

# **One Law for all: multiculturalism and legal plurality in Australia**

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## Abstract

Australia is the great multicultural experiment with around 26% of the population having been born overseas. But multiculturalism in Australia remains controversial. Whilst some see cultural diversity as an asset and cite the existence of a relatively harmonious society, others point to the existence of ethnic ghettos and inter-racial tension. The occasional race riots, typically centered in the inner suburbs of Sydney, are said to be symptomatic of this unease.

Irrespective, multiculturalism has become an embedded part of the fabric of Australia and there is no turning back for the country and its institutions.

One area where the more pluralistic society has caused a rethink in core values is in the legal system. Whilst the law remains steadfastly rooted in its British Christian common law traditions the influence of other cultures and beliefs is emerging. The primary two instances of this have seen the partial accommodation of indigenous customary law and traditions and the debate over the accommodation of Islamic law principles.

The adoption of “foreign” legal concepts goes to the heart of what it means to be a liberal democratic society: does it mean wholesale legal plurality or are there some “foreign” legal principles that are an anathema to a free and equal society? Putting it in the Australian context: should Australia facilitate the recognition by minorities of their customary and religious laws or is multiculturalism about establishing the one legal framework that applies to all equally and without discrimination?

This paper will explore these developments and seek to identify the future implications for the legal system of an increasingly multicultural Australia. It will be observed that legal plurality does exist in Australia but largely in the shadows of the official legal system. There have been limited attempts to render the official realm more sensitive to indigenous beliefs and customs, with the creation in most States of indigenous courts the most significance

development. How successful this initiative has been is yet to be determined. Meanwhile the absence of official recognition and supervision of faith based tribunals, whether Christian, Jewish or Muslim, has resulted in vulnerable people not enjoying the protections afforded in the official realm. It is the author's view that whatever form legal plurality takes first and foremost is the need to protect the vulnerable of society.

# One Law for all: multiculturalism and legal plurality in Australia

*“There is one law we are all expected to abide by. It is the law enacted by the Parliament under the Australian Constitution. If you can’t accept that then you don’t accept the fundamentals of what Australia is and what it stands for.”*

Peter Costello, “Worth promoting, worth defending. Australian citizenship. What it means and how to nurture it.’, Address to the Sydney Institute, 23 February 2006.

## Multiculturalism’s dilemmas

Multiculturalism has always been a controversial proposition. Although at least one notable world leader has labeled it a failure,<sup>1</sup> for many countries, such as Australia, there can be no turning back.

The inherent concern for a multicultural society is whether it will fragment as a result of the recognition and accommodation of differences being inconsistent with basic secular liberal-democratic principles of equality, stability and neutrality.<sup>2</sup> This focuses attention on exactly how these principles are to apply in practice. In particular, should a secular society allow, and even actively accommodate, all religions and practices or rather forbid those which are perceived to impinge on the freedoms of its citizens? Does by secular do we mean that all religions and practices must be allowed to flourish equally or that none may be entertained that impinge on fundamental civil and human rights? Putting the question yet another way, should a multicultural society mandate equal rights for all citizens or should it be prepared to permit, and even endorse, the right of some (possibly coerced and vulnerable) citizens to curtail their fundamental rights in the pursuit of cultural and religious expression?

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<sup>1</sup> Matthew Weaver, “Angela Merkel: German multiculturalism has ‘utterly failed’”, *The Guardian* 17 October 2010 available at <http://www.theguardian.com/world/2010/oct/17/angela-merkel-german-multiculturalism-failed> (last visited 21 March 2014).

<sup>2</sup> Omid Payrow Shabani, “Introduction: The practice of law-making and the problem of difference” in *Multiculturalism and law a critical debate*, University of Wales Press. The phrase “militant democracy” has been invoked to describe the push back by democracies against forces that are seen as inconsistent with democratic principles and secularism: see “The topography of Sharia in the Western political landscape” in Australia” in Rex Ahdar and Nicholas Aroney (eds), *Sharia in the West*, Oxford University Press 2010 at 22.

Western democracies, in particular, are struggling with these dilemmas. Australia is no exception.

### **Australia's experiment**

Australia's transformation from a "nervous white nation" to one of the most multicultural societies on Earth in less than 50 years is truly remarkable. The statistics paint the picture:

- as at 1947 less than 1% of the population were non-European,<sup>3</sup>
- over 6.5 million immigrants since World War II accounting for half the population growth,
- around 25.6% of Australians were born overseas,
- immigrants to local born ratio 2nd highest in the world,
- over 200 languages spoken.<sup>4</sup>

This transformation has not been without controversy and, indeed, the success or otherwise of the experiment is yet to be determined. Some racial ghettos do exist as opponents are quick to point out.<sup>5</sup> Furthermore, there has been racial conflict in the form of riots and ethnic gang activity.<sup>6</sup> Concerns as to the limits of the size of the population that the country can

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<sup>3</sup> Census of the Commonwealth of Australia, 1947 available at [http://www.ausstats.abs.gov.au/ausstats/free.nsf/0/12E0F80677C9A71ACA25784100197F2E/\\$File/1947%20Census%20-%20Volume%20I%20-%20Part%20XII%20Birthplace.pdf](http://www.ausstats.abs.gov.au/ausstats/free.nsf/0/12E0F80677C9A71ACA25784100197F2E/$File/1947%20Census%20-%20Volume%20I%20-%20Part%20XII%20Birthplace.pdf)

<sup>4</sup> Drawn from *About Australia People, culture and lifestyle*, Australian Government Department of Foreign Affairs and Trade, available at [http://www.dfat.gov.au/facts/people\\_culture.html](http://www.dfat.gov.au/facts/people_culture.html) and [http://en.wikipedia.org/wiki/Immigration\\_to\\_Australia](http://en.wikipedia.org/wiki/Immigration_to_Australia) (both last visited 7 March 2014).

<sup>5</sup> For a discussion as to the extent and history of ethnic concentrations see James Jupp, "Ethnic and Cultural Diversity in Australia", *Year Book Australia 1995* available at <http://www.abs.gov.au/Ausstats/abs@.nsf/Previousproducts/1301.0Feature%20Article41995?opendocument&tabname=Summary&prodno=1301.0&issue=1995&num&view> (last visited 7 March 2014).

<sup>6</sup> Epitomized by the 2005 Cronulla riots covered by the ABC in a mini-documentary at <http://www.abc.net.au/archives/80days/stories/2012/01/19/3412161.htm> (last visited 7 March 2014).

sustain in terms of the environment and infrastructure have also added weight to calls for a reconsideration of the immigration policy.<sup>7</sup>

The Australian experience has been a centrally planned immigration policy, a point that is asserted to contrast the approach in Europe.<sup>8</sup> Generally premised on the concept of “populate or perish” (or more specifically “be taken over by some other nation”), the immigration policy has taken many forms, from the early convict fleets, black birding and indentured laborers,<sup>9</sup> assisted passages<sup>10</sup> and the displaced persons program,<sup>11</sup> to the current skills, family and humanitarian program.<sup>12</sup> Underlying the different bases of admission has been a concern with race. Whilst all races were generally welcomed prior to federation in 1901, the first acts of the new country were to enshrine the infamous white Australia policy.<sup>13</sup> Although the definition of “whiteness” waned over time there remained essentially a Euro-centric immigration policy until the early 1970s. From that period there has been a progressive shift towards Asian immigration with a policy of promoting Australia as essentially Asian now predominant.<sup>14</sup>

The deft hand of government has not ended with the entry of these immigrants. There has been a distinct policy to shape multicultural

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<sup>7</sup> The arguments for and against a “big Australia” are neatly summarized in Jessica Brown and William Bourke, “Should Australia’s population be controlled?”, *Sunday Herald Sun* (2 October 2011) at <http://www.heraldsun.com.au/news/opinion/should-australias-population-be-controlled/story-e6frfhqf-1226155091822> (last visited 7 March 2014).

