

# ACCOMMODATING SHARIAH LAW IN AUSTRALIA'S LEGAL SYSTEM

Can we? Should we?

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The 'degree of accommodation the law of the land can and should give to minority communities with their own strongly entrenched legal and moral codes' was raised earlier this year by the Archbishop of Canterbury<sup>1</sup> in his lecture to the Royal Courts of Justice in England. This topic has equal relevance here in Australia, where Muslims have been an integral part of our multi-cultural mosaic since the mid-19th century. 'Mohammedans' were listed in the musters (census) taken in the early 19th century, and Afghan cameleers assisted in opening up remote and central Australia. They built the first Australian mosque in 1861, in South Australia. Today there are over 100 mosques and many masjids (prayer halls) across this continent, which serve the needs of a small, stable but growing Muslim population — around 350 000<sup>2</sup> — most of whom have made, or are intending to make Australia their home. It makes illogical the old response 'go back to a Muslim country if you don't like it here'. Muslims are a permanent part of our landscape. As Muslims, their identity is now tied to Australia, and defining what it is to be an Australian Muslim or a Muslim Australian is not only a personal journey for each individual and their ethnic or faith communities, but is one for the country as a whole. How Australia responds will be important to the identity issue. Dialogue with non-Muslim Australians will also be necessary to enable 'them' or 'the other' to become integrated with 'us'. Given that Islam comes with its own established legal rules, the question at the individual level of identity is, 'How can I adhere to the Shariah<sup>3</sup> within the context of the Australian legal order and society?' For the nation, the question is, 'How accommodating can our legal system be to our Muslim citizens?' It is a dialogue Muslims and non-Muslim Australians should have.

This article offers an analysis of whether the Australian legal system, at this point in time, should give limited recognition to Shariah law in resolving disputes between Muslim Australians. Could we recognise and endorse the authority of Imams or Islamic scholars, boards or tribunals to make determinations in accordance with Islamic legal norms in the resolution of family, inheritance and other inter-personal disputes between Muslims in this country? As is evident from the Archbishop's statement, Australia is not alone in responding to this issue. As societies become more pluralistic, it is inevitable that they will 'wrestle with the extent to which the state should recognise, make concessions to, or even enforce norms and values

embedded in different religions, cultures or traditions.'<sup>4</sup> In reflecting on this, William Twining argues that a consequence of law's complexity in the world today is that it has to deal with 'established, resurgent, developing, nascent and potential forms of legal ordering.'<sup>5</sup> As we in Australia respond to the possibility of entrenching a pluralistic form of legal ordering, so too are our fellow common law compatriots in Canada and Britain wrestling with this issue. Both of these countries have a similar multi-cultural foundation, which makes a brief overview of their current responses relevant to the debate here on recognition of religious law in the Australian context. It will be shown that legal pluralism is already a reality in Australia, although Shariah law has to operate in the realm of the unofficial, non-state legal ordering. Lastly, the article will reflect on some of the factors that inform the debate by putting forward arguments for and against official recognition of Shariah law. While the article will refer to some of the possible models for Shariah tribunals,<sup>6</sup> the aim is not to describe, review or critique any in detail, but rather to canvass the broader issue of whether this is the right direction for Australia to go at this time.

## Lessons from Britain and Canada

The Archbishop of Canterbury's 2008 lecture was controversial because his reflections on the potential for Britain becoming a 'plural jurisdiction'<sup>7</sup> were contextualised in terms of Muslims, Shariah law and Shariah courts. It was a legal pluralism derived from religion not ethnicity. At various junctures he noted that other minority faith groups, including Orthodox Jews, were relevant to his legal pluralism model; yet, his central focus was on accommodating Shariah law within Britain's legal system. At first it seems surprising that the spiritual leader of the Anglican Church would be an advocate for according Islam, a rival religion, with separate legal recognition. However, his argument was also a promotion of a religious conscience in the country as a defence against an 'unqualified secular legal monopoly'.<sup>8</sup> It was not the random ramblings of a 'gullible', 'dangerous'<sup>9</sup> cleric as many in the media suggested, but a considered response to an issue already on the national agenda. In fact, the lecture was an invited one, given as the first in a series chaired by the Lord Chief Justice on the theme 'Islam in English law'. Whether intentional or not, this speech proved to be both provocative and divisive. It drew criticism and praise from many quarters, including from members of the Anglican Synod, the legal profession, political

