

# REPLICATING ‘A MODEL OF MUTUAL RESPECT’: COULD SINGAPORE’S LEGAL PLURALISM WORK IN AUSTRALIA?<sup>1</sup>

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## 1. Introduction

For two centuries, the Muslim presence in Australia has always been a quiet one – Muslims found freedom to practice religion and be good Muslims and good citizens of Australia. Although Christianity was the dominant faith at the time of federation when the six British colonies came together to form the Commonwealth of Australia in 1901, a state religion was never imposed. Many free settlers had fled religious persecution in the sectarian struggles in Europe and Britain and so from its inception Australia was a secular nation<sup>2</sup> but along with a de-establishment clause the Australian *Constitution* provided for freedom of religion and of worship for all.<sup>3</sup> In this land of immigrants, the common law system was, rightly or

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<sup>1</sup> The research for this paper was undertaken during my time of Fellowship in 2011 at the Asian Law Institute, National University of Singapore. I thank the members of ASLI, and also Noor Aisha Bte Abdul Rahman and Ahmad Nizam bin Abbas for their guidance.

<sup>2</sup> On the secular character of Australia, see Bouma et al. 2010: 4-6.

<sup>3</sup> *Australian Constitution* s116: The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for

wrongly, seen as a uniting and equalising force for all Australians. It has remained an unashamedly ‘one law for all’ nation with both sides of politics in support of that stance. However, recently that ‘one law for all’ model has been challenged. One challenge has come from voices within the Australian Muslim community, or more accurately, communities,<sup>4</sup> who argue that a system of legal pluralism should replace the ‘one law for all’ approach. Singapore is given as a model for consideration as it has a respected common law system coexisting with a Syariah<sup>5</sup> court system with special laws enacted exclusively for Muslims. Singapore’s model of legal pluralism is accepted by Muslims and by non-Muslims in Singapore and is promoted as a workable, on-going and respectful system of legal pluralism. This paper explores the viability for Australia of the ‘Singapore model’ which its advocates believe functions effectively because of “the mutual respect the Muslims and the non-Muslim community have for each other” (bin Abbas 2012: 163). It is beyond the scope of this article to assess other models, such as the English network of Arbitration Councils, which is an informal, non-government regulated scheme, whose decisions as arbitral awards may be enforced by the civil courts.<sup>6</sup> As Australia already has an ad hoc, unofficial system in which Muslims obtain

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prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

<sup>4</sup> Legal academic Jamila Hussain writes that it is “probably more correct to speak of Muslim ‘communities’ in Australia rather than ‘the’ Muslim community” (Hussain 2004: 202).

<sup>5</sup> *Shari’a*, *shariah*, *syariah*, *shariat* are transliterations from the Arabic script. The transliteration used in Southeast Asia is usually *syariah*, whilst in Australia *Sharia* is more commonly adopted. Both mean the same thing. In this paper *Syariah* is used when referring to Singapore and *Sharia* for Australia. Whilst there are debates about whether *Sharia* precisely equates with the ‘Islamic law’ the terms are often used interchangeably when English is used. *Sharia* refers to the divinely ordained law embodied in the *Qur’an* (actual word of God as revealed to the Prophet Mohammad), *Sunnah* (practices and traditions of the Prophet) and *fiqh* (jurisprudence). The *fiqh* is the means by which jurists can extend principles contained in the *Qur’an* and *Sunnah* to deal with new situations. There is a range of approved juristic techniques including *ijma* (consensus of scholars) and *qiyas* (analogical deduction and application) with *maslaha* (in the public interest) playing an increasing role. For an overview of *Sharia* from different perspectives see: Glenn 2004: 170 -221; and Hallaq 2009.

<sup>6</sup> See Bano 2007.

guidance and legal rulings on personal status matters and other issues meaningful in their lives, the possible transition from an informal 'shadow' system to a formal parallel court system - identified as the Singapore model - is the focus of the analysis that follows.

## 2. The Australian Context

Muslims have been in Australia for two centuries. Even from the early days of first European settlement when Australia was mainly a convict colony, there were some Muslims amongst the convicts, sailors and free settlers (Centre for Muslim Minorities and Islam Policy Studies 2009). Malay pearl divers came to the northwest and cameleers from Pakistan and Afghanistan opened up the desert interior and built the first mosques (Saeed and Akbarzadeh 2001). Today, Australia has approximately 500,000 Muslims.<sup>7</sup> They came with each wave of migration to Australia<sup>8</sup> from over 80 nations and comprise a substantial component of current migrant and refugee intake. Mosques, *masjids*, Islamic schools, organizations and community centres, *halal* stores, Islamic attire, prayer rooms<sup>9</sup> in public places are part of the fabric of Australian cities and some rural areas. In this nation of immigrants, 44 per cent of the 22 million Australians were born overseas or have a parent who was; four million speak a language other than English, 260 languages in fact; and identify with 270 ancestries (Department of Immigration and

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<sup>7</sup> The precise numbers of Muslims is not known because many do not declare their religious status for census purposes. At the last census in 2006 the Australian Bureau of Statistics stated the number as 340,000 making Muslims the third largest religious group in Australia, after Christians and Buddhists. However it is believed this is an under-representation and that there has been considerable growth in the Muslim demographic over the last five years. See [http://www.dfat.gov.au/facts/muslims\\_in\\_Australia.html](http://www.dfat.gov.au/facts/muslims_in_Australia.html).

<sup>8</sup> These waves include Afghani and Pakistani settlement in outback and rural communities from the 1860s; Albanian and Lebanese migration during the 1920s; significant Turkish and Lebanese migration from the 1960's onward, and from 1990s immigration from the Middle East, South Asia, Bosnia, and the Horn of Africa, also being a significant portion of our refugee intake. As well, there has been migration from South East Asia, South Africa and Fiji.

<sup>9</sup> Airports, universities, theme parks, shopping centres, government offices and other public places.

Citizenship 2011). The results from the 2011 census are not yet published, but in the previous census in 2006, 64% of the population was Christian (Bouma et al. 2010: 6-7), a decrease from the previous census, with Buddhism (2.1%), Islam (1.5%) and Hinduism (0.7%) increasing numerically. Every religion of the world has a base in Australia: Sikhism, Baha'i, Aboriginal spiritualism, Exclusive Brethren, Druid, Scientology, Paganism, Wicca and Satanism (Bouma et al. 2010: 6).