<sup>8</sup> Ethnic diversity is not the same thing as having a multicultural policy: Joint Standing Committee on Migration, *Inquiry into Migration and Multiculturalism in Australia* 2013 at paragraph 4.59 available at [http://www.aph.gov.au/parliamentary\\_business/committees/house\\_of\\_representatives\\_committees?url=mig/multiculturalism/report.htm](http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=mig/multiculturalism/report.htm) (last visited 20 March 2014).

<sup>9</sup> See the ABC mini-documentary at <http://www.abc.net.au/news/2013-08-14/an-blackbirding-special/4887692> (last visited 7 March 2014).

<sup>10</sup> See <http://www.migrationheritage.nsw.gov.au/belongings-home/about-belongings/australias-migration-history/> (last visited 7 March 2014).

<sup>11</sup> Discussed at <http://www.immi.gov.au/about/reports/annual/2009-10/html/65-years-of-nation-building/Immigration-history-1945-1955.htm> (last visited 7 March 2014).

<sup>12</sup> Detailed in the Australian Government fact sheet available at <http://www.immi.gov.au/media/fact-sheets/> (last visited 7 March 2014).

<sup>13</sup> *Immigration Restriction Act* 1901

<sup>14</sup> As expressed in the Australian Government White Paper of October 2012 *Australia in the Asian Century* available at [http://www.asiaeducation.edu.au/verve/\\_resources/australia-in-the-asian-century-white-paper.pdf](http://www.asiaeducation.edu.au/verve/_resources/australia-in-the-asian-century-white-paper.pdf). It is not clear whether the Abbott Government shares the view of the former Government as to the importance of Asia for Australia’s future: see Brendan Nicholson, “Asian century plans consigned to history”, *The Australian* (28 October 2013) available at <http://www.theaustralian.com.au/national-affairs/policy/asian-century-plans-consigned-to-history/story-e6frg8yo-1226747866681#> (last visited 7 March 2014).

Australia.<sup>15</sup> One manifestation of this policy has been the provision of multi-lingual government services and anti-discrimination legislation. At the same time, concerns as to the possibility of Australian society fragmenting into a cluster of tribes has seen emphasis on national cohesion. Initially immigrants were expected to “assimilate” but this begged the question as to what were the core values of the society that they were expected to embrace and could they influence them? A more enlightened policy saw the rhetoric change to one of “integration”,<sup>16</sup> although the expectation of an overriding and unifying commitment to Australia and its society and to accept the rights of others has seen the phrase coined “Australian multiculturalism”. Certainly the government sees diversity as a resource<sup>17</sup> and, whatever it heralds, multiculturalism is here to stay. However the concerns to maintain national cohesion have never been far away with government organized events to promote patriotism highly visible, especially on national celebratory days such as Australia Day and ANZAC Day. More recently a new “Harmony Day” (21 March) has been added to the national calendar.

There is no question that the impact of the immigration policy has massively shaped Australian culture. For many of the first white immigrants of the 1780s Australia was a chance to start a culture afresh. For others though it was seen as a chance to craft the perfect white nation that was waning in the motherland. Over time the later view took dominance as the newsreels of much of the 1900s, with their fresh white faces overlaid with a very British commentary, attest to. However the lack of embedded traditions and the obvious inappropriateness of English customs for such an alien environment ensured that Australia was a sponge ready to absorb and embrace new ideas.<sup>18</sup> As the British Empire waned Australia became to appreciate the need to be self-reliant and, ultimately, that it could not

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<sup>15</sup> Admittedly less so during periods of a conservative government.

<sup>16</sup> *Review of Post Arrival Programs and Services for Migrants, Migrant Services and Programs*, Canberra, Australian Government Publishing Service, 1978 (“Galbally Report”) available at [www.multiculturalaustralia.edu.au/doc/galbally\\_1.pdf](http://www.multiculturalaustralia.edu.au/doc/galbally_1.pdf)

<sup>17</sup> Australian Government (Office of Multicultural Affairs), *National Agenda for a Multicultural Australia*, Canberra, July 1989, available at [www.immi.gov.au/media/publications/pdf/na-multicultural-australia-sharing-our-future.pdf](http://www.immi.gov.au/media/publications/pdf/na-multicultural-australia-sharing-our-future.pdf)

<sup>18</sup> Thus, multiculturalism may be more amenable to settler nations than those with established traditions borne from long occupation, such as Japan.

survive as an isolated Anglo and later Euro-centric enclave in an Asian world. The doors opened to a different type of immigrant with their different ideas.

Day to day life in this multicultural land allows one to be a citizen of the world without leaving home. All end of restaurants, shops, clubs and cultural events abound. The ethnic mix is now simply part of the fabric of the society taken for granted and accepted as the norm.

But what about the effect of multiculturalism on the country's institutions? In particular, what influence, if any, has multiculturalism had on the law? As the nations of the world have become more integrated and populations have mingled a move towards pluralistic rather than mono-cultural legal systems has been increasingly debated.<sup>19</sup> So to what extent is the Australian legal system pluralistic?

### **Knights in armor clanking their medieval chains in a world of gum trees, koalas and aborigines**

Naturally as part of the British Empire the Australian colonies embraced English legal traditions and English law. The notion that Australia had been empty land that had been "settled" not only permitted British sovereignty but meant that English laws applied.<sup>20</sup> Whilst there was some innovation, both courts and the early parliaments took their lead almost exclusively from the motherland.<sup>21</sup> With the Act of Federation (itself British legislation<sup>22</sup>) all the laws of England were assumed into Australia.

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<sup>19</sup> For example, see Sally Engle Merry, "Legal Pluralism" (1988) 22 *Law & Society Review* 869; Peter Sack and Elizabeth Minchin (eds), *Legal Pluralism: Proceedings of the Canberra Law Workshop VII* (ANU, Canberra, 1986); John Griffiths, "What is Legal Pluralism?" (1986) 24 *Journal of Legal Pluralism* 1; Gordon Woodman, "Legal Pluralism and the Search for Justice" (1996) 40 *Journal of African Law* 152; Jennifer Corrin, "Moving Beyond the Hierarchical Approach to Legal Pluralism in the South Pacific" (2009) 59 *Journal of Legal Pluralism* 29 and William Twining, *Globalisation and Legal Theory*, Butterworths 2000.

<sup>20</sup> So confirmed the Privy Council in *Cooper v Stuart* (1889) 14 App Cas 286. Also see *Case 15 - Anonymous* (1722) 2 Peer William's Reports 75; 24 ER 646.

<sup>21</sup> The early 1800s were testimony to a tension between retaining "Britishness" and embracing more emancipist ideals. A view existed that the adoption of English laws needed to be tempered by the peculiar circumstances of the colonies. Notable departures occurred in respect to the right to trial by jury and whether convicts could be jurors and the early recognition of male suffrage and even female suffrage.

<sup>22</sup> *Commonwealth of Australia Constitution Act 1900* (Imp)



These laws had a long pedigree with their origin often subscribed to the Magna Carta of 1215. This was effectively a treaty between King John and his subjects to the effect that they would be governed according to the law and not arbitrarily. Indeed much of the history and evolution of English law can be traced to tensions between the English monarchs and their subjects. Initially the Monarch was the sole arbitrator on legal matters but then as the workload became too great delegates were empowered. Appeals to the Monarch were sometimes possible and to ensure fair and consistent decisions the doctrine of precedent was created whereby previous decisions should be followed unless they could be distinguished by their facts.