## REFERENCES

1. The Archbishop of Canterbury, Dr Rowan Williams, 'Civil and Religious Law in England: a religious perspective', (Foundation lecture at the Royal Courts of Justice, 7 February 2008). <archbishopofcanterbury.org/1575> at 5 November 2008.
2. The precise number of Muslims is not known because many do not declare their religious status for census purposes. However, the Australian Bureau of Statistics says the number exceeds 300 000, making Muslims the third largest religious group in Australia after Christians and Buddhists. Two-thirds were born in a country other than Australia.
3. Shariah, shari'a, syariah, shariat are transliterations from the Arabic script which refers to the divinely ordained law embodied in the *Quran* (actual word of God as revealed to the Prophet Mohammad), *Sunnah* (practices and traditions of the Prophet) and *fiqh* (jurisprudence). Islamic law is derived from the Shariah.
4. William Twining, *Globalisation and Legal Theory* (2000) 51.
5. *Ibid.*
6. One is a government-funded and run Shariah Court with judges/members appointed by the government, as per the Singapore Shariah Court. Another is the former Ontarian model where Muslim scholars established a tribunal/court to make binding rulings on Muslims who chose to bring their family or other interpersonal disputes for determination. The arbitrators' ruling, in turn, was enforced by the Province's civil courts. A third is the English model where Muslims bring cases to unofficial Shari'a Courts which determine outcomes for the parties in accordance with Islamic law, but their decisions are not recognised or enforced by the civil courts.
7. Rowan Williams, above n 1.
8. *Ibid.*
9. Times Online: <timesonline.co.uk/tol/news/uk/article3335026.ece?token=null&offset=12> at 5 November 2008.

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leaders on both sides and media commentators. Blogs in Britain and abroad went into over-drive. Britain's Muslims also responded in different ways to the Archbishop's proposals, with some seeing this concept as having great potential for social inclusion and tolerance, while others feared it might create division amongst Muslims and further alienate non-Muslims.<sup>10</sup> The passionate denunciations that followed confirmed, for some Muslims, that there exists in Britain a 'hostile public discourse to regard Islam-based practices, codes or ideas as by definition extreme or dangerous'.<sup>11</sup> Even the Archbishop started to give mixed messages. He claimed the adoption of parts of Shariah law was 'unavoidable' in Britain but later stressed to the Synod: 'If, and please note that word — this were to be a useful direction in which to move, there would be plenty of work still to be done ...'<sup>12</sup> 'Unavoidable' had been reduced to an 'if' and maybe.

The Archbishop had not instigated but rekindled, in a public forum, a debate that had been simmering in common law countries for some time. When, in 2004, the Province of Ontario, Canada, gave legal recognition to an Islamic arbitration system for family and inheritance disputes between Muslims, the Muslim diasporas in other common law countries felt this could be the catalyst for reform in their own jurisdictions. Buoyed by the Ontarian initiative, some Australian Muslims began to canvas the option here. For example, the Islamic Council of Western Australia went public with an announcement that it was establishing a Board of Imams to settle (mediate or arbitrate) what it called civil disputes arising between Muslims. Governments in Australia (at a federal or state level) did not come forward with support. Within a year of the establishment of the Islamic Institute of Civil Justice's Shariat Court, Ontario repealed the relevant sections of their *Arbitration Act 1991* to reject not only Shariah based arbitration, but all forms of faith-based arbitration. Vociferous opposition had forced the government to back down. Whilst the Ontario experiment ultimately failed, it was nonetheless a catalyst for considering such possibilities. It also highlighted the difficulty in gaining community acceptance, as opposition from Muslims, especially Muslim women's groups, was equal to that from the broader community.