*The challenge to 'one law for all'*

The first challenge to 'one law for all' came from Aboriginal and Torres Strait Islanders. As the first peoples of Australia (also known as indigenous Australians), a case was put forward for differential treatment in criminal matters, which was designed to address concerns of significant over-represented in the prison population.<sup>10</sup> This resulted in the setting up of Murri (Hennessy 2007) or Koori Courts,<sup>11</sup> which are sentencing courts. These courts do not apply customary law and have no operation in family, inheritance or other matters although some recommendations for this have been made (Australian Law Reform Commission 1986).<sup>12</sup> The only jurisdiction they have is when an Aboriginal or Torres Strait Islander is accused of a minor criminal offence and pleads guilty. As sentencing courts, a magistrate sits with an Indigenous elder or elders to jointly determine a culturally appropriate sentence. The aim is to avoid incarceration or fines, and so give community based orders in the hope of rehabilitating offenders within the community. The establishment of these courts was not contentious and had overwhelming community support.

In contrast, it was highly contentious when some Muslim groups<sup>13</sup> and their representatives, made arguments for Islamic family, inheritance and possibly

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<sup>10</sup> In Queensland in 2006, indigenous and Torres Strait Islanders were 3.5% of the population but comprises 27% of the adult prison population and 60% of juvenile detainees (Parker and Pathe 2006: 4).

<sup>11</sup> Koori Court is the name used in Victoria, and in New South Wales these are Circle Sentencing Courts.

<sup>12</sup> A report in Western Australia advised against the recognition of indigenous customary law (Law Reform Commission of Western Australia 2006).

<sup>13</sup> Australian Muslim Mission and Islamic Friendship Association of Australia.

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contract law to be determined by Muslims, for Muslims. Such dispute resolution would be in accordance with Islamic law and would require separate Islamic legal institutions, referred to as Sharia courts, tribunals or councils, whose decisions should have formal recognition from the common law courts. Essentially a case was made for formal legal pluralism.

The desire for accommodation of Islamic law into Australia's legal system may have been bubbling along within Muslim communities and mosques for some time but the notion first entered the public arena in Ontario, Canada in 2005-6 (Boyd 2004). Ontario's foray into Islamic arbitration for family disputes ultimately failed, but it did give impetus to some Imams in Australia<sup>14</sup> to signal that similar options would now open up in Australia. It also raised the expectations of many Muslims. The issue picked up more momentum in 2008 with the famous speech of the Archbishop of Canterbury to the Royal Courts of Justice in England. Analysis of his speech and reaction to it from all quarters saturated our local media for some time. The views of Muslim spokespersons were sought, and these views were mixed, but within days of the Archbishop's speech, the government through our Attorney-General, Robert McClelland clarified Australia's 'one law for all' stance, stating "the Rudd government is not considering and will not consider the introduction of any parts of Sharia law into the Australian legal system" (Zwartz 2008).

These debates and reform agendas taking place in other parts of the world served to both inspire and conversely to quell local sentiments. There were other factors that also informed the desire amongst some Australians to formalize the place for Sharia. One is that Islamic law acts as a marker for identity, which is important for all religious and cultural minorities especially in democratic multicultural nations. This is true in Australia, just as it is in Singapore where Muslim Malays are an ethnic and religious minority. Professor Maznah binte Mohammad argues that Islamic law as administered through Singapore's *Administration of Muslim Law Act* Cap 3 (AMLA) has become integral to Malay identity in Singapore. If you remove it, you remove part of your identity. This, she sees as a shared identity that binds Muslims together to form a religious boundary – a 'ring fence' – within the territorial boundary of the nation state.<sup>15</sup>

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<sup>14</sup> In 2005 Imam Abdul Jalil Ahmad, of the Islamic Council of Western Australia proposed setting up a Court in Western Australia comprised of ten Islamic leaders to deal with divorce and separation (Weber 2005).

<sup>15</sup> Personal communication with research scholar at Asia Research Institute, the

Furthermore, the world is now global and its people mobile. The Muslim population is not embedded nor settled in any one place and individuals and families can have multiple allegiances. Many who come to Australia intend to make it their home forever and do; for others their stay is to attain a qualification or career opportunity; for some it may not work out and they return to their country of origin or to ‘greener’ pastures in other places. If they marry in compliance with Islamic law or their Islamic marriage terminates in Australia, how will they give their changed status legal effect without a formal Sharia court/tribunal? Will the informal options using Imams and local entities now open in Australia have any legal standing in a Muslim country that applies Islamic law? The answers vary. Would an Iranian Sharia Court recognize an Islamic divorce decree given by an Imam or some informal body in Australia? The answer is no. Would the Syariah Court in Singapore accept such a decision as a legal divorce? The answer is maybe, as the court would look at the circumstances and make a decision on the substantive evidence presented. Even in England the Sharia Courts, which operate under a system of Islamic arbitration will not recognize a decision from Australia as the legal ruling is not valid under Australian law and no entity is recognized by Australian courts (Arshad, *Islamic Family Law* (2010: 36).

Another reason is that by not providing a regulated formal Sharia court system, unfairness and inequity, especially for Muslim women can result. The main example for this ‘unfairness’ is divorce. Whilst a Muslim husband can extrajudicially pronounce divorce, a wife usually cannot.<sup>16</sup> In the unofficial ad hoc system in Australia, there is no formal court for her to go to so a Muslim wife who wants to end an unhappy marriage has to find ‘someone’ or some ‘organisation’ she believes can affect such a religious divorce, usually an Imam or Sheik whose religious authority is informally recognised by the others. This has led to inconsistency and unaccountability, as individuals or groups can simply put themselves forward as sufficiently scholarly, pious or authoritative to make family law determinations, especially for the ethnic community with which they are aligned. These men may look to modernist interpretations or adhere to patriarchal and conservative ones. When conservative interpretation prevails, women can find it difficult to obtain a religious divorce, as for example a *khula* divorce may be

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National University of Singapore. September 2011. See also previous note. On law as a marker of Muslim identity in Singapore see Abdul Rahman 2009: 112.