The deft hand of religion was never far from the scene so running parallel to what became known as the common law courts were the ecclesiastical courts with jurisdiction over religious matters, which initially included marriage, separation and succession (wills). Then, as the doctrine of precedent over time left the common law too rigid and inflexible, a new system of courts evolved know as Chancery or Equity. The equitable courts were less concerned with common law principles and more with focusing on the over-riding fairness of their decisions. Just before Australia's federation the two court systems were merged with the possibility of conflicting principles being dealt with by the maxim "equity prevails".<sup>23</sup>

This legal system entertained a feudal system of landholdings. The absolute power of the monarchy was reflected in its absolute ownership of all the lands of England, the use and enjoyment of which by its subjects was permitted at its pleasure. Thus a pyramid system was created with the most senior Lords and Barons given vast chunks of land in return for their allegiance, with rights to use the land being defused down the pyramid in ever decreasing portions to ever decreasing persons of significance. At the bottom were the peasants, working parcels of the land in return for paying a share of their produce that then made its way back up the pyramid.

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<sup>23</sup> *Judicature Act 1873 (Imp)*

By virtue of the *Australian Courts Act* of 1828<sup>24</sup> the Privy Council became the final court of appeal from Australian courts and all the laws and statutes in force in England applied to the Australian colonies.<sup>25</sup> Furthermore, the doctrine of repugnancy provided that laws passed by a colonial legislature were invalid to the extent that they were inconsistent with an English law whilst the doctrine of paramount force permitted subsequent English statute law to apply to the colonies if it was so worded.<sup>26</sup> The effect was to join English and Australian common law at the hip and even ensure substantial compatibility of statute law. Whilst with federation the Australian parliaments were freed up (at least in theory), the courts remained constrained for a further 85 years. In 1978 the High Court of Australia finally asserted the infallibility of the Privy Council<sup>27</sup> and eight years later appeals to it were abolished.<sup>28</sup> Freed from these shackles it has only been in the last 30 years that the Australian common law has carved a divergent jurisprudence.<sup>29</sup>

So it was that the English system of law and land holding became the foundation of the laws in a country of gum trees, kangaroos and, most problematically as it was to transpire, aborigines.

### **Customary law shakes the foundations**

That there could be little room for other than English law in Australia was initially a given. The common law is prepared to acknowledge customary law but the criteria are strict, namely that the custom:

- not be inconsistent with any statute or fundamental principle of common law,
- have existed 'from time immemorial',
- have been exercised continuously and peaceably as of right,

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<sup>24</sup> *Australian Courts Act* (Imp) 1828 (9 Geo IV, c 83). Not finally removed until the *Statute of Westminster* 1931(Imp), the *Statute of Westminster Adoption Act* 1942 (C/W) and the state *Australia Acts (Request) Acts* 1985 and *Australia (Request and Consent) Act* 1985 (C/W).

<sup>25</sup> Although the dates of reception were not consistent across all the Colonies.

<sup>26</sup> *Colonial Laws Validity Act* (Imp) 1865

<sup>27</sup> *Viro v The Queen* (1978) 141 CLR 88

<sup>28</sup> *Australia Act* 1986

<sup>29</sup> M. Ellinghaus, A. Bradbrook and A. Duggan (eds.), *The Emergence of Australian Law*, Butterworths, Sydney 1989 at 70.

- should be sufficiently certain, and
- be regarded as 'reasonable' by the court.<sup>30</sup>

It made sense in the light of the prevailing view that the indigenous inhabitants were so primitive as to have no real laws of their own and the superiority of the English race meant that the rules of inferior races were unacceptable and, typically, barbaric.<sup>31</sup> So it was in the *Gove land case*<sup>32</sup> Blackburn J was able to say, albeit with regret, that the doctrine of communal native title was not part of the law of Australia as a settled colony.

But as more enlightened views as to the sophistication of the indigenous society began to take hold a realization that the law had been complicit in a great wrong began to worry most fair minded Australians. The parliaments of Australia responded with land rights legislation but it was the decision of the High Court in *Mabo*<sup>33</sup> that became the rally call for the recognition of indigenous customary law. Rejecting any idea that Australia was an empty land when the British arrived, the Court held that native title could co-exist within the land tenure system unless it was specifically extinguished. No longer were the lands of Australia to be taken to be absolutely owned by the English monarch.

### *Reform proposals*

Some years before this decision was handed down the Australian Law Reform Commission looked at whether it was desirable to apply customary law to aborigines. Whilst the subsequent report acknowledged that customary laws were a significant influence in the lives of many aborigines a fundamental difficulty was that there was no one authentic version of customary law. Rather customary law was a series of dynamic and changing systems applying to different groups of indigenous Australians.

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<sup>30</sup> *Recognition of Aboriginal Customary Laws* (ALRC Report 31) available at <http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC31.pdf>

<sup>31</sup> And hence unreasonable. In *Murrell's case*, for example, it was stated that aborigines 'had no law but only lewd practices and irrational superstitions contrary to Divine Law and consistent with the grossest darkness.' Id at paragraph 62.

<sup>32</sup> *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141

<sup>33</sup> *Mabo v Queensland [No 2]* (1992) 175 CLR 1

In particular the report referred to various objections to the recognition of customary laws, including:

- the problem of unacceptable rules and punishments,
- the secret aspects of customary laws,
- the need to protect aboriginal women and children,
- the community divisiveness that recognition could cause,
- the difficulties of definition, and
- whether such recognition would violate the principle of equality before the law and be racially discriminatory.

Ultimately the report recommended that aboriginal customary laws should be recognised, but within the framework of the general law. Particular areas included the recognition of traditional marriages for some purposes, a customary law defence in relation to some crimes, the continued recognition of customary laws for the purposes of bail and sentencing and some hunting, fishing and gathering rights.<sup>34</sup>

More recently the Law Reform Commission of Western Australia revisited the topic.<sup>35</sup> The essence of its 131 recommendations was the recognition of customary law on a case by case basis always subject to maintaining international human rights standards, with particular attention to the rights of women and children and the right not to be subject to cruel punishment. Furthermore, customary law was to be taken into account in a number of ways with respect to the laying of charges, the hearing of cases,<sup>36</sup> sentencing, bail applications, parole and prison releases to attend funerals,

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<sup>34</sup> There were many other recommendations relating to the impact of customs on the interaction of the legal system with indigenous people. These included the need for special considerations relating to the interrogation and incarceration of aborigines, additional training of police officers and special evidential rules as to identifying custom. This later area continues to be a major limitation on the recognition of customary laws by the courts: Jennifer Corrin, *Report on pleading and proof of indigenous customary law in Queensland courts*, University of Queensland 2010 available at

<http://www.law.uq.edu.au/documents/cpicl/Pleading-and-Proof-of-Indigenous-Customary-Law.pdf> (“Corrin”).

<sup>35</sup> Law Reform Commission of Western Australia, *Aboriginal customary laws, The interaction of Western Australian law and Aboriginal law and custom*, September 2006 available at [http://www.lrc.justice.wa.gov.au/files/P94\\_FR.pdf](http://www.lrc.justice.wa.gov.au/files/P94_FR.pdf)

<sup>36</sup> For example, as to the gender of the judge and/or jury, allowing evidence to be given in narrative form (not questions and answers), by a group of individuals or being taken in country, allowing exceptions to the hearsay and opinion rules, protecting sensitive information from disclosure and protecting vulnerable witnesses.

coronial enquiries and post mortems, burial disputes, driving disqualification, child custody, succession and maintenance, hunting, fishing and gathering rights. Education of both those administering justice, as to indigenous culture, and aborigines, as to the law (especially laws at odds with custom), was seen as vital.