While the door to formal recognition has been closed in Ontario, and possibly Canada, in Britain it is widening. The Lord Chief Justice, Lord Philips, recently endorsed the Archbishop's position by stating, '[T]here

is no reason why sharia principles, or any other religious code, should not be the basis for mediation or other forms of alternative dispute resolution.'<sup>13</sup> However, the official response from Prime Minister Gordon Brown's office was more cautious: 'We think that British law should be based on British values and determined by the British Parliament'.<sup>14</sup> Yet, a dialogue between establishment voices in England, including the Anglican church, the legal fraternity, the government and the media, with representatives of Muslims in the country has commenced. This is an important first step.

### Current position in Australia

To date, pronouncements from both sides of Australian politics accord with the view promoted by Australia's former treasurer, Peter Costello:

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. Our State is a secular State. As such it can protect the freedom of all religions for worship. Religion instructs its adherents on faith, morals and conscience. But there is not a separate stream of law derived from religious sources that competes with or supplants Australian law in governing our civil society. The source of our law is the democratically elected legislature.

There are countries that apply religious or sharia law. Saudi-Arabia and Iran come to mind. If a person wants to live under sharia law these are countries where they might feel at ease. But not Australia.<sup>15</sup>

In response to recent calls for recognition of Muslim polygynous marriages, Attorney-General McLelland said, 'There is absolutely no way that the Government will be recognising polygamist relationships. They are unlawful and they will remain as such.'<sup>16</sup>

The uncompromising view of 'one law and one law only' would prevail among the wider Australian community. When we consider reports such as Kevin Dunn's *Australian Public Knowledge of Islam*,<sup>17</sup> it is clear there is a high level of community apprehension regarding Muslims. Scott Poynting found Muslims are the least liked of all immigrants and are seen as the most threatening.<sup>18</sup> It would seem there would be a broad Australian consensus that Muslims should jettison their religious law, but retain their religious beliefs and practices of worship. In so doing, Muslims would be able to better integrate into Australia's predominately secular society. But it is not that simple. This 'one law for all' creed ignores the reality that Shariah law is currently operating in Australia. Many of Australia's

10. Danny Savage, 'Puzzled voices among Bradford's Muslims' *BBC News* 8 February 2008.

11. Tariq Modood, 'Multicultural citizenship and the anti-sharia storm' *Open Democracy*, 14 February 2008: [opendemocracy.net](http://opendemocracy.net) at 5 November 2008.

12. 'Archbishop's speech to general Synod' *BBC News* [news.bbc.co.uk/2/hi/uk\\_news/7239567.stm](http://news.bbc.co.uk/2/hi/uk_news/7239567.stm) at 5 November 2008.

13. 'Law lord backs sharia', *The Courier Mail*, 5 July 2008, 44.

14. *Ibid.*

15. Peter Costello, Address to Sydney Institute, 'Worth promoting, worth defending—Australian citizenship, what it means and how to defend it', 23 February 2006.

16. Alison Caldwell, 'Islamic Leaders Call for Recognition of Polygamous Marriages' (2008) *ABC Online*, 202.6.74.101/news/stories/2008/06/25/2285395.htm at 27 October 2008.

17. Kevin Dunn, 'Australian Public Knowledge of Islam' (2005) 12 *Studia Islamika*, 2.

18. Scott Poynting, *Bin Laden in the Suburbs: Criminalising the Arab 'Other'* (2004).

350 000 Muslims are regulating their lives according to the Shariah. This includes the legal relationships they enter, into or out of marriage, divorce, custody, inheritance and also business dealings - and includes a preference to have disputes settled by persons with Islamic credentials. This does not mean every Muslim Australian is defying or avoiding Australian laws and by-passing the Australian legal system, but means choices are negotiated within the parameters of both laws. Muslims, as minorities in secular societies, have become skilled 'cultural navigators'<sup>19</sup> as they manoeuvre their way through the demands of different normative orders, laws and cultures.

