

Multiculturalism and legal plurality in Australia

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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.

Abstract. The great multicultural experiment that is Australia has engendered a reconsideration of core values. Even the traditionally conservative legal system has not been immune. While the law remains anchored in its British Christian common-law traditions, the influence of other cultures and beliefs are emerging. Taking the term multiculturalism to encompass all cultures, including indigenous peoples as well as new comers, two instances of this are the partial accommodation of Indigenous customary law and a debate over the accommodation of Islamic law principles.

The adoption of "foreign" legal concepts poses a dilemma for a liberal democratic society. On one hand, such a society might be expected to embrace wholesale legal plurality. However, there may be some foreign legal principles that are resisted on the basis that they are unacceptable to a free and equal society. The challenge is how to acknowledge the customary and religious laws of

minorities whilst establishing one legal framework that applies to all, equally, and without discrimination and protects vulnerable parties.

This article explores the implications for the legal system of a multicultural Australia. Taking the instances of Indigenous and Islamic law, it will be observed that legal plurality exists in Australia but largely in the shadows where the vulnerable of society lack protection. It proposes an institutional response that might help shine a light on these shadows.

Key words: Multiculturalism, legal plurality, Australian culture, customary law, shariah

Multiculturalism's dilemmas

The inherent concern for a multicultural society is whether it will fragment as a result of accommodating differences that are inconsistent with secular liberal democratic principles of equality, stability and neutrality. This concern focuses attention on exactly how these principles would apply in practice. Do these principles mean that a secular society should allow and actively accommodate all religions and cultural practices, or, rather, forbid those that are perceived to impinge on the fundamental civil and human rights of its citizens? Putting the question another way, should a multicultural society mandate equal rights for all citizens or should it be prepared to permit, and even endorse, the trade-off of fundamental rights for the pursuit of cultural and religious expression on the part of some citizens who might even be coerced or vulnerable? Western democracies, in particular, are struggling with these dilemmas. Australia is no exception.

Australia's multicultural experiment

Australia's transformation from its "white only" policy to one of the most multicultural societies on earth in less than fifty years is truly remarkable. 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. Furthermore, there has been racial conflict, most famously at Cronulla in 2005. Concerns about population sustainability, in terms of the environment and infrastructure, have also added weight to a reconsideration of immigration policy.¹

One manifestation of government policy has been the provision of multilingual government services and anti-discrimination legislation. At the same time, concerns about the possibility of

Australian society fragmenting into a cluster of tribes have seen emphasis on national cohesion.² Initially, immigrants were expected to “assimilate”, but a more enlightened policy saw the rhetoric change to one of “integration”, 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”. The government espouses diversity as a resource,³ and, whatever it heralds, multiculturalism is here to stay.

There is no question that the impact of the immigration and indigenous policy has massively shaped Australian culture. 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 mixed, a move towards pluralistic rather than monocultural legal systems, has been increasingly debated. So, to what extent is the Australian legal system pluralistic?

English legal traditions in Australia

The Australian legal system is founded on English legal traditions. The notion that Australia had been empty land that was then “settled” not only permitted British sovereignty but meant that English laws applied. The colonial courts and the early parliaments took their lead almost exclusively from the motherland, and then, with the Act of Federation (itself British legislation), all the laws of England were adopted by Australia

The origin of these laws is often ascribed to the Magna Carta of 1215, a treaty between King John and his subjects specifying that they would not be governed arbitrarily. Initially, the monarch was the sole arbitrator on legal matters, but then delegates were empowered, and, to ensure consistency, the doctrine of precedent was devised whereby previous decisions would be followed unless the new cases could be distinguished by their facts. As this doctrine over time rendered the “common law” too inflexible, a new system of courts, known as “equity”, evolved. These courts were less concerned with rigid principles and more focused on the overriding principle of fairness. Just before Australia’s federation, the two court systems were merged.

This English legal system featured a feudal system of landholdings. The absolute power of the monarchy was reflected in the monarchy’s absolute ownership of 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 elites given possession of land in return for the allegiance of the monarchy’s subjects, with rights to use the land being defused down the pyramid in ever-decreasing portions to ever-decreasing persons of significance.