<sup>16</sup> It is possible for a marriage contract to specify that the husband delegates to his wife his authority to pronounce divorce, known as *talaq-i-tafwid*. This option however is not widely employed in marriage contracts.

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refused unless the husband consents to it<sup>17</sup> or his statement of facts may be accepted in preference to a wife's. The result is some Muslim women are disadvantaged, even vulnerable, especially recent migrants who may have little knowledge of the local language or of avenues available outside their immediate family or mosque. It gives rise to phenomenon known as 'limping' marriages, where a wife can or has obtained a secular divorce, but a religious one is denied. This is well documented in Australia (Family Law Council of Australia 2001; Black 2010) and also in the United Kingdom (Law Commission 1972; Yilmaz 2003b; Muslim Arbitration Tribunal 2008) and in secular Muslim Turkey (Yilmaz 2003a).

### *Perspectives on the legal pluralism debate*

Against a background of multiple rationales for a Sharia court-like institution, the Gillard government in 2011 set up a Parliamentary Enquiry into Multiculturalism.

The Minister for Immigration, Hon Chris Bowen, set out policy outlining Australia's model of multiculturalism (Department of Immigration and Citizenship 2011) which he argued differed from those in Europe, particularly Germany and the United Kingdom<sup>18</sup> because the first loyalty must be given to Australia – to the Constitutional, rule of law, democracy, freedom of speech and religion, English as the primary language and to sexual equality and tolerance. Other cultures and traditions can be celebrated, and each individual is free to keep his or her own linguistic, religious and ethnic heritage, but if there is conflict between these and

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<sup>17</sup> In *khula* the wife requests divorce and in return provides her husband with compensation, which is usually the return of part or all of her *mahr* (marriage portion), or if deferred, to forego her rights to it, along with rights to maintenance during her *iddah* (divorcee or widow's waiting period before remarriage is permissible). There is debate on the matter of whether the husband must agree to this and whether his lack of consent negates *khula*. Jurisprudence developed over many centuries in which the dominant position was that a grant of *khula* was contingent upon the husband's consent. However, this traditional conservative position has been revisited and the consent fetter removed, especially in cases where arbitration failed to bring about agreement. Egypt, Bangladesh and Pakistan, for example, allow a woman to unilaterally apply to a registrar or a court who can grant *khula* without the husband's consent.

<sup>18</sup> See generally Payrow Shabani 2007.

Australian values derived from the articulated sources of loyalty then “traditional Australian values win out. They must” (Bowen 2011). The other two defining features that the Minister identified were that it is citizenship-based multiculturalism,<sup>19</sup> which makes each and every Australian an equal partner in citizenship; and that it has received political bipartisanship. The Minister announced there would be a parliamentary enquiry into multiculturalism to which individuals and organisations could make submissions: 490 submissions were made.

Australia’s national Muslim umbrella body, the Australian Federation of Islamic Councils (AFIC) made a submission via its President, Ikebal Patel, in April 2011 entitled ‘Embracing Australian Values and Maintaining the Rights to be Different’ (AFIC 2011). The submission advocated that “multiculturalism should lead to legal pluralism” arguing that conflicts should be resolved according to the law and traditions of one’s own religion. In support it drew on the history of the Ottoman Empire with the millet system based on religious affiliation and a division of governance based on Muslim and *dhimmi* classification.<sup>20</sup> The AFIC submission challenged Australia’s policy of multiculturalism on the ground that by limiting it to culture, religion and language and not extending it to encompass law, Australia was treating Muslims as ‘second class citizens’ by requiring them to live ‘under one law: Western law’. On this point, it drew support from Gary Bell from the National University of Singapore who was cited in the submission as supporting multi-legal regimes:

Multiculturalism applied to the law should lead to an acceptance and celebration of legal pluralism – Islamic law is part of a Muslim’s culture and completely denying any recognition of this

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<sup>19</sup> New citizens were to pledge “loyalty to Australia and its people ... whose democratic beliefs I share ... whose rights and liberties I respect ... and whose laws I will uphold and obey”.

<sup>20</sup> Dhimmis were a protected minority, which meant adherents of Christianity and Judaism were allowed to follow their own family and religious laws with the community heads given jurisdiction over such matters. In the Ottoman Empire this was formalised as the millet system. The practice of allowing minorities to retain and administer different family, inheritance and religious laws from the Muslim majority has continued in most Muslim countries. Colonial rule further cemented pluralism, officially through parallel court systems and through laws applicable to specific religious or ethnic sectors.

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law goes directly against any profession of multiculturalism.<sup>21</sup>

The AFIC submission reasoned that Sharia was not immutable but adaptable and it was possible to have a moderate form of Sharia that could co-exist with the Australian legal system through a concept of 'twin tolerations' in which "Muslims in Australia should accept the Australian values", and Australia should provide a "public sphere for Muslims to practice their belief." The paper referred to the existing legal regulation of *halal* products and the pending changes to Australian taxation laws to give parity to Islamic financial products, as examples that demonstrated the workability of a plural legal system in Australia.

The reaction to the AFIC submission was swift. The media reported on the "call for Sharia law in Australia" (ABC News Online 2011; Hole 2011; Devine 2011; Kervalas 2011a) and featured the topic in subsequent news cycles. The government quickly quelled concerns. Attorney General McClelland stated there was no place for Sharia in Australian society, and the government strongly rejected any proposal for its introduction. He endorsed the Minister Bowen's stance by saying that: "Australia's brand of multiculturalism promotes integration. If there is any inconsistency between cultural values and the rule of law, then Australian law wins out" (Karvelas 2011b). Also retiring Chief Justice of the New South Wales Supreme Court, Jim Spigelman posited there was no basis for intrusion of Sharia or any body of religious law' into Australian law and legal system (Merritt 2011b). Instructive, however, was the reaction from some sectors of the Australian Muslim community, in particular from AFIC itself – the very body that had made the submission. Two days later a second submission was made to the Parliamentary Enquiry with a different focus, one that kept well away from law, and did not mention either 'legal' issues or 'pluralism' (Ibrahim 2011). Several state Islamic Councils also distanced themselves from the AFIC submission saying they were not consulted on it<sup>22</sup> and were more concerned with other issues, such as the carbon tax.<sup>23</sup> Some state Islamic Councils made their own separate submissions.<sup>24</sup> Muslim academics also entered the public debate, including Halim Rane of the Islamic Research Centre at Griffith University, who opined that Sharia law was not

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<sup>21</sup> Whilst this quote from Assoc Prof Gary Bell was in the AFIC submission, no citation was actually provided.

