



Legal recognition of Sharia law

Is this the right direction for Australian family matters?

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A new direction for a pluralistic nation?

Australia is marked by pluralism—cultural, religious and ethnic. Yet, our legal system is not pluralistic. Apart from some concessions to the Indigenous peoples of this country, we abide by the “one law for all” mantra. Both sides of politics have rejected a separate stream of law for specific religious or ethnic communities on the basis that Australia is a secular nation. Freedom of religion and worship is protected, but religion is to play no part in the formal legal system. Australia’s former treasurer, Peter Costello (2006), argued, “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” (para. 44). This year, Attorney-General Robert McClelland confirmed that the “Rudd government is not considering and will not consider the introduction of any part of Sharia law into the Australian legal system” (Zwartz, 2009).

Research undertaken by Dunn (2005) and Poynting, Noble, Tabar, and Collins (2004) indicates that there is a high level of apprehension among the general population about Muslims “in our suburbs”, which gives support to the contention that the majority of Australians accept and endorse the “one law for all” approach. However, this position does raise challenges for Australian Muslims for

whom adherence to their religious law—the Sharia¹—is an Islamic obligation and not a matter of personal preference, particularly in regard to family matters.

The issue of whether Australia should give formal legal recognition to Sharia law in resolving family law disputes involving Muslims will be canvassed in this paper. The case for and against such recognition is outlined. Debate on this issue has gained currency across common law jurisdictions due to several recent events. One was the legal recognition given to Islamic arbitration in the province of Ontario, Canada, in 2004. Although the enabling sections of the *Arbitration Act* were subsequently repealed, it did ignite the possibility that within a common law system there could be faith-based dispute resolution for family law and other legal matters. The second event was the Archbishop of Canterbury’s address to the Royal Courts of Justice (Williams, 2008), in which he promoted the concept of Britain becoming a “plural jurisdiction” by accommodating aspects of Sharia law. Although this speech provoked opposition from some other members of Britain’s legal, political and religious communities (including some Muslim groups), the Lord Chief Justice of Britain came to the Archbishop’s defence by also supporting alternative dispute resolution using Sharia principles. Whether this is the right direction for Australia or whether we should retain the status quo needs consideration and debate.

This paper examines arguments that have been raised for and against the official recognition of Sharia law and finds that, on balance, the status quo should prevail.

The case for official recognition

Sharia law is already operating in Australia

Given that many of Australia's 350,000 Muslims (Australian Bureau of Statistics [ABS], 2006) are already regulating their lives according to Sharia, it is logical to officially recognise and support this. Sharia regulates the legal relationships many Australian Muslims enter into and out of, including marriage, divorce, custody and inheritance, as well as contractual and commercial dealings. Among Australian Muslims, there exists a strong preference to have legal questions answered and disputes settled by persons with Islamic credentials. Except in rare cases, this does not mean there is rejection of Australian laws, but instead there is a desire to conform with Sharia law when it is possible to do so. Muslims as minorities in secular societies like Australia have been recognised as skilled "cultural navigators" (Yilmaz, 2005), able to manoeuvre through two systems of law, one of their nation and the other of their faith.

Complying with both systems of laws is one approach that can and is being taken. In Australia, marriage is a good example where there can readily be dual compliance. The *Marriage Act 1961* (Cth) accommodates Islamic marriages by allowing marriages to be performed and registered by a Muslim marriage celebrant, usually an Imam, without the need for a separate registering event or ceremony. Polygynist marriages, however, remain problematic, being unlawful under section 94 of the Act.

With divorce, compliance with both systems is possible. A husband and wife can serve out the 12-month period of separation both to have a valid divorce under Australian law on the grounds of irretrievable breakdown of marriage in accordance with *Family Law Act 1975* (Cth) and also comply with the extra-judicial form of divorce, known as *talaq* in Islamic law. A husband is able to pronounce *talaq* and, if all the legal requirements are met,² the marriage is terminated, although there is a three-month reconciliation period.

However, compliance with both systems is more problematic for wives. A wife does not have the same extra-judicial divorce option. If her husband does not agree to pronounce *talaq*, she is left to find someone with authority to hear her case and hopefully to grant her an Islamic divorce. Islamic law has always provided divorce options for wives, but each requires a third party—usually a judge or a body of legal scholars—to make the determination. In Muslim countries, the role is typically fulfilled by Sharia courts, but in Australia there is no judicial equivalent. As a divorce decree from the Family Court lacks any Islamic currency, it can mean that in the eyes of her community, her husband and herself, she is not really divorced. In the absence of an established Sharia court, tribunal or body, Muslim women have to find a Muslim person or organisation with Islamic credentials to hear her case and make a determination. For empowered Muslim women who want to escape from an unhappy marriage, this will not be an obstacle, but it is a problem for those who lack the contacts, knowledge and confidence to proceed. It also can make women

vulnerable to spousal, religious and community pressures to resolve the marital dispute in accordance with what is presented as the right version of Islamic law. This relates to the second argument for legal recognition.