By virtue of the *Australian Courts Act* of 1828, the Privy Council became the final court of appeal for Australian courts, and all the laws of England applied to the Australian colonies. Furthermore, the doctrine of repugnancy provided that laws passed by a colonial legislature were invalid if they were inconsistent with an English law, while the doctrine of paramount force permitted subsequent English statute law to apply to the colonies if it was so worded. The effect was to assimilate English and Australian common law and ensure substantial compatibility with statute law. Although the Australian parliaments were freed up (at least in theory) with Federation, the courts remained constrained for a further eighty-five years. In 1978, in *Viro v The Queen* (1978) 141 CLR 88 the High Court finally asserted the infallibility of the Privy Council, and, eight years later, the *Australia Act* 1986 abolished appeals to it. Freed from these shackles, in the last thirty years Australian common law has carved a divergent jurisprudence.

Customary law challenges the legal foundation

Although common law is prepared to acknowledge customary law, the criteria are strict and in light of the prevailing view that Indigenous inhabitants were so primitive as to have no true laws and only unacceptable and barbaric practices, English law applied unfettered. So it was in *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 Mr Justice Blackburn 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.

As more enlightened views about the sophistication of Indigenous society were adopted, there was a realisation that the law had been complicit in a great wrong. The parliaments of Australia responded with land-rights legislation, but it was the decision of the High Court in *Mabo v Queensland [No 2]* (1992) 175 CLR 1 that has become the highpoint in the recognition of Indigenous customary law. Rejecting the idea that Australia was an empty land when the British arrived, the High Court held that native title could coexist within the land tenure system, unless it was specifically extinguished.

Reform proposals

Some years before this decision, the Australian Law Reform Commission released a report entitled *Recognition of Aboriginal Customary Laws* on whether it was desirable to apply customary law to Indigenous Australians. The report acknowledged that customary laws significantly influenced the lives of many Indigenous Australians, but a fundamental difficulty was that no single version of

customary law existed. Rather, customary law was a series of dynamic and changing systems applying to different groups of Indigenous Australians.

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

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

Ultimately, the report recommended that Indigenous customary laws should be recognised, but within the framework of the general law. Particular areas included the recognition of traditional marriages for some purposes, the continued recognition of customary laws for the purposes of bail and sentencing, and the recognition of some hunting, fishing and gathering rights.

More recently, the Law Reform Commission of Western Australia revisited the topic: *Aboriginal Customary Laws, The Interaction of Western Australian Law and Aboriginal Law and Custom*, (September 2006). The essence of its 131 recommendations was the recognition of customary law on a case-by-case basis, always subject to the maintaining of 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 including the hearing of cases, sentencing, bail applications, parole and prison releases, coronial enquiries and post mortems, burial disputes, child custody, succession and maintenance, hunting, fishing and gathering rights. Education of those administering justice (as to Indigenous culture) and Indigenous Australians (as to the law, especially laws at odds with custom) was seen as vital. The commission emphasised 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. Importantly, it also advocated constitutional recognition.

Indigenous courts initiative

A particularly important recommendation was that of involving elders and respected people in sentencing. This initiative was implemented in most Australian states. These “Indigenous” courts can display other novel features, such as the sitting of the accused unrestrained at the bar table

with a supporter, the magistrate and counsel. The informality and flexibility, together with the involvement of community justice groups, is directed to the judicial officer so that the officer can learn more about the offender, 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. Although there is conflicting evidence about the success of these courts the real problem might be the lack of resources, especially post-court supervision.⁴

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 that conduct should be viewed in its cultural context. Although these judges might more readily recognise customary laws, some commentators argue that this approach is flawed to the extent that it can endorse repressive cultures or socially unacceptable behaviour.⁵

Areas where this discretion has often been called into play include applying a reasonable person test, the granting of injunctions to prevent coronial autopsies and in family law (especially custody) and succession (often burial) disputes. Although it could be argued that customary law has largely been marginalised in Australian case law, the exercise of discretion by individual judges has served as a vehicle for its recognition. Meanwhile, the High Court has expressed its own necessity to deal with the issue when the appropriate matter comes before it.⁶