Complying with both systems of laws is one approach that can be taken. Unlike the United Kingdom, marriage here in Australia is generally not problematic, except for polygynist marriages, which are unlawful under the *Marriage Act 1961* (Cth), s 94. Otherwise the Act allows for marriages to be performed and registered by recognised marriage celebrants, who for Muslims may be their Imam, and without the need for a separate registering event or ceremony. With divorce, a Muslim husband or wife can serve out the 12 month period of separation to have a valid divorce under Australian law on the ground of irretrievable breakdown of marriage in accordance with *Family Law Act* (Cth). Islamic law allows for extra-judicial divorce by the husband, which, like Australian divorce law, requires no cause or fault to be established. He can pronounce *talaq* and, provided all the legal requirements are met,<sup>20</sup> the divorce will also be valid under Islamic law. Therefore, either before or after a secular divorce, a husband can complete his divorce in compliance with Islamic law. Complying with both is not difficult. However, it is not as easy for a wife. As the wife under traditional Shariah law does not have the power of unilateral extra-judicial pronouncement — *talaq* — she will, in Australia, also have to seek a religious divorce from a person or tribunal she believes has religious authority to decree this. It could be her local Imam; a body of Shariah scholars in her state, such as the *Ulama Majlis* (Council of learned scholars) in Queensland or the Board of Imams in Western Australia; she may feel it necessary to go interstate to a Sheikh, mosque or institution with the Islamic credentials she, or her family, regard as necessary for a valid pronouncement; or, in some cases, to go overseas to a court in a Muslim country, usually her country of origin or the place of the marriage, for a divorce decree with impeccable official standing. The religious pronouncement of divorce may be vital to her on many levels — spiritual, personal, practical (to enable re-marriage) and also legal. Only the Shariah divorce will accord her with divorcee status within her faith community and in the eyes of 'God'. The civil divorce can not.

The second, and a quite common navigational strategy, is to bypass the Australian legal requirements and operate according to religious law only: essentially a Shariah system working separately but alongside, or in the shadow of, the Australian system. In Australia, one can marry according to the requirements of Islamic law, but not formally register the marriage, and

be considered lawfully married in the eyes of one's community. Any children would be recognised by other Muslims as the legitimate children of the marriage. If the husband or wife wishes at a later time to end that marriage, the divorce proceeds in the same way. The husband can divorce his wife extra-judicially through *talaq* and, provided he adheres to the Islamic laws governing maintenance, he would be considered by other Muslims as lawfully divorced and able to re-marry without the need for a 12 month separation period. As noted previously, it is more onerous for a wife initiating divorce if her husband refuses to pronounce *talaq*. She must find an authoritative Muslim individual or body to effect an Islamic divorce, through *khula* — divorce whereby the wife returns her *mahr* (marriage portion/dowry), effectively buying her way out of the marriage; or through *ta'liq* or *talaq-i-tafwid*, where the husband has breached a stipulated term in the marriage contract, thereby ending the marriage through breach; or *fasakh*, which requires her to establish fault in one of the recognised categories, such as absence, impotency, certain illnesses, cruelty, failure to maintain his wife and child. An empowered Muslim woman will not find this an obstacle. The absence of an established state (such as the Shariah Court, Singapore) or community-designated authority (such as the unofficial Shari'a courts in England) can leave some women in a vulnerable position. It can be a disincentive for a wife wanting to escape from an unhappy marriage, making her vulnerable to possible spousal, religious and community pressures to resolve the marital dispute in accordance with what is presented as Islamic law. Whilst it can cause difficulties, mainly for a percentage of Muslim women, the reality is that for Muslims generally in Australia, marriage, including polygynist ones, divorce and custody can and do occur without resort to the Australian legal system.