<sup>22</sup> Islamic Councils in Queensland, New South Wales and Victoria said they had not been consulted and disagreed with parts of the submission (Merritt 2011d).

<sup>23</sup> Sherene Hassan of the Islamic Council of Victoria.

<sup>24</sup> For example see Islamic Council of Victoria 2011.

needed and not wanted by Muslims in Australia.<sup>25</sup> Ultimately, AFIC President, Ikebal Patel, retreated from his own submission. In an interview he said that, “it had been a mistake to even mention Sharia law and legal pluralism” and he remained “a supporter of secular law” (Merritt 2011a).

Yet, despite the responses and an apparent retraction from the call for legal pluralism, the issue remains a live one. AFIC’s original submission to government remains. Moreover, there is support and continuing articulation by other prominent Muslim lobby groups<sup>26</sup> and individuals<sup>27</sup> that formal recognition for some parts of Islamic law is necessary. How many of Australia’s 500,000 or so Muslims support this is not known. What is advocated seems to range from ‘everything’,<sup>28</sup> to certain discreet aspects notably family and inheritance, banking, finance and commerce, (Saeed 2010: 231; Hussain 2010) to ‘nothing’ (Halim Rane quoted in Merritt 2011c).<sup>29</sup> Views are diverse and sometimes divisive amongst Muslims, just as amongst non-Muslims. The desire in the wider Australian society to be inclusive and to counter, or at least reduce, disaffection amongst some sectors of the Muslim community is widely accepted. Whether formal accommodation of some aspects of Sharia would achieve this is unclear; however, the issue of whether we can, or should, establish Sharia Courts or Islamic arbitration tribunals remains in the public arena. It warrants consideration and attention by Muslim and non-Muslim Australians. A shift to a plural system based on religious affiliation would be a very significant change to Australia’s existing system of law.

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<sup>25</sup> He added that Australian law meets the higher objectives of Islamic law. See Merritt 2011c.

<sup>26</sup> Islamic Friendship Association, Australian Islamic Mission, Islamic Council of Western Australia, Sharia4Australia.

<sup>27</sup> Individuals include Kaysar Trad, Zachariah Matthews, Abdul Jalil Ahmad, Ibrahim Siddiq-Conlon, and Sheik Mohamadu Nawas Saleem. Also there are individual members of the Australian National Council of Imams and the imam of the mosque at Hoppers Crossing in the Melbourne. See Karvelas 2011b. Also for divorce, see Essof 2011.

<sup>28</sup> Sharia4Australia organization.

<sup>29</sup> See also El Matrah 2009 in which a women’s perspective is given on a Sharia tribunal.

### 3. The Singapore Model of Mutual Respect.

Is Singapore's model of legal pluralism one that Australia could adopt and implement? Unlike neighbouring Brunei Darussalam and Malaysia, where Muslims are in the majority, both Singapore and Australia are democracies with a multi-ethnic population in which Muslims are a recognizable minority group, 3% in Australia, and 15% in Singapore. Both were former colonies of Great Britain and share the institutions and processes inherent in the common law tradition. Whilst the Singapore model has many positive attributes that will be outlined, it must be borne in mind that it is a product of different historical forces and operates within a distinctive cultural context; neither of which is replicated in Australia.

#### *A proven track record*

The significance of the Singapore model is that it is not experimental. It demonstrates that legal pluralism can have long-term viability for Muslim minorities within a common law setting. Singapore's current conjoint system of Syariah and common law courts has been in operation since 1958 when the Syariah Court was first established under the *Muslims' Ordinance 1957* (subsequently amended)<sup>30</sup> and which post-independence was replaced by the *Administration of Muslim Law Act 1966* (AMLA).<sup>31</sup> On becoming an independent, democratic Republic, Singapore recognized that its Muslim citizens should have their personal law administered separately from non-Muslims. This was a smooth continuation of the legally pluralistic colonial model employed by the English from the 1820s, which allowed separate legal orders for personal law (Leong 2007: 885-887)<sup>32</sup> for Singaporeans. Sir Stanford Raffles negotiated with Sultan Hussein Muhammad Shah<sup>33</sup> that for all cases involving Malays in ceremonies of religion, marriages and inheritance "the law and custom of the Malays will be respected" unless "contrary to reason, justice or humanity" (Abdul Rahman 2009: 109). This was formalized

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<sup>30</sup> *Muslims (Amendment) Ordinance 1960*

<sup>31</sup> Act 27 of 1966, 2009 Rev. Ed. Laws of Singapore.

<sup>32</sup> The *Mohammedan Marriage Ordinance* of 1880 allowed for the establishment of Kathi Courts.

<sup>33</sup> Singapore was under the control of the Sultan of Johore, and Sultan Hussein was supported in that position by Raffles. On the founding of Singapore, see Tan 2011: 331.

in three ways. First, by legislation, notably the *Mohammadan Marriage Ordinance* of 1880, which in 1957 became the *Muslims' Ordinance*. Second, by establishing Islamic courts with jurisdiction over Muslims, which under the 1880 *Ordinance* were the Kathi/Kadi Courts and but were designated in 1955 as Syariah, courts of law. Third, in keeping with colonial bureaucratisation, separate administrative bodies were formed, notably the Mohammadan Advisory Board in 1915, which became the Muslim Advisory Board in 1946. It has been rightly put that by the time of independence in 1965, so entrenched was the right and practice for Muslims to adhere to Islamic law that AMLA was facilitating “rather than creating a new jurisprudence of law” (bin Abbas n.d.).