Underground systems lack protections

While Sharia law is the dominant normative force in the lives of many Australian Muslims, its operation and regulation is essentially "underground". It is not subject to scrutiny by anyone other than its participants, nor is it subject to the protection of Australian laws and processes. Providing protection for those adhering to Sharia law was a significant feature of the Ontario law, prior to its repeal. Protections could include accreditation requirements for Sharia arbitrators, mediators or members of any Sharia tribunal; the need to obtain independent legal advice from a qualified Australian lawyer prior to a dispute being heard; the recording of transcripts and decisions; establishing avenues of appeal to the common law courts; allowing legal representation at hearings; and ensuring there are mechanisms for addressing power imbalances between parties.

In our current unofficial system, if a group of Islamic scholars or sole Imams hold themselves out as having legal authority to determine issues of marriage, divorce, custody and inheritance for Muslims, such protections can be missing. Islam is premised on fairness and doing justice between the parties in terms of the Sharia; however, in a totally unregulated or self-regulated system to govern family law matters, Australian Muslims may be disadvantaged. If the government, in conjunction with representatives of the Muslim community, found common ground that allowed for application of Islamic law by a board of Imams or a Sharia arbitration council or court, the opportunity for regulation and accountability becomes more likely.

Legal pluralism works

History provides many examples of the effectiveness of legal pluralism in managing religious and ethnic diversity. The Ottoman Empire had the millet system, which enabled the personal laws of its different religious denominations to co-exist. Muslim Turks were subject to Islamic law,



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while Christians and Jews followed their own laws, with the heads of their communities officially empowered to exercise jurisdiction over them. The era of colonisation provides many examples where European powers recognised the advantages of having different legal orders for different sectors of the population, based on ethnicity and also religion. What colonisers ethnocentrically called “Mohammadan” law was retained and formalised in colonies with Muslim populations. As family and succession laws were usually immune from displacement by the common law or European codes, this has intensified their importance for Muslims.³

Today, many Muslim majority nations remain legally pluralistic. Family law and inheritance matters for Muslims are heard in Sharia courts, but non-Muslims take their cases to the civil courts. Some laws apply only to Muslims—in particular those based on Islamic practice—so that non-Muslims may be exempt from laws dealing with prayer, apostasy, fasting during Ramadan, alcohol and pork consumption, provided these acts are done in private. It means that immigrants who have come from such countries to Australia are comfortable with legal pluralism.

Recognition can be empowering and inclusive

Delegation of legal authority and autonomy over family law matters to Muslims could build trust and thereby aid in better social integration through acceptance of shared identity. Non-Muslims could see that Sharia is non-threatening and does not conform to stereotypes derived from publicity around traditional *budud* punishments.⁴

Case against official recognition

Recognition can intensify division

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, thus intensifying a “ghetto-isation” for Muslims. Allowing Muslims to regulate family and inheritance law disputes through a legally recognised entity could also intensify divisions *within* Australian Muslim communities as well as between Muslim and non-Muslims. This was the experience in Ontario, Canada. The role of the Sharia Court⁵ in Ontario fractured the province’s Muslim

community, with the strongest opposition to it coming from within, not from outside. The Muslim Canadian Congress rejected the notion of differential treatment, arguing that the principle of equality in the Canadian Charter of Rights demanded Muslims be treated equally, not differently. Muslim women’s groups, including the National Council of Women in Canada, advocated repeal of the law. The NO Sharia Campaign,⁶ led by an Iranian Canadian woman, Homa Arjomand, argued that any move to introduce Islamic laws should be opposed by everyone who believed in women’s civil and individual rights. The movement is now focused on Britain where, buoyed by the Archbishop’s endorsement, their unofficial Sharia courts are seeking formal state recognition.

Whose Islam? Islamic law is diverse

Islam is not monolithic. Islam in Somalia is different from Islam in Indonesia. Although the central tenets are shared, there can be considerable variation. This is a result of the Sunni–Shia schism, differences between the schools of Islamic law, political forces, the impact of local customs and practices, the legacy of colonial laws and governance and, more recently, the impact of globalisation and international law instruments. Today, Islamic law is as diverse as an individual Muslim’s allegiance to it. This diversity is important when considering official legal recognition of Islamic law. Whose Islam do we recognise? Australian Muslims are culturally, linguistically and ethnically diverse, coming from over 70 different countries. Australian legal academic, Jamila Hussain (2004), concludes that it is “probably more correct to speak of Muslim ‘communities’ in Australia rather than the Muslim community” (p. 202), since it is so ethnically divided. Thus, Australia differs from Muslim majority nations and also from nations like Singapore, whose Muslim minority has a shared history, shared Malay ethnicity and language and by and large follows the same school of law.⁷

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Muslims are in Australia for diverse reasons and these can be a factor in individuals’ views on the place of Sharia in their lives. If people flee from persecution in a country with a comprehensive Sharia system, they may find Australia’s secular system and its protections reassuring. If they are born here and convert to Islam, or are in Australia for economic or educational reasons, they may seek to affirm or strengthen their adherence to religious laws and practices. There are many variables that lead to different levels of commitment to Islam, ranging from devout to purely nominal.