In summary, Australia is already legally pluralistic, as official law co-exists with Islamic law in the form of Muslim personal law. The latter operates in the realm of the unofficial or the extra-legal, leaving it in a sphere of cultural practice. Whether this should change in favour of official recognition will now be considered. There are arguments for and against.

## The case for official recognition

### *Legal pluralism works*

Legal pluralism at an official or juristic level is practically and historically workable. If one looks at the Ottoman Empire, the state devised the millet system to accommodate the personal laws of its different religious denominations — the Turks, as Muslims, were subject to Islamic law; however, Christians and Jews were allowed to follow their own laws, with the heads of those communities officially empowered to exercise jurisdiction over their communities. In many, probably most, Muslim nations today, this continues as a socio-legal reality: Shariah Courts decide legal disputes, especially in family and succession matters, for the Muslim population, whilst civil law courts make those determinations for non-Muslims. In general,

19. Ihsan Yilmaz, *Muslim Laws, Politics and Society in Modern Nation States* (2005) 66.

20. These include that he understands what he is doing (is not insane, intoxicated or asleep); is an adult; has communicated the *talaq* to his wife; and his wife is not menstruating. The pronouncement severs the marriage. There is a three month revocation period.

*Until there is a greater consensus amongst Muslims in Australia, and until there is a group of 'home grown' Imams and scholars of both genders who can create an Australian Islam, we are not ready to officially recognise Islamic law.*

other laws going to Islamic religious practice have not been imposed, so non-Muslims need not fast during Ramadan, can drink alcohol, eat pork, or gamble, with the proviso that these acts are done in the private not the public space. In fact, many Muslim nations can show western countries that there is nothing alarming about legally pluralistic systems.

During the era of colonisation, Europeans too recognised the advantages to be gained through legal pluralism. One only has to look at colonial rule in Asia to see that, even though the colonizers transplanted large sections of their western laws, rarely did this extend to personal laws. In the regulation of family relationships, the local inhabitants — be they Muslims as in Malaysia and Brunei, or the Chinese in the early colonisation of Hong Kong, or the Vietnamese in Indochina — local laws and institutions were respected as the accepted means of dispute resolution for particular sectors of the population. Criminal law and commercial law had to be that of the coloniser and applied uniformly, but for family matters, including inheritance, there was co-existence of different legal orders. Islamic family and succession laws were generally immune from displacement by the common law or European codes.

Today, many of Australia's Muslim immigrants have come from countries where there has been and still is formal accommodation of the personal laws of minorities.

#### **An underground system lacks protections**

As Shariah law continues as the dominant normative force in the lives of many Australian Muslims, its operation and regulation is essentially 'underground', in the sense that it is not subject to scrutiny by anyone other than its participants. Nor is it subject to the protection Australian laws and process could provide. This was a significant factor in the Ontario law (prior to its repeal), which allowed for religious arbitration. As there were accreditation requirements for the arbitrators, parties had to have independent legal advice from a Canadian lawyer prior to their case going to the Shariat (Arbitration) Court, and there were avenues of appeal to the civil courts.<sup>21</sup> In an unofficial system, if a group of Islamic scholars or a sole Imam hold themselves out as having legal authority to determine issues of marriage, divorce, custody, and inheritance for Muslims in dispute, who can verify this? Is the person qualified? Is the law being applied fairly and in accordance with the Shariah? If there is a person aggrieved by the decision, to whom can he or she go?

If there is a power imbalance between parties to the dispute, has this been addressed by the process? When there aren't reports and transcripts, nor avenues of appeal, how do we know similar matters are being determined in the same way throughout the country?

Essentially, we are allowing determination of important matters like divorce, custody and maintenance to go unchecked. Islam is premised on doing justice between the parties, and in seeking fairness in terms of the Shariah. But can Muslims in this country be sure, in a totally unregulated or self-regulated environment, that this is being achieved? If the government, in conjunction with representative bodies of the Muslim community, were to agree and give formal recognition to the application of Islamic law by a Board of Imams, a Shariah Arbitration Council or Court, the opportunity for regulation and accountability becomes more likely.