Religious affiliation continues to determine the applicable law and court system for Muslims and for non-Muslims in a range of family law, succession and others matters. The High Court of Singapore has no jurisdiction to hear matters that fall within the exclusive jurisdiction of the Syariah Court.<sup>34</sup> In family law matters, Singaporeans, other than Muslims, have been under the jurisdiction of the *Women's Charter*.<sup>35</sup> Article 3 of the *Charter* sets out that it is to regulate “all persons in Singapore” and “domiciled in Singapore” but excludes Muslims from its application for certain matters, namely, the “solemnization of marriage, the regulation of spouses, the unnatural termination of marriage and ancillary powers of the court”.<sup>36</sup> AMLA sets out areas of exclusive jurisdiction, which for family law matters are set out in s. 35(3). However, the details and substantive aspects of what is “Muslim law as varied where applicable by Malay custom” in each of these areas is frequently left to the discretion of the court and the Legal Committee of *Majlis Ugama Islam, Singapura* (MUIS). Section 35 directs the *Majlis* or the Legal Committee to consider the tenets of the Shafi'i school and for determining the Muslim law for issues of inheritance s. 114 AMLA sets out seven texts recommended to the court.<sup>37</sup>

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<sup>34</sup> *Supreme Court of Judicature Act* Cap 322, 2009 Rev. Ed. Laws of Singapore, s. 17A(1).

<sup>35</sup> Cap 353, 2009 Rev. Ed. Laws of Singapore.

<sup>36</sup> Under s. 3(2); Parts II to VI and Part X and ss. 181-182.

<sup>37</sup> AMLA s. 114 (1):

In deciding questions of succession and inheritance in the Muslim law, the court shall be at liberty to accept as proof of the Muslim law any definite statement on the Muslim law made in all or any of the following books: (a) The English translation of the

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There is also a dual system for registering marriages. The Registry of Muslim Marriages (ROMM) has exclusive jurisdiction to register marriages where both parties are Muslim, and the Registry of Marriages (ROM) registers all other marriages for Singaporeans including marriage between a Muslim and a non-Muslim. The result is that marriages between a Muslim and *kitabiyah* woman fall under the jurisdiction of the civil ROM registry. In some schools of Islam, Hanafi for example, a marriage between a Muslim man and woman who is a *kitabiyah* (person of the Book)<sup>38</sup>, which includes Christians and Jews is lawful, though it is generally regarded as undesirable.<sup>39</sup> However, the Shafi'i school, which is the dominant legal tradition in Singapore and Southeast Asia, has traditionally held a narrow interpretation of *kitabiyah* requiring the woman to be a descendant from a lineage that was Christian before the time of the Prophet Mohammad, or Jewish before the time of the Prophet Isa; a condition that is almost impossible to fulfill, so in practical terms amounts to a de facto not de jure prohibition.

Who is a Muslim for the purposes of the *Womens' Charter* and for the application of AMLA? Section 2 of the AMLA gives little guidance as it provides simply that a Muslim is "a person who professes the religion of Islam" and states the court's jurisdiction is for actions and proceedings in which "all the parties are Muslim or where the parties were married under the provisions of Muslim law".<sup>40</sup> There is acceptance that a child born to a Muslim parent is by birth Muslim, as is a person who formally converts to Islam. Although this does not frequently arise, jurisdiction can be relevant in cases of mixed religious marriages or in situations of conversion, whether into, or out of, Islam especially for marriage validity<sup>41</sup> and for

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*Quaran*, by A. Yusuf Ali or Marmaduke Pickthall; (b) *Mohammedan Law*, by Syed Ameer Ali; (c) *Minhaj et Talibin* by Nawawi, translated by E. C. Howard from the French translation of Van den Berg; (d) *Digest of Moohummudan Law*, by Neil B. E. Baillie; (e) *Anglo-Muhammadan Law*, by Sir Roland Knyvet Wilson, 6th Edition Revised by A. Yusuf Ali; (f) *Outlines of Muhammadan Law*, by A. A. Fyzee; (g) *Muhammadan Law*, by F. B. Tyabji.

<sup>38</sup> The 'Book' refers to lawgivers in the Abrahamic tradition. See generally Mohamad 2008: 8.

<sup>39</sup> The Prophet married a Christian and also a Jewish woman.

<sup>40</sup> AMLA s. 35(2)

<sup>41</sup> *Noor Azizan bte Colony (alias Noor Azizan bte Mohammad Noor) v Tan Lip*

inheritance distribution<sup>42</sup> as the estate of a Muslim must be distributed in accordance with Islamic inheritance laws.<sup>43</sup> There are difference views as to whether it would be the Syariah Court or the Civil Court that would make such a determination and possibly it falls with the jurisdiction of either court. In a plural system where legal consequences and legal status flow from the Muslim designation it can be crucial. Apostasy, whilst a sensitive issue in Singapore, is lawful and does not have the legal ramifications as are found in Malaysia where an apostate can face not only legal difficulty converting out of Islam, but criminal sanctions and/or detention in Rehabilitation Centers.<sup>44</sup> Singapore does not require religious affiliation on its Registration Identity cards, just race, and as ‘Malay’ is not defined in the *Constitution* as a person of the Islamic religion, it is possible in Singapore to be racially and ethnically Malay but not be a Muslim.<sup>45</sup> For determinations on religious adherence, a person could take an oath<sup>46</sup> in the Syariah Court declaring before Almighty God that he or she was, or was not, a Muslim or a fatwa of the Legal Committee of MUIS obtained. Alternatively, in the civil law tradition a statutory declaration could be made before a Commissioner of Oaths. Essentially, in Singapore it is for the parties to decide who is a Muslim for the purposes of the *Womens’ Charter* and for the application of AMLA.

Although Singaporeans have greater autonomy over religious affiliation than in neighbouring countries of Malaysia and Brunei, where apostasy is unlawful, the Singapore model does not allow a Muslim to opt out of the jurisdiction of the Syariah Court in matters where it has been exclusively given to the Syariah Court. This legal requirement is seen differently by Singaporeans. Non-Muslims tend to call it a ‘concession’ (Leong 2007: 891). Some Muslims describe it as an ‘honour’ or ‘privilege’ given only to Muslims, (bin Abbas 2012: 163) others as their ‘obligation or duty’, and some have the view that it is a restriction on their rights as Singaporeans, as it “restricts the freedom of the individual to decide the forum

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*Chin (alias Izak Tan)* [2006] 3 *Singapore Law Reports*, 707.