Shariah

With the increased migration of Muslims from Islamic nations, western nations are grappling with the accommodation of Islamic beliefs in their societies, including their legal systems. Although Australia has a very small Muslim population of around 500,000, it has not been immune from the issue of whether and how to accommodate Islam. In fact, the place of Muslims in Australian society is a surprisingly controversial subject for such a multicultural society. This controversy is most pronounced in the debate over whether Australia should accommodate shariah (Islamic law). Shariah is the set of principles that regulate the relationship between Muslims and God, and between themselves. It derives from the principles laid down 1,400 years ago in the *Qur'an*, believed to contain the word of God transmitted to the Prophet Mohammed, and the *Sunnah*, rules derived from *Hadith*, a document capturing the actions and life of Mohammed. Together, these rules are the subject of interpretation and extension by Islamic (legal) scholars, creating a body of Islamic jurisprudence or *fiqh*. 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 eighty different nations, with fifty different ethnicities and cultures.⁷

In the shadows and out of step

Australian Muslims live in a legally pluralistic environment in a similar way to indigenous societies. In their daily life, they strive to accommodate the official state law of Australia while at the same time embracing their version of shariah. For Muslims, shariah is more than law: it embodies their religious beliefs and practices. There is even jurisprudence to guide Muslims as to which laws they are obliged to follow when in non-Muslim lands.⁸ This jurisprudence requires Muslims to obey the law of the land in matters other than those 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, in the context of family law, differences in the two systems of law can be controversial. For example, a 2008 request by two Muslim leaders for the government to consider legalising polygyny was met with stern rebuke from the government, which stated that this would never happen.

Black and Sadiq have sought to explain the negative perception of Islamic family law that exists in Australia.⁹ 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 fuelled 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. Furthermore, child custody and guardianship can favour the male. 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.

Inconsistencies of this nature have influenced the government rhetoric against embracing shariah. 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”.¹⁰ 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 by a response from the minister for immigration that “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.”¹¹

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. 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.”¹²

Islamic finance is a form of finance that accords with shariah, in particular the prohibitions on interest, uncertainty and gambling. Although not embraced by all Islamic scholars,¹³ there has been an explosion in the popularity of Islamic finance in the Muslim world in the last decade or so. The finance industry and the Australian government have identified the economic opportunities for the country from facilitating Islamic finance activities. However, there are regulatory and, especially, tax law barriers that arise from the nature of the transactions that are necessary to comply with shariah. Essentially, these transactions recast the traditional finance arrangements in a shariah-compliant form that avoids the payment or receipt of interest, but this can have adverse tax implications that render the recast transactions less commercially beneficial. The basis of the reform proposals is to remove the regulatory burdens and imposts on Islamic finance that are not suffered by parties to traditional finance arrangements.

The government’s desire to accommodate Islamic finance is motivated by perceived financial benefits for the country. However, there are valid reasons to be cautious. Some of the issues are the artificial and complex nature of the transactions, the potential for fraud and tax avoidance and the problems of definition, the 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 among Muslims. Furthermore, proper investigation is needed because it has been suggested that the products have the potential to damage the western finance system.¹⁴

Although the Australian government’s approach to recognising 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. The challenge is how to expand this recognition beyond merely financial laws to the legal system more generally.

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, particularly 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 be an imperative for such recognition. As observed above, many Muslims are operating in the shadow of 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 access to decision makers who are accountable and whose decisions are transparent. The lack of international recognition of decisions reached in this unofficial realm also has the potential to place Australian Muslims 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 recognised for Islamic law purposes remains a possibility. Accommodating Islamic marriages within the formal legal environment might not only be a remedy but could also provide the means by which adjustments to Islamic family law would be negotiated, in order 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 affecting personal rights. The United Kingdom has its shariah arbitration councils, the decisions of which have been enforceable since 2008; India has *The Muslim Personal Law (Shariat) Application Act* 1937; and Singapore has an entrenched shariah courts system dating from 1958. 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”, Black concludes that it does not provide a solution for Australia.¹⁵ In her view, Australia’s Muslim diversity, the entrenched cultural preference for secularism over religiosity and, most significantly, the constitutional mandate in section 116 against sectarianism are obstacles that are too great.