#### **Official recognition is empowering**

Delegation of legal authority and autonomy over family law matters to Muslims could be empowering. It could build trust, and thereby aid in better social integration through acceptance of shared identity. And the non-Muslim community could see that Shariah law did not conform to stereotypes derived from traditional hudud punishments. Conversely, recognising a separate system of law and institutions for one religious group could be seen as isolating, differentiating and separating Muslims from the wider community — intensifying a ghetto-isation for Muslims. And this is one of the arguments against recognition of Islamic law.

#### **The case against official recognition**

##### **Internal legal pluralism**

Some scholars contend that, because Islam operates in distinctive ways in local contexts, there is a range of Islams — 'as many Islams as there are situations that sustain it.'<sup>22</sup> This has occurred due to a number of factors, including the Sunni-Shia schism; the development of *madhabs* (Sunni schools of law) and other sects; local customs (*urf/adat*) fusing with and shaping Islamic law in different ways; the influence of other cultures, including colonial laws and governance; and also international law. Islamic law is diverse, as is an individual Muslim's allegiance to it. Keeping this diversity in mind is important when considering official legal recognition of Islamic law. Australian Muslims are culturally, linguistically and ethnically diverse, coming from over 70 different countries, with the two largest Muslim communities being Lebanese and then

21. Marion Boyd, 'Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion', Report to the Attorney-General of Ontario, December 2004.

22. Aziz Al-Azmeh, *Islams and Modernities* (1996) 1.

Turkish. Australian legal academic, Jamila Hussain, notes that ethnic differences have led to mosques being established on ethnic lines so that the language of the country of origin is used in addition to Arabic for the formal prayers. This means that, whilst any Muslim can attend a mosque, it is natural to gravitate to the one adopting one's own language. As a consequence, she feels it is:

probably more correct to speak of Muslim 'communities' in Australia rather than the Muslim 'community' since it is so ethnically divided.<sup>23</sup>

In states like Queensland, which lack a particular ethnic concentration, one finds English, with Arabic, typically used.

The presence of Muslims from diverse nations has also meant that experiences of Islam and Islamic law vary significantly. Unlike the Muslim nations of our region or the Middle East, where there is an established dominant ethnicity, language, culture, history, *madhab* and jurisprudence, the Australian picture, by contrast, is a mosaic. Here, intra-pluralism dominates. Muslims also are in Australia for different reasons: some were born here, some came to escape persecution in their home country, and some came to escape from war and uncertainty. Some are economic migrants trying to make a new start in a first world country, others came to join family members and some are converts to the world's fastest growing religion. Some migrants, who have left countries with a comprehensive Shariah system in order to escape from it, find Australia's secular system and its legal protections very appealing. For others, a strengthening rather than abandonment of their 'Islam' occurs, resulting in an increased attachment to religious laws and traditional practices. Yilmaz writes that Muslims in Britain work to 'safeguard Islam' from secularisation and, when their stay becomes permanent, the desire to practice Islam intensifies, thereby cementing Islam as the binding force in their lives.<sup>24</sup> From all these variables, as with most religions, there are different levels of commitment to Islam, ranging from deeply devout to nominal, even to some who use the descriptor 'secular Muslims'.

#### **Leadership and sources of authority**

Given this mosaic, it is inevitable that not all Muslims want Shariah law recognised in the Australian system, nor do all believe there is need for this. And amongst those who do, there is no unanimity on the form it should take. In fact, the Muslim community remains divided on many questions, including who has authority to speak on their behalf,<sup>25</sup> and who, in the individual and collective sense, has authority to deliver legal opinions and rulings on Islamic family law matters. The division was evident when the Family Law Council of Australia called for submissions on cultural-community divorce. The Council's report highlighted that the viewpoints from the Islamic community were very diverse with less consensus (than with the Jewish community for example) on what the Federal government could do to assist in overcoming divorce difficulties.<sup>26</sup> A related issue is whether Australia has the Imams and scholars with the experience and knowledge

to fairly operate such a system. This was seen as a failing in Canada, where Dr Mohammad Elmasry of the Canadian Islamic Congress concluded, 'there are only a handful of scholars in Canada who are fully trained in interpreting and applying Sharia law — and perhaps as few as one.'<sup>27</sup> Faisal Kutty, Canadian lawyer and activist, expressed concern that, 'as it stands today anyone can get away with making rulings so long as he has the piety and a group of followers.'<sup>28</sup> Similar sentiments have been echoed in Australia.