<sup>42</sup> *Re Mohammad Said Nabi, decd* (1965) 31 *Malayan Law Journal*, 121.

<sup>43</sup> AMLA ss. 111 and 112.

<sup>44</sup> See generally, Dawson and Thiru 2007.

<sup>45</sup> Contrast with Malaysia where s. 160 of the *Constitution* of Malaysia defines a ‘Malay’ as a person who ‘professes to be a Muslim, habitually speaks the Malay language, adheres to Malay customs, and is domiciled in Malaysia or Singapore’.

<sup>46</sup> An oath in Islam is a religious as well as legal procedure.

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to hear” his or her dispute. This is because Muslims are prevented from having those exclusive personal status issues determined by the civil court even where a Muslim wishes it or perceives that he or she may have a more advantageous outcome or have it resolved more quickly. (Abdul Rahman 2006: 429).

The longevity of the two separate legal regimes shows that co-existence cannot only work but can stand the test of time. Jurisdictional conflict does occur and depending on your view is either minimal or “notoriously difficult to resolve” (Leong 2007: 918) but legal uncertainties are worked through. On the whole,<sup>47</sup> the model seems to have a high level of acceptance amongst Muslims and Singaporeans in general with AMLA and the Syariah system “cherished by the (Muslim) community” (Abdul Rahman 2009: 109). If its existence and accepted operation has been an avenue for social inclusion and harmonious relations between the Singapore’s different religious and ethnic groups, it warrants consideration in Australia. Western nations in general, Australia included, are concerned about disaffection and alienation of some Muslim citizens, especially amongst young people, many of whom are second and third generation. As well, in particular suburbs of large cities where there is a high concentration of Muslims from the same ethnic group, alienation from the wider non-Muslim society and a distrust of Australian institutions is evident (Human Rights and Equal Opportunity Commission 2004: 83). If Singapore’s form of legal pluralism sends a message of respect for Sharia that is inclusive and affirming, and allows minority values and aspirations to be recognized in a way that may help counter ethnic and religious tensions, then there is much to commend it. Similarly, if the constitutionally sanctioned operation of Syariah Courts demystifies Sharia and provides a face of Islam that is rational, adaptable, moderate and demonstrably able to co-exist with other value systems and legal processes, then it could go a long way in reducing distrust, misconceptions and the alarm which some sectors of Australia view both Islam as a religion, (Dunn 2005: 8) and Muslims as citizens (Poynting et al. 2004; Centre for Muslim Minorities and Islamic Policy Studies 2009: 6; Human Rights and Equal Opportunity Commission 2004: 45). Whilst it would be simplistic to conclude that the presence of the Syariah Court and MUIS alone has resulted in a ‘harmonious’ Singapore, the end result is one that appears to be based on ‘mutual respect’, a phrase used by a Singapore lawyer (bin Abbas n.d.) to describe Singapore’s system of legal pluralism.

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<sup>47</sup> Cf Bahrawi 2007. See also Ahmed 2010.

*Relationship with the civil courts*

The longevity of legal pluralism in Singapore has meant that the Syariah and civil courts have had to establish a working relationship. The jurisdiction of each is delineated with regular interaction between the two. For example, the Syariah Court lacks powers of enforcement, so its orders for maintenance, *mutaah*,<sup>48</sup> marriage expenses, custody, and property division are enforceable (s. 53) but not reviewable by the civil court. They are enforced as if they were orders of the District Court. There are also cases in which each court will play a distinct role. In distributing a Muslim's estate, the Islamic laws of inheritance are applied by the Syariah Court in order to issue an inheritance certificate (AMLA s. 115), but all grants for probate and letters of administration are issued by the civil courts.<sup>49</sup> Also disputes over the validity of wills are heard in the civil courts but where the deceased was a Muslim a fatwa from the MUIS can be obtained on its compliance with Islamic inheritance laws (AMLA s. 114). A shared arrangement also operates within family law matters. Whilst the Syariah Court has exclusive power to hear and make an order on divorce it does not have power to determine matters of spousal maintenance or whether a protection order should be issued. These must be remitted to the civil court. In some matters the courts have concurrent jurisdiction. Whilst a Muslim couple must have their divorce heard in the Syariah Court, applications for child custody, access and distribution of matrimonial property can be made to 'any court', which enables a Muslim party during or after divorce proceedings in the Syariah Court to make an ancillary application to the civil Family Court where the civil law will be applied.<sup>50</sup> AMLA requires this to be with the consent of the parties and with the leave of the Syariah Court (AMLA s. 35A).<sup>51</sup> Although adoptions fall under the jurisdiction of the civil family court<sup>52</sup> the Court takes into account Islamic principles on adoption, for example, to allow the child to keep the name of her birth parents and not that of the adoptive family (Abdul Rahman 2006: 416). It appears that the Syariah Court applies the civil law of evidence. Section 42 AMLA states that the court will follow "the law of

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<sup>48</sup> Payment of compensation to a woman divorced without fault.

<sup>49</sup> *Probate and Administration Act*, Cap 215, 2009 Rev. Ed. Laws of Singapore.

<sup>50</sup> *Supreme Court of Judicature Act*, Cap 322, 2009 Rev. Ed. Laws of Singapore s. 17A(2)

<sup>51</sup> Also *Supreme Court of Judicature Act*, s. 17.

<sup>52</sup> *Adoption of Children Act*, Cap 4, and generally see bin Abbas 2012: 174.

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evidence for the time being in force in Singapore, and shall be guided by the principles thereof, but shall not be obliged to apply the same strictly.” Also, the Syariah Court can apply legal principles from the civil law system when the issue is one not covered in by Islamic law (bin Abbas 2012: 174). Conversely, the civil courts will take legal advice on matters of Islamic law from the Majlis (MUIS). Lastly, the criminal offences contained in AMLA Part IX which include religious offences such as failure to pay *zakat* (a tithe), cohabitation outside of marriage, enticing an unmarried woman away from her *wali* (male guardian, usually her father), and teaching false doctrines about Islam<sup>53</sup> are heard, determined and sentenced in the civil courts.