The Commission emphasized that it was not recommending a separate set of laws for indigenous people but rather seeking to accommodate customary laws and practice within the Australian legal system. This was termed “functional recognition”: the recognition of customary law for particular purposes in defined areas of law. Importantly though it advocated some change at the top: constitutional recognition.

#### *The indigenous courts initiative*

An especially important recommendation was that of the involvement of elders and respected people in sentencing. This initiative had, and now has, been implemented in most States.<sup>37</sup> Whilst the specifics can vary, these “indigenous” courts permit not only the involvement of elders in the case but display other novel features, such as the sitting of the accused unrestrained at the bar table with a supporter, the magistrate and counsel. This has given rise to the expression “circle courts”. The informality and flexibility, together with the involvement of community justice groups, is directed to the judicial officer being able to learn more about the offender and the offence and developing an appropriate response. The input of elders and respected persons also assists in the offender having a more positive attitude towards the process.

The aim of these courts is, ultimately, to decrease the over-representation of indigenous people in the criminal justice system. Whilst there is conflicting evidence as to their success<sup>38</sup> the real problem might be the lack of resources, especially post-court supervision.<sup>39</sup>

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<sup>37</sup> Elena Marchetti and Kathleen Daly, *Indigenous Courts and Justice Practices in Australia*, Australian Institute of Criminology, Trends and Issues in crime and criminal justice, Paper No 277, May 2004 available at <http://www.aic.gov.au/documents/0/8/3/%7B08326CEA-3B11-4759-A25B-02C1764BCB8A%7Dtandi277.pdf>

<sup>38</sup> The Queensland Murri court was closed at the end of 2012 the Government arguing that it was not working effectively: Kate Lemmon, “Murri courts axed to save millions”, *The Queensland Times* (15

Apart from statutory initiatives, there are many instances of judges using their discretion to take customary laws into account. Such judges tend to be “cultural relativists”, a phrase to describe those who take the view that moral values operate in the framework of a cultural bias and conduct should be viewed in its cultural context.<sup>40</sup> Whilst these judges might more readily recognize customary laws some would argue that this approach is flawed to the extent that it can endorse repressive cultures or socially unacceptable behaviour. Thus some indigenous people aggrieved by the recognition of these customs have coined the phrase “bullshit law”.<sup>41</sup>

Areas where this discretion has often been called into play include in applying a reasonable person test, the granting of injunctions to prevent coronial autopsies and in family law (especially custody) and succession (often burial) disputes.<sup>42</sup> Although it has been suggested that customary law has largely been marginalized in Australian case law<sup>43</sup> the exercise of discretion by individual judges has served as a vehicle for its recognition. Meanwhile the High Court has expressed the necessity for it to deal with the issue when the appropriate matter comes before it.<sup>44</sup>

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September 2012) available at <http://www.qt.com.au/news/murri-court-is-axed-to-save-35-million-closure/1545357/> (last visited 12 March 2014).

<sup>39</sup> Anthony Morgan and Erin Louis, *Evaluation of the Queensland Murri Court: Final Report Technical and Background paper 39*, Australian Institute of Criminology 2010 available at <http://www.aic.gov.au/publications/current%20series/tbp/21-40/tbp039.html> (last visited 12 March 2014).

<sup>40</sup> See Franz Boas, *Race, Language and Culture*, Macmillan, New York, 1948 and Ben-Ami Scharfstein, *The Dilemma of Context*, New York University Press, New York, 1989.

<sup>41</sup> A reference to alleged cultural practices (typically by older indigenous men) to justify physical violence or underage carnal knowledge.

<sup>42</sup> See the discussion in Corrin, 34 – 42.

<sup>43</sup> Id, 47. Note that in November 2009, the Australian and State and Territory Governments endorsed the National Indigenous Law and Justice Framework which aims to eliminate Indigenous disadvantage in law and justice: Standing Committee of Attorneys-General Working Group on Indigenous Justice, *National Indigenous Law and Justice Framework 2009-2015* (2009).

<sup>44</sup> Elizabeth Byrne, “The World Today – High Court rejects customary law defence in sexual abuse case” *ABC The World Today*, 19 May 2006 available at <http://www.abc.net.au/worldtoday/content/2006/s1642802.htm> (last visited 14 March 2014). The particular case at issue, involving underage carnal knowledge, was not considered as an appropriate test case partly as the principle that ignorance of the law was no defence would deny the accused an argument that he was not aware that his reliance on customary rights was not a defence.

## Shariah

With the increased migration of Muslims from Islamic nations many Western nations are feeling their way in accommodating Islamic beliefs in their societies, including their legal systems.<sup>45</sup>

Although Australia has a very small Muslim population<sup>46</sup> it has not been immune from this phenomenon. In fact, the place of Muslims in the Australian society is a surprisingly controversial subject for such a multicultural society. Much of the controversy is fueled by conservative elements playing up to the fears that exist in the community from terrorist attacks in other parts of the world. Nowhere is this controversy more pronounced than in the 'debate' over whether Australia should accommodate Shariah (Islamic law) principles.

Shariah are the set of principles that regulate the relationship between Muslims and God and between themselves. It derives from the principles laid down 1400 years ago in the *Qur'an*, believed to contain the word of God transmitted to the Prophet Mohammad, and the *Sunnah*, rules derived from *Hadith*, essentially the preaching of Mohammad. Together these rules are the subject of interpretation and extension by Islamic (legal) scholars creating a body of Islamic jurisprudence or *fiqh*. It should be observed from the outset that, as with indigenous customary law, there is considerable variation in the interpretation and application of Shariah in the Muslim world. This is particularly relevant to Australia whose Muslims come from 80 different nations, with 50 different ethnicities and cultures.<sup>47</sup>

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<sup>45</sup> Typically with some controversy, for example see the recent uproar in the UK over a Law Society practice note for solicitors drafting wills in compliance with Shariah norms: John Bingham, "Islamic law is adopted by British legal chiefs", *The Telegraph* (22 March 2014) available at <http://www.telegraph.co.uk/news/religion/10716844/Islamic-law-is-adopted-by-British-legal-chiefs.html> (last visited 28 March 2014). Further, see the National Secular Society website, an organization dedicated to challenging religious privileges: <http://www.secularism.org.uk/blog/2014/03/sharia-law-is-well-and-truly-operating-in-the-uk--thanks-to-the-law-society> (last visited 28 March 2014).

<sup>46</sup> 350,000 as per the 2006 census: Australian Bureau of Statistics, 2006 Census of Population and Housing.

<sup>47</sup> On the Australian Muslim community see: Abdullah Saeed, *Islam in Australia*, Allen and Unwin 2003; Abdullah Saeed and Shahram Akbarzadeh (eds), *Muslim Communities in Australia*, UNSW Press 2001; Jamila Hussain, *Islam: its Law and Society*, Federation Press 2004.

*In the shadows and out of step*

Notwithstanding this diversity, Australian Muslims live in a legally pluralistic environment in a similar way to aboriginal societies. In their daily life they must accommodate the official state law of Australia whilst also embracing their version of Shariah. For Muslims Shariah is more than law, it embodies their religious beliefs and practices. But it is nothing if not pragmatic. There is even jurisprudence to guide Muslims as to which laws they are obliged to follow when in non-Muslim lands.<sup>48</sup> This jurisprudence requires Muslims to obey the law of the land in other than matters relating to personal obligations, such as rituals, food, drink, clothing, inheritance and, more significantly, in matters of marriage and divorce. Much of this recognition of Shariah occurs unobtrusively but it is in the context of family law that differences in the two systems of law are stark and controversial. For example, a 2008 request by two Muslim leaders for the government to consider legalizing polygyny<sup>49</sup> was met with the stern rebuke from the government that this would never happen.<sup>50</sup>

Ann Black and Kerrie Sadiq have sought to explain this negative perception of Islamic family law that exists in Australia.<sup>51</sup> They suggest that family law is central to identity and belonging and that Islamic family law is viewed as “out of step” with the Australian way of life. Certainly, although the media has over dramatically fueled this negative sentiment, there remain some fundamental inconsistencies between the two sets of family laws. Under Shariah, female initiated divorce must overcome hurdles not applicable to men whilst child custody and guardianship also favours the male and is premised on with which parent the children will most effectively be brought up with Islamic values. Australian law approaches both divorce and custody from a no fault no gender distinction and an emphasis (in the case of custody) on the best interests of the child and shared parental responsibility in which religion plays no part.