#### **Like it just the way it is...**

The diversity in the Islamic world is in part due to Islam's adaptability to the culture, time and place in which it is located. The phenomenon of large numbers of Muslims coming to live in non-Muslim lands has necessitated adaptability. Researchers in Britain are noting the development of an *angrezi shariat* (English Shariah), which is a reconstruction of Muslim laws for the English socio-legal context.<sup>29</sup> Many migrants find that the Australian legal system has 'much room' in it, and when this is coupled with Islam's adaptability, there need be no conflict between Islamic and Australian laws.<sup>30</sup> The freedom to practice as a Muslim, or not to practice, is a hallmark of secular societies. If a parallel family law system for Muslims was introduced, that may be perceived, or held out, as obligatory for Muslims, thereby negatively impacting upon the current freedom of choice. Choice can be important. Immigrants from countries where laws of gender equality and family matters are different from Australia may accept a ruling, unaware that if they went to the Family Court, the outcome in terms of divorce, custody or maintenance could be different. German Muslims have taken the collective view that they can exist in harmony with the German political and legal system. Article 13 of their *Islamic Charta* states, 'The command of Islamic law to observe the local legal order includes the acceptance of the German statutes governing marriage and inheritance, and civil as well as criminal procedure.'<sup>31</sup>

#### **Intensifying Division**

Allowing Muslims to regulate family and inheritance law disputes through a legally recognised entity could intensify divisions. This was the experience in Ontario, Canada. When the group of Imams set up their arbitration board, which they at first called a Shariat Court, they would not have realised that it would fracture the Province's Muslim community, and that the most outspoken criticism and opposition would come not from non-Muslims, but from groups of Canadian Muslims. The Muslim Canadian Congress argued that the principle of equality in the *Canadian Charter of Rights* demanded Muslims be treated equally, not differently, from other Canadians. There was strong opposition from several Muslim women's groups, including the National Council of Women in Canada, which called for repeal of the law allowing for faith-based arbitration. The *NO Sharia Campaign* was led by an Iranian woman, Homa Arjomand, who wrote that any move to introduce Islamic laws should be opposed by everyone who believes in women's civil and individual rights.<sup>32</sup>

23. Jamila Hussain, *Islam: its law and society* (2004) 203.

24. Yilmaz, above n 19, 57.

25. Evident in the internal politics with regard to the position Mufti of Australia and the different Councils, such as ANIC and AFIC.

26. Family Law Council of Australia, *Report on Cultural Community Divorce and the Family Law Act 1975* (2001) 4 (Executive Summary 17).

27. Quoted in Dahlia Lithwick, 'How do you solve the problem of Sharia?' (2004) Slate <slate.com/id/2106547/> at 27 October 2008.

28. Faisal Kutty, 'Canada's Islamic Dispute Resolution Initiative Faces Strong Opposition' (2004) Washington Report of Middle East Affairs <washington-report.org/archives/May\_2004/0405070.html> at 5 November 2008.

29. Yilmaz above n 19, 66.

30. Report by Ann Black 'Determining a Need for Legal Awareness Training for Queensland Imams', LPITAF, 2007.

31. Islamic Charta Germany, <qantara.de/files/332/Islamic-Charta.pdf> at 5 November 2008.

32. International Campaign Against Shari'a Court in Canada <nosharia.com> at 5 November 2008.



## MENTIONS

### National Human Rights Consultation

Attorney-General Robert McClelland marked the 60th Anniversary of the *Universal Declaration of Human Rights* by launching the National Human Rights Consultation to seek the community's views on human rights in Australia.