The effectiveness of the relationship between the two legal systems is generally assumed, with lawyers in Singapore reluctant to be critical in any way although the phrase “this is very sensitive” was frequently used when questions regarding effectiveness were broached. Ahmad Nizam Abbas reflects the common sentiment that the plural system is working for the benefit of Muslim Singaporeans and is evolving into a professional one that ensures fairness and justice for all concerned (bin Abbas 2012). Conversely, Leong Wai Kum sees the dual court system as “potentially problematic” in resolving family law disputes and that “apparent and real conflicts do crop up” which cannot be resolved by “reference to a simple separation” of jurisdiction of the two court systems. He feels that as such conflicts are “notoriously difficult” to resolve, he awaits “the eventual integration of the entire family law in Singapore to regulate all Singaporeans” (Leong 2007). Abdul Rahman also sees “significant problems” in the current system but does not favour cessation of the dual system for family law but rather advocates for jurisprudential and legislative reform of the Syariah system. The problems she outlines arise because the “substantive law on marriage, divorce and ancillary issues is not comprehensively codified” in AMLA, so the interpretation of Syariah resides with the judges of the court and with MUIS. She feels the initial spirit of the framers of AMLA, which was attuned to the contemporary needs of women has been eroded by traditionalism,<sup>54</sup> which is important when Muslims are restricted from accessing the civil forum (Abdul Rahman 2006: 416).

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<sup>53</sup> AMLA ss. 137, 134, 135 and 139.

<sup>54</sup> Defined by Mannheim as a “dogmatic attitude that clings firmly to old ways, resisting innovations or accepting them only unwillingly”, and by Towler as a “style of religious belief whose essence is to cherish the entire tradition received as sacred such that if any part is threatened or called into question, it is the whole pattern which is put at risk” (Abdul Rahman 2006: 416).

*Constitutionally sanctioned*

Singapore's *Constitution* was drafted to entrench a form of legal pluralism. It creates a special legal status for Muslims in recognition of the fact that the Malays are "the indigenous people of Singapore".<sup>55</sup> The *Constitution* also guarantees its citizens "equality before the law" and "equal protection", but s. 12(3) makes it clear these guarantees do not extend to the regulation personal law, which is under AMLA. Similarly the protection from discrimination on grounds of "religion, race, descent or place of birth in any law or in the appointment to any office" given in s. 12(2) does not extend to "provisions of an institution managed by a group professing any religion" or "to persons professing that religion", or to provisions "restricting office or employments connected with any affair of any religion." The operation of s. 12(3) is to allow judges, registrars, counselors and all personnel in the Syariah Courts system and in the *Majlis Ugama Islam, Singapura* (MUIS), to be appointed and funded by the government on exclusive religious lines. By contrast, the Australian *Constitution* makes it unconstitutional for any religious test to be required as a qualification for any office or public trust under the Commonwealth. That may prohibit any Australian government establishing and funding a *Syariah* Court or Arbitral Tribunal where a qualification for judicial or arbitral appointment to office, is a religious one. Whilst s. 116 does not bind the states, family law is now a matter under Commonwealth not state jurisdiction.

*Professional and transparent*

The ad hoc system in Australia where informal tribunals and certain Imams hold themselves out as possessing authority and knowledge to make legal decisions for Muslims based on their understanding of Islamic law is neither transparent nor professional. These legal determinations are done 'behind closed doors', just as occurs with the arbitral bodies in the English scheme. In contrast, Singapore's model is quite professional and is open to scrutiny. Trials and hearings are in open court<sup>56</sup> with the power given in s. 46(2) AMLA for the court, if it thinks fit, to hold part or all of the proceeding in camera. This power is frequently exercised.

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<sup>55</sup> Art. 152 *Constitution of Singapore*.

<sup>56</sup> *Administration of Muslim Law Act* Cap. 3 2009 Rev. Ed. Laws of Singapore ss. 32(1), 46, with the power given in s. 46(2) for the court, if it thinks fit, to hold part or all of the proceeding in camera. This power is frequently exercised.

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Although decisions are not formally reported and published, as they are in the common law courts, the Syariah Court does have an internal system of records, which are made available to the legal representatives of the parties. This has allowed an informal system of precedence to develop that facilitates consistency and predictability. Appeals are also possible. Decisions of both the Court and the Registrars can be taken on appeal to the Syariah Appeal Board.<sup>57</sup> This degree of transparency and an appellate review are two important safeguards lacking in Australia's informal system.<sup>58</sup> In an unofficial system, if a group of Islamic scholars or an individual claims to have knowledge and authority to make determination on marriage, inheritance, divorce, financial matters how can this be checked? When hearings take place in private, without lawyers, without transcripts, and when there is no avenue of appeal to a higher authority it is almost impossible to know if the reasoning and application of Syariah law is fair and accurate. As well, there can be different outcomes on the same issue. The Singapore model provides oversight of legal decision-making with the safeguard of an appeal process.

Whilst AMLA does not lay down specific qualifications for judicial appointment whether as President, Deputy President, ad hoc Presidents or for Kadis, nor for its Registrars,<sup>59</sup> in practice the individuals appointed to these positions have knowledge and experience in both Syariah law and the common law. There were discussions in 1997 at a Parliamentary Select Hearing on specifying qualifications for the Syariah Court appointments. It was decided not to proscribe these, but rather to leave it to the government, through the Ministry of Community Development, Youth and Sport to make appointments based on jurisprudential credentials, an upright and pious character, leadership qualities and familiarity with the civil law processes in Singapore.<sup>60</sup> The latter was seen as important because the Syariah Court interacts with the civil courts and should not be in a

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<sup>57</sup> AMLA s. 55. The minimum number for the Appeal Board is seven. Currently there are 16 members: seven religious teachers, five district judges and four lawyers. Four of the members are women (bin Abbas 2012: 185).

<sup>58</sup> See Black 2008: 217.

<sup>59</sup> The Registrar is a relatively new position, which was deemed necessary to reduce the increasing administrative load of the Presidents and to provide a filtering mechanism to determine the complexities of cases and the allocation of resources.