Muslim diversity should not be understated as a roadblock to any, even marginal, recognition of shariah in Australia. In the absence of a dominant Muslim ethnicity, there is a divergence of views regarding an appropriate jurisprudence. In fact, there is evidence that many Muslim immigrants are opposed to any form of shariah which they associate with oppressive and intolerant regimes. In this regard, Australia contrasts with both Britain and Singapore, and probably has more in common with Canada, where shariah has been comprehensively rejected.¹⁶ The current unofficial and voluntary realm of Islamic law in Australia at least allows for this diversity of views within the Muslim population.

Further precedents questioning the need for formal shariah courts (at least in relation to marriage and divorce) are provided by the Catholic and Jewish examples. The Catholic Church does not recognise civil divorce, and so divorced Catholics are viewed as sinners and may not remarry in a Catholic church or even enter into the sacraments.¹⁷ 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 canon law. 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 and Melbourne. Again, these tribunals have no formal legal recognition, yet 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? Rather, the decisions of all these religious tribunals should be recognised as law, with the attendant imposition of conditions of voluntariness, transparency, accountability and civil processes designed to protect the parties. Furthermore, a right of appeal to the mainstream Australian courts, empowered to overturn unfair decisions, would add a further layer of protection. The problem of the limping marriage might also be overcome if, during divorce proceedings, the Family Court was explicitly given the power to require the parties to submit to the relevant religious court or procedure. This could ensure that any grant of civil divorce is replicated in the religious court.

Section 116 of the Australian constitution does present a potential barrier to such reconciliation of religious and civil laws. It provides that the government should not make any law “for imposing any religious observance, or for prohibiting the free exercise of any religion”. Strum argues that the referral by a Family Court judge of a matter to the Beth Din would not breach this section as it is directed at the legislature, not the judiciary.¹⁸ However, the official recognition of these courts in legislation providing for, among other requirements, due process and appeal rights might be in breach.

It may be that the family dispute resolution process of the Family Court supplies the connection with faith-based obligations. Since 2006, compulsory mediation is mandated before divorcing couples can file proceedings in the Family Court. The mediation is facilitated by family dispute resolution practitioners. A number of legally trained Muslims have been accredited as practitioners, and this process might provide an avenue for Muslims, and indeed those from other faiths, to reconcile their faith with civic rights and responsibilities.

In the absence of legislative developments, contract law may also have a role to play in both recognising 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* [2012] NSWSC 852. The case concerned the validity of a marriage agreement between

parties married under Islamic law but not Australian law. At issue was a clause stating that the husband was to pay the wife \$50,000 in the event he initiated a separation. In dismissing the appeal, the court refused to set the contract 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 and the High Court decision in *Haque v Haque* [1962] HCA 39; (1962) 108 CLR 230. The latter case was more extraordinary in apparently suggesting that, as far back as 1962, a polygamous marriage entered into within Australia in accordance with Islamic law should be recognised as a valid marriage.¹⁹

A further example is the even older High Court decision in *Macqueen v Frackelton* (1909) 8 CLR 673 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 upon between the members of the church. It followed that if any of these terms were against public policy, they would not be binding.

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. At the same time, by virtue of the terms of these contracts, parties might be able to negotiate between their faith-based and civic responsibilities.

Extending the commercial arbitration legislation

If constitutional objections can be overcome and faith-based tribunals 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 tribunals, particularly 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. This was notwithstanding a government review that had recommended retaining the right to faith-based arbitration with additional protections for vulnerable parties.²⁰ Some commentators argued that these protections simply did not go far enough and were not pragmatic for vulnerable parties. In particular, the notion of arbitration was only appropriate for commercial disputes where parties were more likely to be able to engage on an equal footing²¹ as arbitration actually reinforces power imbalances. 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.

The same issues are also surfacing in the United Kingdom in relation to its Muslim arbitration tribunals, and the issues have led to the introduction of the *Arbitration and Mediation (Equality) Services Bill [HL] 2015–16* addressing inequality and discrimination issues, and jurisdictional creep in the proceedings of these tribunals. Maret argues that legislation will not remedy discrimination in the absence of social policies that seek to draw the Muslim population into the main framework of British society.²²

Nevertheless, the arbitration model with jurisdiction extended from commercial to personal disputes may provide an answer to the question of how the state can ensure that its citizens are free to practise their faith and to pursue their consciences while at the same time preserving the integrity of public law and maintenance of central democratic institutions. 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. Matters for consideration could extend to religious (not civil) divorce, marriage, inheritance, dowry payments, financial support and possibly 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 were not coerced into accepting an arbitrator’s decision. Similarly, neither should the challenge of reconciling the various shariah schools with Australian law be underestimated. However, the continuation of the alternative—allowing faith-based law to coexist in the shadows with no protections or oversight—fails a vulnerable section of society.