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<sup>48</sup> Mohamad Abdalla, “Islamic Australia? What place is there for sacred law in a secular land?” (2013) 21(3) *Griffith Law Review*.

<sup>49</sup> The practice of a man being able to have more than one wife at a time.

<sup>50</sup> ABC, “No recognition for polygamous marriages: AG”, *ABC News*, 25 June 2008 available at [www.abc.net.au/news/stories/2008/06/25/2285423.htm](http://www.abc.net.au/news/stories/2008/06/25/2285423.htm) (last visited 28 March 2014).

<sup>51</sup> Ann Black and Kerrie Sadiq, “Good and bad Sharia: Australia’s mixed response to Islamic Law” (2011) 34(1) *UNSWLJ* 383 at 395 – 401.



Inconsistencies of this nature have no doubt influenced the government rhetoric against embracing Islamic law. In 2008 the then Attorney General is quoted as saying that the “government is not considering and will not consider the introduction of any part of Sharia law into the Australian legal system”.<sup>52</sup> The topic was even off the radar of any government enquiry into the future shape of Australian multiculturalism. When, in 2011, the Australian Federation of Islamic Councils (“AFIC”) lodged a submission advocating that “multiculturalism should lead to legal pluralism” the suggestion was met with the Minister for Immigration going on the record to say: “Anybody who calls for Sharia law is not doing so in the name of multiculturalism. They are doing so as extremists and extremists need to be dealt with, whatever their creed.”<sup>53</sup> Even many in the Australian Muslim population reacted against the AFIC’s suggestion.<sup>54</sup>

#### *Government hypocrisy on Islamic finance*

Given such emphatic statements of “principle” it is extraordinary that in the midst of these statements the same government was promoting Australia as an Islamic Finance Centre and commissioning a review into Australian law to determine how it might be amended to better accommodate Islamic finance.<sup>55</sup> Apparently offering Islamic finance products might “foster social inclusion” and enable “Australian Muslims to access products that may be more consistent with their principles and beliefs.”<sup>56</sup>

Islamic finance is a form of finance that accords with Shariah principles, in particular the prohibitions on interest, uncertainty and gambling amongst

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<sup>52</sup> Barney Zwart, “Australia’s Muslims cool on change”, *The Age* (online), 9 February 2008 available at [www.theage.com.au/news/world/australians-muslims-cool-on-change/2008/02/08/1202234168549.html](http://www.theage.com.au/news/world/australians-muslims-cool-on-change/2008/02/08/1202234168549.html) (last visited 28 March 2014).

<sup>53</sup> Sabra Lane, “Multiculturalism is back”, *ABC News AM Program*, 17 February 2011 available at [www.abc.net.au/am/content/2011/s3141073.htm](http://www.abc.net.au/am/content/2011/s3141073.htm) (last visited 28 March 2014).

<sup>54</sup> See the discussion by Black (2013) at 72.

<sup>55</sup> See the Board of Taxation website at [www.taxboard.gov.au/content/content.aspx?doc=reviews\\_and\\_consultations/islamic\\_finance\\_products/default.htm](http://www.taxboard.gov.au/content/content.aspx?doc=reviews_and_consultations/islamic_finance_products/default.htm) (last visited 12 March 2014). The inconsistency also extends to the contradiction that *halal* products are regulated.

<sup>56</sup> Nick Sherry (Assistant Treasurer), *Opening address to the La Trobe University, National Australia bank and Muslim Community Corporation of Australia Symposium on Banking and Finance*, Melbourne 6 July 2009 available at <http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=speeches/2009/003.htm&pageID=005&min=njsa&Year&DocType> (last visited 12 March 2014).

others.<sup>57</sup> Although not embraced by all Islamic scholars<sup>58</sup> there has been an explosion in the popularity of Islamic finance in the Muslim world in the last decade or so. The finance industry<sup>59</sup> and Australian government has identified the economic opportunities for the country from embracing this new industry.<sup>60</sup> However there are regulatory and, especially, tax law barriers that arise from the nature of the transactions that are necessary to comply with the Shariah prohibitions. Essentially these transactions recast the traditional finance arrangements in a Shariah compliant form which avoids the payment or receipt of interest but this can have adverse tax implications that render the recast transactions less commercial. The essence of the reform proposals is to “suppositively” create a level playing field for Islamic finance with traditional finance arrangements.<sup>61</sup>

Clearly the government’s concern to accommodate Islamic finance principles within Australian law is financially motivated for the benefit of the country and, as primarily directed at an offshore market, might be distinguished from its rejection of embracing Shariah more generally. However this rush to embrace Islamic finance has failed to consider the many concerns that have been raised by those advocating caution. The artificial and complex nature of the transactions, the potential for fraud and tax avoidance and the problems of definition, potential lack of parity with similar non-Islamic arrangements and the even doubtful Shariah compliant credentials of many of these products and their lack of take up amongst Muslims are some of the issues.<sup>62</sup> Possibly of greater concern given the government’s otherwise anti-Shariah rhetoric is the alleged connection

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<sup>57</sup> Generally see Justin Dabner, “Eliminating Income Tax Barriers to inbound Islamic Investment” (2008) 62 *Bulletin of International Taxation* 238.

<sup>58</sup> Authorities identifying the different viewpoints are referred to in D. Yerushalmi, “Shariah’s ‘black box: civil liability and criminal exposure surrounding Shariah compliant finance” [2008] 3 *Utah Law Review* 1019 at footnote 59. (“Yerushalmi 2008”)

<sup>59</sup> *Australia as a Financial Centre Building on our strengths*, Report by the Australian Financial Centre Forum, Commonwealth of Australia, November 2009 (“Financial Centre Forum report 2009”).

<sup>60</sup> *Islamic Finance*, Australian Trade Commission, January 2010 (“Australian Trade Commission 2010”) at 11.

<sup>61</sup> There is an argument that legitimate Islamic finance arrangements do not generate interest in substance or form so are, in fact, taxed appropriately in the absence of special concessions. See Justin Dabner, “Islamic finance in Australia. Interest or not interest that is the question?” (2012) 18 *New Zealand Journal of Taxation Law and Policy* 12 (“Dabner 2012”).

<sup>62</sup> The threshold issues that have not been addressed are identified in Dabner 2012.

between Islamic finance and terrorist groups and even the suggestion that it has the potential to seriously damage the Western finance system.<sup>63</sup>

The later may be possibly crackpot views but it is, nevertheless, surprising that they have never been investigated by a government apparently horrified at the damage that embracing Islamic family law might do to the fabric of the country. Australia might never allow polygyny but accommodating transactions pursuant to which terrorist groups may be funded under the guise of *zakat*<sup>64</sup> is, apparently, less of a concern.

