 people in Lockerbie itself.

In this case the British (or should I say Scottish?) response was a measured one. The outrage was treated as being a criminal matter. Mutual legal assistance treaties were activated, and about 17 countries provided essential intelligence and evidence in the course of the lengthy investigation that lead to the prosecution of two Libyan officials, and the conviction and jailing of one of them. Compensation of $US8 million was paid by the Government of Libya to the families of each of the victims – the government saying that it had not been involved, but accepted responsibility for the unauthorised actions of its officials. (The aftermath lingers on as a further appeal is before the Scottish courts.). It took time; it was measured; and it carried public opinion with it.

Which of these two very different approaches would we judge as the appropriate response for a free society such as our own?

Can we not gain inspiration from the words of yet another US Presidential inauguration – those of Franklin D. Roosevelt –

> Let me assert my firm belief that the only thing we have to fear is fear itself - nameless, unreasoning, unjustified terror … paralyses needed efforts to convert retreat into advance.

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