Conclusion

Although a multicultural society, Australia has been slow to embrace legal principles foreign to 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. The principle of assimilation has been abandoned as the guiding principle of our migration policy, yet legal assimilation remains the dominant policy. Thus, citizens with a particular cultural or religious background that might lead to discrimination and social exclusion are denied the sense of solidarity that could come from observing their religious laws and customs. We fail to appreciate their need for personal matters to be resolved before or among those who share a similar value system.

Notwithstanding the various law reform recommendations directed at integrating or, at least, recognising some Indigenous customs and rites, 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 fundamental challenge for both customary law and shariah is whether they have a place in a modern society where they are at odds with the state's official laws and international human rights principles. If these other systems of law are to gain a mainstream representation in Australian society, they must overcome the perception, if not reality, that they oppress the rights of women and children and impose punishments and sanctions at odds with fundamental human rights. It is conceivable that the government or the courts might selectively choose from these other laws to accommodate some cultural nuances. However, 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. In the compromise between competing principles, the protection of the vulnerable should take precedence over cultural nuances and traditions.

With the practical difficulties 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 doing so would entail. 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 which de facto legal pluralism exists when the committee recommended against legislative recognition. One possible future would be to see these religious courts recognised 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 witnessing the absorption of western legal principles into a modified shariah. 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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¹ *Australia to 2050: future challenges*, Commonwealth of Australia, January 2010, accessed 19 May 2015, http://archive.treasury.gov.au/igr/igr2010/report/pdf/IGR_2010.pdf. For a neat summary of the opposing arguments see Jessica Brown and William Bourke, "Should Australia's Population Be Controlled?" *Sunday Herald Sun*, 2

October 2011, accessed 7 March 2014, <http://www.heraldsun.com.au/news/opinion/should-australias-population-be-controlled/story-e6frfhqf-1226155091822>.

² Elsa Koleth, *Multiculturalism: a review of Australian policy statements and recent debates in Australia and overseas, Research paper No 6 2010-11* (Canberra: Parliament of Australia, 8 October 2010), accessed 20 May 2015, [http://www.aph.gov.au/About Parliament/Parliamentary Departments/Parliamentary Library/pubs/rp/rp1011/11rp06](http://www.aph.gov.au/About%20Parliament/Parliamentary%20Departments/Parliamentary%20Library/pubs/rp/rp1011/11rp06).

³ *National Agenda for a Multicultural Australia* (Canberra: Australian Government (Office of Multicultural Affairs), July 1989), accessed 21 May 2015, www.immi.gov.au/media/publications/pdf/na-multicultural-australia-sharing-our-future.pdf.

⁴ Anthony Morgan and Erin Louis, *Evaluation of the Queensland Murri Court: Final Report Technical and Background paper 39* (Canberra: Australian Institute of Criminology, 2010), accessed 12 March 2014, <http://www.aic.gov.au/publications/current%20series/tbp/21-40/tbp039.html>.

⁵ See Franz Boas, *Race, Language and Culture* (New York: Macmillan, 1948); Ben-Ami Scharfstein, *The Dilemma of Context* (New York: New York University Press, 1989). On the difficulties of taking a cultural relativist stance and the retreat from the principle in relation to customary law see Peter Sutton, "Customs not in common: cultural relativism and customary law recognition in Australia," *Macquarie Law Journal* 6 (2006):161.

⁶ Elizabeth Byrne, "The World Today—High Court Rejects Customary Law Defence in Sexual Abuse Case," *ABC The World Today*, 19 May 2006, accessed 14 March 2014, <http://www.abc.net.au/worldtoday/content/2006/s1642802.htm>. The particular case at issue, involving underage carnal knowledge, was not considered as an appropriate test case partly because 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.