Although the Australian government's approach to recognizing Shariah may have the hallmarks of hypocrisy, the Islamic finance proposals do illustrate how the legal system might allow for some incremental recognition of Shariah. Whilst it is less conceivable that a secular country like Australia might allow central elements of its legal system to be supplanted by unique regimes for exclusive groups, where possible impediments might be removed to allow a more inclusionary legal system.<sup>65</sup>

### *Bringing Islamic and other faith based tribunals out of the shadows*

Whether the Australian legal system should defer to Islamic law where Muslim parties are concerned, especially in the context of family law, will become an increasingly vexed issue as the population of Muslim Australians increases. The Islamic finance example may provide a precedent. Furthermore, there may, in fact, be an imperative for such recognition. As observed above, many Muslims are operating in the

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<sup>63</sup> The so called 'Trojan horse': see Yerushalmi 2008. The 2008 global financial crisis could partially be attributed to Islamic finance, according to some: K. B. Day, "Economic warfare report explains what *Shariah* finance really means" available at <http://www.theusreport.com/the-us-report/2011/3/1/economic-warfare-report-explains-what-Shariah-finance-really.html> (last visited 28 June 2011).

<sup>64</sup> Levies paid to charities. Such levies might be mandated to excuse, or as a result of, purported Islamic finance arrangements that offend Shariah principles. It has been demonstrated that some of the charities who are recipients of these payments have connections with designated terrorist organizations: see by D. Clarke, "Demystifying *Sharia* finance in Australia" (29 March 2010) available at [http://www.islammonitor.org/index.php?option=com\\_content&task=view&id=3385&Itemid=85](http://www.islammonitor.org/index.php?option=com_content&task=view&id=3385&Itemid=85) (last visited 28 June 2011). Claims that Islamic Finance is funding terrorist activities were rejected by the Michigan District Court in the course of dismissing a claim that Federal assistance paid to an entity that promoted Islamic finance arrangements violated the secular guarantees in the United States Constitution: see B. Gould, "Case against AIG's Islamic finance fails" available at [http://www.theislamicglobe.com/index.php?option=com\\_content&view=article&id=36:case-against-aigs-islamic-finance-fails&catid=13:article&Itemid=38](http://www.theislamicglobe.com/index.php?option=com_content&view=article&id=36:case-against-aigs-islamic-finance-fails&catid=13:article&Itemid=38) (last visited 28 June 2011).

<sup>65</sup> If indeed this is what the proposed Islamic finance amendments would do.

shadow of the Australian family law by avoiding State sponsored marriage and, largely unknown to the rest of the society, embracing Shariah. But this unofficial family law system lacks fundamental protections such as due process, legal representation, appellate procedures and decision makers who are accountable and whose decisions are transparent.<sup>66</sup> The lack of international recognition of decisions reached in this unofficial realm also has potential to place Australian Muslims returning or travelling to Islamic countries in a difficult position. Similarly, the concept of a “limping marriage” where a wife has obtained a secular divorce but not one recognized for Islamic law purposes is well documented.<sup>67</sup> Accommodating Islamic marriages within the formal legal environment might not only be a remedy but could also provide the means by which adjustments might be negotiated to Islamic family law to render it more gender neutral and provide greater protection for the rights of children.

There is precedent for an official pluralistic path, at least in regards to Islamic law impacting on personal rights. The UK has its Shariah arbitration councils, the decisions of which have been enforceable since 2008,<sup>68</sup> Indian Muslims are governed by *The Muslim Personal Law (Shariat) Application Act 1937*<sup>69</sup> and Singapore has an entrenched Shariah courts system dating from 1958 but with its roots as far back as the 1820s.<sup>70</sup> Although the Singapore system, in particular, could be asserted as evidence of a model that could be adopted “to help send a message of respect and inclusion, counter ethnic and racial tensions and provide a face of Islam that is rational and moderate,” Ann Black concludes that it does not provide a solution for Australia.<sup>71</sup> In her view, Australia’s Muslim

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<sup>66</sup> Black and Sadiq at 411.

<sup>67</sup> Family Law Council of Australia, *Report on cultural community divorce and the Family Law Act 1975: A proposal to clarify the law*, August 2001 available at <http://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Cultural%20community%20Divorce%20and%20the%20Family%20Law%20Act%201975.pdf>

<sup>68</sup> See Samia Bano, “Muslim family justice and human rights: the experience of British Muslim women” (2007) 1(4) *Journal of Comparative Law* 1.

<sup>69</sup> Not a separate system of Shariah law but special legislation enforced by the mainstream courts. Notably different rules can apply for Shia Muslims than Sunnis. Although the regime dates back to the British rule it continues to be controversial with both Muslims and non-Muslims.

<sup>70</sup> Ann Black, “Replicating a ‘Model of Mutual Respect’: could Singapore’s legal pluralism work in Australia?” (2012) 65 *JLP* 65

<sup>71</sup> *Id.*

diversity,<sup>72</sup> the entrenched cultural preference for secularism over religiosity and, most significantly, the constitutional mandate against sectarianism<sup>73</sup> are too greater obstacles.

The Muslim diversity should not be understated as a road block to any, even marginal, recognition of Shariah in Australia. In the absence of a dominant Muslim ethnicity there is a divergence in views as to an appropriate jurisprudence. In fact, there is evidence that many Muslim immigrants are opposed to any form of Shariah having 'escaped' from oppressive and intolerant regimes.<sup>74</sup> In this regard Australia is to be contrasted with both Britain<sup>75</sup> and Singapore and probably has more in common with Canada where Shariah has been comprehensively rejected.<sup>76</sup> The current unofficial and voluntary realm of Islamic Law in Australia at least allows for this diversity of views within the Muslim population to be accommodated.<sup>77</sup>

Domestic precedents for not establishing formal Shariah courts are provided by the Catholic and Jewish examples. The Catholic Church does not recognize civil divorce and so divorced Catholics are viewed as sinners and may not remarry in a Catholic church or even enter into the sacraments.<sup>78</sup> In order to avoid these consequences divorced Catholics may apply to a church tribunal for an annulment, which may be granted where it can be established that the marriage was invalid according to

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<sup>72</sup> The Singapore model recognizes indigenous Malays so, if anything, lends support to greater recognition of aboriginal customary law in Australia.

<sup>73</sup> S 116 of the Constitution of Australia

<sup>74</sup> Or would be happy with a very few small changes: Abdullah Saeed, "Reflections on the establishment of Shari'a Courts in Australia" in Rex Ahdar and Nicholas Aroney (eds), *Sharia in the West*, Oxford University Press 2010, 223 at 231 ("Saeed 2010").

<sup>75</sup> Where over 75% of Muslims come from the one region of South Asia: Kathleen M Moore, *The Unfamiliar abode: Islamic Law in the United States and Britain*, Oxford University Press 2010 at 17.

<sup>76</sup> At the instigation of Canadian Muslim women: see Homa Arjomand, *International campaign against Shari'a Court in Canada* available at <http://www.nosharia.com/eng.htm> (last visited 15 April 2014).

<sup>77</sup> Also see the papers by Ann Black: "Accommodating Shariah law in Australia's legal system. Can we? Should we?" (2008) 33(4) *Alternative Law Journal* 214 and "In the shadow of our legal system: Shari'a in Australia" in Rex Ahdar and Nicholas Aroney (eds), *Shari'a in the West*, Oxford University Press 2010 at 239. In Saeed 2010 the arguments for and against the establishment of Shariah courts in Australia are reviewed with the conclusion that the convergence of the two legal systems over time may remove the imperative.

<sup>78</sup> See the Catholic Australia website at <http://www.catholicaustralia.com.au/page.php?pg=sacraments-divorcefags0> (last visited 18 March 2014).

canon law.<sup>79</sup> There is no legislative endorsement or legal recognition of these bodies and they too operate in the shadow of the official law.