The Consultation will be conducted by a committee of four eminent Australians:

Father Frank Brennan (Chair), Mick Palmer, Mary Kostakidis and Tammy Williams. This independent committee will report to the government by 31 July 2009.

The Consultation will provide an opportunity for all Australians to share their views on how human rights and responsibilities can be better recognised and protected. The government aims to encourage broad community debate on a range of human rights issues, not only on whether a Charter or Bill of Rights is necessary.

Further information on the consultation, including how to make a submission, is available at [humanrightsconsultation.gov.au](http://humanrightsconsultation.gov.au).

### Australian Human Rights Group

Made up of more than 60 organisations, the Australian Human Rights Group aims to support the better protection of our human rights. Members work every day with ordinary Australians: the homeless, artists, religious groups, children, the mentally ill, indigenous people, gay

and lesbian people, migrants and local community groups. We believe that all Australians need to have their human rights better recognised and protected, especially those vulnerable to abuse.

Australia remains the only western country without proper protection of our human rights. Australia has always been happy to talk about the importance of human rights overseas; now it is time that we have a Human Rights Act to protect our human rights at home.

Human rights are part of our daily lives, and abuses are common but often don't make the news. The Australian Human Rights Group wants to defend the rights Australians may take for granted. Contrary to what we might think, many of our rights are not adequately protected. In the UK, New Zealand and now in Victoria and the ACT, laws have been passed so that governments must protect human rights in making decisions and new laws. In these places, democracy has been enhanced by greater protection of human rights.

It is time that the human rights of all Australians were protected by a legally enforceable Human Rights Act passed by the Commonwealth Parliament. The Australian Human Rights Group welcomes and supports a consultation process into how to better protect our human rights.

If you would like to get involved, or for more information, go to [humanrightsact.com.au/ahrg/](http://humanrightsact.com.au/ahrg/). To join the Group's mailing list, contact Phoebe Knowles on [seconded1@pilch.org.au](mailto:seconded1@pilch.org.au).

### To conclude

Legal pluralism is alive here in Australia, but it is not the formal pluralism working effectively in most Muslim majority countries. Our Muslim minority can select individuals and Muslim entities, such as a *Majlis Ulama* or an Imam, to resolve any family and personal disputes in accordance with Islamic law, but it will be unofficial, self-regulated and extra-legal. However, a choice is there and is taken by many. With it come uncertainties, as highlighted by the Family Law Council's finding that:

the unresolved status of the Islamic divorces granted in Australia, and the absence of a Sharia court in Australia, are significant obstacles to achieving equally beneficial results in the Islamic community.<sup>33</sup>

The Archbishop of Canterbury has argued for official recognition of Islamic law in Britain, where there are already numerous unofficial Shariah courts and councils in operation,<sup>34</sup> and where a hybrid system of rules *angrezi shariat* has emerged. It may be that there is a greater consensus amongst Britain's two million Muslims (for 80 per cent of whose place of origin is South Asia)<sup>35</sup> than among Australia's diverse mix who seek differing outcomes. Until there is a greater consensus amongst Muslims in Australia, and until there

is a group of 'home grown' Imams and scholars of both genders who can create an Australian Islam, we are not ready to officially recognise Islamic law. If this is rushed, and we sanction a form of Shariah law that would be more at home in the Middle East or in Pakistan, it will further divide our Muslim communities, and alienate non-Muslim Australians just as it did in Canada.

Can we, and should we, give formal legal recognition to Shariah law for inter-personal disputes between Australian Muslims? I would argue that Australia is not yet ready to embrace official recognition, but in time it may be the path Muslim and non-Muslim Australians agree to take.

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33. Family Law Council of Australia, above n 26.

34. Williams, above n 1.

35. Yilmaz, above n 19, 56.