⁷ On the diversity of Australian Muslim community, see: Abdullah Saeed, *Islam in Australia* (Sydney: Allen and Unwin, 2003); Abdullah Saeed and Shahram Akbarzadeh, ed., *Muslim Communities in Australia* (Sydney: UNSW Press, 2001); Jamila Hussain, *Islam: Its Law and Society*, 2nd edition, (Federation Press, 2004).

⁸ Mohamad Abdalla, "Islamic Australia? What Place Is There for Sacred Law in a Secular Land?" *Griffith Law Review* 21.3 (2013). A shortened version of this article, accessed 20 May 2015, can be found at <http://www.abc.net.au/religion/articles/2013/05/10/3756163.htm>.

⁹ Ann Black and Kerrie Sadiq, "Good and Bad Sharia: Australia's Mixed Response to Islamic Law," *University of New South Wales Law Journal* 34.1 (2011): 383 at 395–401.

¹⁰ Barney Zwartz, "Australia's Muslims Cool on Change," *Age* (online), 9 February 2008, accessed 28 March 2014, www.theage.com.au/news/world/australians-muslims-cool-on-change/2008/02/08/1202234168549.html.

¹¹ Sabra Lane, "Multiculturalism Is Back," *ABC News AM Program*, 17 February 2011, accessed 28 March 2014, www.abc.net.au/am/content/2011/s3141073.htm.

¹² 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, accessed 12 March 2014, <http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=speeches/2009/003.htm&pageID=005&min=njsa&Year&DocType>.

¹³ Authorities identifying the different viewpoints are referred to in D. Yerushalmi, "Shariah's 'black box': Civil Liability and Criminal Exposure Surrounding Shariah Compliant Finance," *Utah Law Review* 3 (2008): 1019 at footnote 59.

¹⁴ The so-called "Trojan horse": see Yerushalmi, *Shariah's 'black box'*. 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," *The U.S. Report* (1 March 2011), accessed 21 May 2015, <http://www.theusreport.com/the-us-report/2011/3/1/economic-warfare-report-explains-what-Shariah-finance-really.html>. 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 promoting Islamic finance arrangements violated the secular guarantees in the United States Constitution: see Blake Gould, "Case Against AIG's Islamic Finance Fails," *The Islamic Globe*, accessed 21 May 2015, http://www.theislamicglobe.com/index.php?option=com_content&view=article&id=36:case-against-aigs-islamic-finance-fails&catid=13:article&Itemid=38.

¹⁵ Ann Black, "Replicating a 'Model of Mutual Respect': Could Singapore's Legal Pluralism Work in Australia?" *Journal of Legal Pluralism* 65 (2012): 65, 95.

¹⁶ At the instigation of Canadian Muslim women: see Homa Arjomand, *International Campaign Against Shari'a Court in Canada*, accessed 15 April 2014, <http://www.nosharia.com/eng.htm>.

¹⁷ See the Catholic Australia website at <http://www.catholicaustralia.com.au/page.php?pg=sacraments-divorcefaqs0>, accessed 18 March 2014.

¹⁸ Andrew Strum, *Getting a Gett in Australian Courts*, published at *Jewish Law Articles*, accessed 21 March 2014, <http://www.jlaw.com/Articles/getaus.html>, 10–13.

¹⁹ Note that the *Family Law Act 1975 (C/W)* section 6 does recognise the validity of Muslim polygynist marriages entered into overseas, and, since 2008, de facto polygamist marriages entered into in Australia can be recognised as de facto marriages: section 4AA(5)(b).

²⁰ Marion Boyd, *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion* (Toronto, Ontario: Ministry of the Attorney General, December 2004), section 8, accessed 21 May 2015, <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/executivesummary.pdf>.

²¹ Larry Resnick, "Family Dispute Arbitration and Sharia Law" (2007), accessed 21 May 2015, <http://bccla.org/wp-content/uploads/2012/04/2007-BCCLA-Sharia-law.pdf>.

²² Rebecca Maret, "Mind the Gap: The Equality Bill and Sharia Arbitration in the United Kingdom," *Boston College International and Comparative Law Review* 36 (2013): 255, accessed 4 April 2014, <http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1696&context=iclr>.