Similarly, Jewish “courts”, the Beth Din, have been established in Sydney<sup>80</sup> and Melbourne<sup>81</sup> since 1905 and 2013 respectively. Again, whilst these tribunals have no formal legal recognition they operate in the areas of family law and deal with some commercial disputes between Jewish people imposing Jewish law (Halakhah).

But is the mere existence of these other unregulated and unofficial courts justification for their continuation? There is certainly an argument that the decisions of all these religious tribunals should be recognized at law, with the attendant imposition of conditions of voluntariness, transparency, accountability and civil processes designed to protect the parties.<sup>82</sup> Furthermore, a right of appeal to the mainstream Australian courts, empowered to overturn unfair decisions, would add a further layer of protection.

Furthermore, if the Family Court when considering the grant of a divorce was to be able to require the parties to submit to the relevant religious court this might overcome the problem of the “limping marriage”. It has been suggested that it already has this power in relation to Jewish divorce and it should be exercised to ensure that the grant of a civil divorce is effective in fact.<sup>83</sup>

It is accepted that a potential barrier to such a reconciliation of religious and civil laws remains S 116 of the *Constitution* which provides relevantly that the government should not make any law “... for imposing any religious observance, or for prohibiting the free exercise of any religion...”. It has been argued that the referral by a Family Court judge of a matter to the

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<sup>79</sup> As to the nature of the Tribunal see: <http://www.parra.catholic.org.au/tribunal-of-the-catholic-church/tribunal-of-the-catholic-church.aspx> (last visited 18 March 2014).

<sup>80</sup> See <http://elischlange7.wix.com/bethdin3> (last visited 21 March 2014).

<sup>81</sup> See <http://www.cosv.org.au/gsqp.php?gsqp=bethdin> (last visited 21 March 2014).

<sup>82</sup> Ian Crawshaw, “Courts outside the usual legal processes can offer better outcomes”, 16 June 2011.

<sup>83</sup> Andrew Strum, “Getting a Gett in Australian Courts” available at <http://www.jlaw.com/Articles/getaus.html> (last visited 21 March 2014) (“Strum”). Also note the recommendation of the Australian Law Reform Commission in its report *Multiculturalism and the Law*, Report No 57, 1992.

Beth Din would not breach this section as it is directed at the legislature and not the judiciary.<sup>84</sup> However, the official recognition of these courts in legislation providing for, amongst other requirements, due process and appeal rights might breach this provision.

In the absence of legislative developments the common law, by dint of contractual law principles, may still have a role to play in both recognizing cultural diversity and providing protection from unacceptable or oppressive features of Islamic or other “foreign” laws. This is illustrated by the recent decision in *Mohamed v Mohamed*.<sup>85</sup> The case concerned the validity of a marriage agreement between parties married under Islamic law but not Australian law. At issue was a clause that the husband was to pay the wife \$50,000 in the event that he initiated separation. In finding that the contract was enforceable the Magistrate refused to set it aside on the grounds of infringing public policy and specifically acknowledged that the law needed to evolve in a manner that accommodated cultural diversity, quoting British and Canadian case law<sup>86</sup> and the High Court decision in *Haque v Haque*.<sup>87</sup> The later case was probably even more extraordinary in apparently suggesting as far back as 1962 that a polygamous marriage entered into within Australia in accordance with Islamic Law should be recognized as a valid marriage.<sup>88</sup>

A further example is the even older High Court decision in *Macqueen v Frackelton*<sup>89</sup> which held that the Presbyterian General Assembly of Queensland was not a court in the sense that it took its powers from the State but rather could merely arbitrate on the contract that bound members of the church. The parties remained able to “appeal” to the civil courts notwithstanding a decision of this arbitrator and the courts were bound to give effect to the terms of the contract agreed between the members of the

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<sup>84</sup> Strum, at 10 – 13.

<sup>85</sup> [2012] NSWSC 852

<sup>86</sup> In particular *Nathoo v Nathoo* [1996] BCJ No 2720.

<sup>87</sup> [1962] HCA 39; (1962) 108 CLR 230

<sup>88</sup> Note that the *Family Law Act 1975 (C/W)* s 6 does recognize the validity of Muslim polygynist marriages entered into overseas and since 2008 de facto polygamist marriages entered into in Australia can be recognized as de facto marriages: s 4AA(5)(b).

<sup>89</sup> (1909) 8 CLR 673

church. It followed that if any of these terms were against public policy they would not be binding.<sup>90</sup>

The ultimate authority of the courts to be able to interfere in the interests of public policy may provide aggrieved parties at least some protection.<sup>91</sup>

### *Extending the commercial arbitration legislation*

If any constitutional objections can be overcome and these faith based tribunals were to be brought in from the shadows then the extension of Australia's State commercial arbitration legislation to accommodate them might provide the appropriate framework. Again this is controversial as illustrated by the Ontario experience where the *Arbitration Act* 1991 was sufficiently broadly drafted to permit such tribunals. However, following a public outcry concerning Shariah based tribunals, especially over the lack of safeguards for the rights of women, the government amended the law to prohibit any form of religious arbitration in relation to family matters.<sup>92</sup> This was notwithstanding a government review which had recommended retaining the right to faith based arbitration with additional protections for vulnerable parties.<sup>93</sup> Some commentators argued that these protections simply did not go far enough and were not pragmatic,<sup>94</sup> that the notion of arbitration was only appropriate for commercial disputes where parties

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<sup>90</sup> For a recent decision where an award of the Sydney Beth Din was set aside on the basis of a failure to comply with agreed procedure, including giving adequate notice and then reasons for the decision, and where bias and impartiality by the decision makers was demonstrated see *Thaler v Amzalak (No 2)* [2013] NSWSC 632.

<sup>91</sup> In the context of the Beth Din also see: Joshua Levi, "Beth Din bias slammed in court", *The Australian Jewish News* (30 May 2013) available at <https://www.jewishnews.net.au/beth-din-bias-slammed-in-court/30964> (last visited 26 March 2014).

<sup>92</sup> Generally see Anna Korteweg, "The Sharia debate in Ontario" (2006) *ISIM Review* 50 ("Korteweg 2006") available at [http://korteweg.files.wordpress.com/2010/12/isim-review\\_18-501.pdf](http://korteweg.files.wordpress.com/2010/12/isim-review_18-501.pdf) and Mariam Pal, "Faith-based arbitration in Canada and Beyond: recent developments and future prospects" *Presentation to the CBA, Vancouver Branch and to the Institute of Transborder Studies, Kwantlen University College Richmond BC*, January 24 and 25, 2006 available at <http://ebookbrowse.net/adr-mspal-presentation-pdf-d185289619>.

<sup>93</sup> Marion Boyd, *Dispute resolution in family law: protecting choice, promoting inclusion* (2004) - executive summary available at <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/executivesummary.pdf>

<sup>94</sup> For example, vulnerable parties might be expected to waive their rights to legal recognition and would be unlikely to appeal to a civil court, especially if that risks them committing apostasy. Ultimately any appeal would substitute the State's principles of custody, inheritance, etc for that of Shariah or risk offending the Constitution and asserting unequal rights amongst the nation's citizens.



were more likely to be able to engage on an equal footing<sup>95</sup> and that arbitration actually reinforces power imbalances.<sup>96</sup> These criticisms all failed to address the fact that informal faith based arbitration would continue to shape the lives of religious parties and in the absence of any attempt of government oversight these people remained vulnerable.<sup>97</sup>

The same issues are also surfacing in the UK in relation to its Muslim Arbitration Tribunals.<sup>98</sup> This has resulted in proposals for legislation addressing equality and discrimination issues and jurisdictional creep in the proceedings of these tribunals.<sup>99</sup> It has been argued though that, whilst laudable, legislation alone will not remedy discrimination in the absence of social policies that seek to draw the Muslim population into the main framework of British society such that Muslims can feel an attachment to British laws and values rather than alienated by them.<sup>100</sup>

Nevertheless, the arbitration model with jurisdiction extended from commercial to personal disputes<sup>101</sup> may provide the best answer to the question of how the State can ensure that its citizens are free to practice their faith and to pursue their consciences whilst also preserving the integrity of the public law and maintenance of central democratic

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<sup>95</sup> Larry Resnick, "Family dispute arbitration and Sharia law" (2007) available at <http://bccla.org/wp-content/uploads/2012/04/2007-BCCLA-Sharia-law.pdf>

<sup>96</sup> Discussed in Korteweg 2006.