Who are the leaders and sources of authority?

This diversity in part explains the level of factionalism among Australian Muslims. There is division on which organisation represents their interests; who, in the individual or collective sense, has authority to speak on their behalf; and who has authority to deliver legal opinions and rulings

on Islamic family law matters. The Family Law Council of Australia (2001), for example, noted the diversity of viewpoints and lack of consensus on what could be done to overcome divorce difficulties experienced by Muslims in this country. The question of leadership and authority is a problem in other secular countries where a tradition of Islamic scholarship and jurisprudence has not had time to develop. Dr Mohammad Elmasry of the Canadian Islamic Congress, in his submission to the Attorney-General of Ontario, highlighted this, noting: “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” (cited in Boyd, 2004, p. 113).

Australia is already accommodating of Islam

The freedom to practise or not to practise as a Muslim is a hallmark of secular societies. If a parallel family law system for Muslims was introduced, it may be perceived as or held out to be obligatory for Muslims, thereby negatively affecting their freedom of choice. Choice can be important. Migrants who come 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. For these reasons, German Muslims have promoted acceptance of state law. Article 13 of the German 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” (Zentralrat der Muslime in Deutschland, 2002, Declaration 13).

Conclusion

Diversity across the Muslim world is in part due to Islam’s adaptability to the culture, time and place in which it is located. As large numbers of Muslims now reside in non-Muslim lands, this inherent adaptability remains important. Researchers in Britain are noting the emergence of an *angrezi shariat* (English Sharia), which is a reconstruction of Muslim laws in the English socio-legal context (Yilmaz, 2005). German Muslims have adapted to allow state law to govern family and inheritance matters. In Australia, there are Muslims—including Keysar Trad, spokesperson for Islamic Friendship Association and the Australian Federation of Islamic Council—who feel our system should be more inclusive and champion the case for legal recognition of aspects of Sharia law, including legalisation of polygyny for Muslim men. Other Muslims find that the Australian legal system has “much room” in it, and when this is coupled with Islam’s adaptability, the result is that the two sets of laws are, by and large, compatible. In response to the case for polygyny, their argument would be that Islam does not make marrying more than one wife obligatory, but merely permissible in certain circumstances, and one of those circumstances is compliance with the law of land. They have noted that Muslim nations like Tunisia also make polygyny illegal. As Abdullah Saeed (2009) noted, “the freedoms that exist here are a part of Australian society’s fundamental values and should be seen as a plus from a Muslim point of view ... In essence, Australian values and Islamic teachings on the question of freedom are not so vastly different. Both are based on ideas such as human

dignity, justice, equity and egalitarianism” (paras. 14–15). For now, the status quo should prevail.

Endnotes

- 1 Sharia, shariah, shari’a, syariah and shariat are all variously spelled transliterations from the Arabic script of the same word. The term refers to the divinely ordained law embodied in the Quran, *Sunnab* (traditions of the Prophet) and *fiqh* (jurisprudence). Islamic law is derived from the Sharia.
- 2 These include that: the husband is an adult; understands what he is doing; is not insane, intoxicated or asleep; and has communicated the *talaq* to his wife; and his wife is not menstruating.
- 3 Other aspects of Sharia, such as commercial, criminal and evidentiary law were replaced by Western laws.
- 4 *Hudud* is one of three Sharia categories of criminal law. Orthodox scholars give this classification to offences in the Quran that are held to have a fixed punishment. These include theft, illicit intercourse (adultery), false accusations of adultery, highway robbery and consumption of alcohol. Their respective punishments are amputation of limbs, stoning, lashings, death or crucifixion, and lashings. In some countries, apostasy is also a *budud* offence. Today, most Muslim countries do not implement *budud* penalties, but they are still imposed in nations such as Saudi Arabia, Iran and Nigeria.
- 5 Although called a court, it was in fact an arbitration tribunal.
- 6 See International Campaign Against Sharia Courts in Canada, <www.nosharia.com>.
- 7 This is the Shafii school. Within Sunni Islam, there are four main schools (*Madbbab* in Arabic), named after their founders—Hanafi, Malaki, Hanbali and Shafii—and individuals and governments align with one of these. Also, there are mystical orders of Sufis and ultra-conservative sects, such as Salafi and Wahhabi.

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