<sup>97</sup> Ibid.

<sup>98</sup> See the MAT website at <http://www.matribunal.com/> (last visited 21 March 2014). Such bodies are to be contrasted with the UK Shariah Councils (for example see [http://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&sqi=2&ved=0CDkQFjAA&url=http%3A%2F%2Fwww.islamic-sharia.org%2F&ei=WcwrU8XYK4gpkQWXqoCQDA&usq=AFQjCNGUSM4Mt5NL7W\\_fum0AhuJRe8SuUA&bvm=bv.62922401,d.dGI](http://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&sqi=2&ved=0CDkQFjAA&url=http%3A%2F%2Fwww.islamic-sharia.org%2F&ei=WcwrU8XYK4gpkQWXqoCQDA&usq=AFQjCNGUSM4Mt5NL7W_fum0AhuJRe8SuUA&bvm=bv.62922401,d.dGI) (last visited 21 March 2014))

which lack the necessary protections for parties attending before them. On the MAT see Joshua Rozenberg, "What can Sharia courts do in Britain?", *The Telegraph* (14 September 2008) available at <http://www.telegraph.co.uk/news/newstopics/lawreports/joshuarozenberg/2957692/What-can-sharia-courts-do-in-Britain.html> (last visited 21 March 2014).

<sup>99</sup> *Arbitration and Mediation (Equality) Services Bill [HL]* 2013-14. See <http://services.parliament.uk/bills/2013-14/arbitrationandmediationequalityservices.html> (last visited 4 April 2014).

<sup>100</sup> Rebecca Maret, "Mind the gap: the Equality Bill and Sharia arbitration in the United Kingdom" (2013) 36 *Boston College International and Comparative Law Review* 255 ("Maret 2015") available at <http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1696&context=iclr> (last visited 4 April 2014)

<sup>101</sup> The UK and initial Ontario arbitration regimes might provide guidance as to an appropriate regime.

institutions.<sup>102</sup> Such “faith based arbitration tribunals” would provide a basis for disputes to be resolved with deference to the parties’ religious convictions but they would also be free to have the decision reviewed by a civil court with the mandate to reject any decision that breached the general laws of the land including fundamental principles of human rights.<sup>103</sup> Matters that might be considered could extend to religious (not civil) divorce,<sup>104</sup> marriage, inheritance, dowry payments, financial support and possibly even custody.

The difficulties of ensuring protection for vulnerable parties, especially women and children, should not be underestimated. There would be a particular need to ensure that such parties are not coerced into accepting an arbitrator’s decision. Similarly, neither should be underestimated the difficulties with reconciling the various Shariah schools with Australian law as an Australian Shariah is gradually developed. However the continuation of the alternative of allowing faith based law to co-exist in the shadows with no protections or oversight fails a vulnerable section of society.

## **Conclusion**

Although one of the world’s most multicultural societies, old prejudices and allegiances remain steadfastly embedded in Australia’s legal system. The country has been slow to embrace principles foreign to British common law and anglo-centric values. Typically rejected on the basis of the “one law for all” mantra, legal pluralism only appears at the margins and in the shadows. Whilst we have abandoned assimilation as the guiding principle of our migration policy, legal assimilation remains the dominant policy.<sup>105</sup> In this way we deny those with a particular cultural or religious background that might lead to discrimination and social exclusion in a predominantly Western environment the sense of solidarity that might come from

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<sup>102</sup> Michael Nazir-Ali, “Islamic law, fundamental freedoms, and social cohesion: retrospect and prospect”, in Rex Ahdar and Nicholas Aroney (eds), *Sharia in the West*, Oxford University Press 2010 at 89.

<sup>103</sup> Such a decision might be set aside and returned to the tribunal with directions or, in appropriate cases, ruled on directly by the courts. The later approach might require the court ruling on religious law which would be problematic: see *Uddin v Choudhury* [2009] EWCA (Civ) 1205 and the discussion in *Maret* 2013.

<sup>104</sup> Civil divorce jurisdiction would remain with the Federal Court alone.

<sup>105</sup> Jamila Hussain, *Islam: its Law and Society*, Federation Press 2004

observing their religious laws and customs. We fail to appreciate their need for matters personal to them to be resolved before or amongst those who share a similar value system.

Whilst there have been various law reform recommendations directed at integrating or, at least, recognizing some indigenous customs and rites, in many respects much is left to the discretion of individual bureaucrats and judicial officers. The various guises of indigenous courts are the most significant development but in the absence of clear evidence of their success their future is not assured in these times of budgetary constraint.

The difficulty is always as to what extent customs and traditions that are at odds with the State's official laws and international human rights principles can have any place in a modern society. If other systems of law, especially customary law and Shariah, are to gain a more comprehensive representation in Australian society they must overcome the perception, if not reality, that they are oppressive of the rights of women and children and impose punishments and sanctions at odds with fundamental human rights.<sup>106</sup> Whilst it might be conceivable that the government or the courts might "cherry pick" from the suite of these other laws to accommodate some cultural nuances, fundamental principles of justice drawn from the embedded system and international treaties will, and should, operate to limit what a fair and just society should embrace. It is this author's belief that in the compromise between competing principles the protection of the vulnerable should take precedence over cultural nuances and traditions.

Whilst the practical difficulties are acknowledged, the best way to achieve this protection may not be to continue to acquiesce to legal pluralism in the shadows but to bring it within the safety net of official recognition with the procedures and review rights that entails. It is submitted that the Joint Standing Committee on Migration in its 2013 report *Inquiry into Migration and Multiculturalism in Australia* did not appear to appreciate the extent to

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<sup>106</sup> See Upendra Baxi, "Discipline, repression and legal pluralism" in Peter Sack and Elizabeth Minchin (eds), *Legal Pluralism: Proceedings of the Canberra Law Workshop VII*, Australian National University, Canberra, 1986. In *Refah Partisi (No 2) v Turkey* (2003) 37 EHRR 1 the European Court of Human Rights ruled that both Shariah and plural religion based legal systems were incompatible with the European Convention on Human Rights.

which de facto legal pluralism exists when it recommended against legislative recognition.<sup>107</sup> One possible future would be to see these religious “courts” recognized as registered arbitrators with ultimate recourse to the courts by aggrieved parties. Decisions inconsistent with basic human rights and Australian values/laws might then be set aside as against public policy. Ultimately this might lead to the creation of Australian versions of Shariah, Halakhah and Canon law mirroring the developments in some Muslim jurisdictions that are witnessing the absorption of Western legal principles into a modified Shariah.<sup>108</sup> Such a convergence might accommodate the desire of devoutly religious Australians to be able to satisfy both secular and religious obligations.

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<sup>107</sup> At 85. The report is available at [http://www.aph.gov.au/parliamentary\\_business/committees/house\\_of\\_representatives\\_committees?url=mi/multiculturalism/report.htm](http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=mi/multiculturalism/report.htm) (last visited 20 March 2014).

<sup>108</sup> Saeed 2010