<sup>60</sup> Personal communication.

religious bubble removed from other legal and social processes.<sup>61</sup> Appointments do not come with security of tenure but are akin to ones made by the Singapore Legal Service. This is different from High Court judges in the common law system, who do have security of tenure. Parties are entitled to legal representation “by advocate or solicitor or by an agent, generally or specially authorized to so by the Court.”<sup>62</sup> This does not exclude non-Muslim lawyers. Ahmad Nizam Abbas notes that as there are no mandatory requirements or qualifications specified for legal counsel, the “motivation to equip oneself adequately” in Syariah law and procedure, lies with the individual lawyer to engage in self-study, attend courses and seek guidance from experienced practitioners (bin Abbas 2012: 181).

### *Jurisprudential Consistency*

Consistency in interpretation of Syariah provides a measure of certainty and predictability in the application of Islamic law in Singapore. Again this is absent in the ad hoc unofficial system in Australia. Jurisprudential consistency comes not only from the courts and the supervisory role of the *Majlis Ugama Islam, Singapura* (MUIS) Appeal Board but also from the MUIS Legal Committee, which can issue fatwas (legal opinions on matters of Islamic law). Section 31 AMLA sets out the composition of the legal committee, namely “(a) the Mufti; (b) two other fit and proper members of the *Majlis*; and (c) not more than two other fit and proper Muslims who are not members of the *Majlis*.” The Mufti of Singapore is the Chairman of the Committee and the Mufti and Committee members are appointed by the President of Singapore, with the advice of the *Majlis* for the other members.<sup>63</sup> In keeping with the tradition of *ifta* (the issuing of fatwas) in Islamic law, a question requiring a fatwa on any point of Islamic law can be asked by “any person”,<sup>64</sup> or by a court of law, including the Syariah Court.<sup>65</sup> The Committee can

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<sup>61</sup> President Alfian Kuchit studied *Syariah* at the International Islamic University, Malaysia and has an LLM from Columbia University.

<sup>62</sup> *Administration of Muslim Law Act* Cap 3 2009 Rev. Ed. Laws of Singapore ss.32(1), 39.

<sup>63</sup> *Administration of Muslim Law Act* s. 30.

<sup>64</sup> *Administration of Muslim Law Act* s. 32(1).

<sup>65</sup> *Administration of Muslim Law Act* s. 32(8).

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also “of its own motion” make and publish any ruling or determination.<sup>66</sup> The process involves making a draft ruling which if it is unanimously approved by the Legal Committee<sup>67</sup> will be issued by the *Majlis*, and if not unanimous, will be referred to the *Majlis* who will issue the fatwas in “accordance with the opinion of the majority of its members”.<sup>68</sup> The goal of consistency is further promoted by s33 AMLA which requires both the *Majlis* and the Legal Committee to “ordinarily follow the tenets of the Shafi'i school of law, unless it is not in the public interest to do so.”<sup>69</sup>

The role of the Legal Committee provides not only the Syariah Court with an authoritative source for interpretations of Sharia law but fulfills that role also for the civil courts. Unlike the Syariah Courts, the civil courts are not bound by any ruling of the Legal Committee, though the cases show consideration and general respect for the Committee's rulings.<sup>70</sup> That the civil courts have one entity to which they can turn for an Islamic law opinion is a valuable attribute of the Singaporean model. In Australia, who can qualify as an expert in matters of Islamic law can be problematic and has to be established each time to the satisfaction of the court.

On the MUIS website some of the important fatwas are published in either Malay, English, or both languages, and include legal rulings on finance and estate matters; zakat; family matters including family planning; the permissibility of certain medical advances including the stem cell research; organ donation and transplantation; bone marrow transplantation; abortion; advanced medical

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<sup>66</sup> *Administration of Muslim Law Act* s. 32(6).

<sup>67</sup> *Administration of Muslim Law Act* s. 32(4) includes those members present and entitled to vote.

<sup>68</sup> *Administration of Muslim Law Act* s. 32(7).

<sup>69</sup> *Administration of Muslim Law Act* s. 33(1) with s. 33(2) stating that ‘the tenets of any of the other accepted schools of Muslim law as may be considered appropriate’ can be used in such rulings, but that ‘the provisions and principles to be followed shall be set out in full detail and with all necessary explanations’. Rulings can also be made when specifically requested ‘in accordance with the tenets of [another] particular school of Muslim law’, see AMLA s. 33(3).

<sup>70</sup> *Saniah Binte Ali & Anors v Abdullah Bin Ali* [1990] 1 *Singapore Law Reports*, 555.

directives; the permissibility of using ethanol as a food additive; and whether a particular group engages in deviant teachings (on Islam). These questions would resonate with many Muslim Australians who also seek guidance in similar matters. The role fatwas fulfill in the Islamic system is not limited to Muslim countries or to ones like Singapore that apply Syariah law. Fatwas are equally, if not, more important in countries like Australia with a preponderance of immigrants, rather than a long settled Muslim population. In order to accommodate Islamic religious requirements within a secular framework, fatwas are of particular significance for Australian Muslims (Black and Hosen 2009a; Black and Hosen 2009b). They facilitate social and cultural transformations, at a personal, individual and private level. Alexandre Caeiro's (2010) research in Europe found the demand for fatwas in the West appears greater than in Islamic countries. He argues this is because there is a discontinuation in the transmission of Islamic knowledge, which increases the need to find ways to adapt Islamic law for western context and allows women to find "elaborate strategies of survival" for the different normative orders (Caeiro 2010).

Without an equivalent of Singapore's MUIS Legal Committee or a government appointed Mufti, there can be confusion and inconsistency in the legal opinions provided, or alternatively, a plethora of views, which reflects the voluntary nature of *ifta* as a tradition and the diversity within the Australian Islamic community. Muslims in Australia turn to a range of sources for fatwas: to national organizations such as the Australian Federation of Islamic Council (AFIC), the Darulfatwa Islamic High Council, or the National Council of Imams (ANIC); to state organizations including state Islamic Councils and local *majlis ulama*; to local Sheikhs or an Imam at their mosque; or to a scholar or organization in their country of origin; and last, but importantly to the Internet's many online fatwa sites (Black and Hosen 2009a). The process of searching Islamic websites for religious rulings has been called 'fatwa shopping', or surfing the 'inter-madhab net' (Yilmaz 2005: 39). Potentially, it opens all sorts of new, alternative and diverse interpretations of Islam alongside the more traditional versions. Australian Muslims are big users of such services with the au (Australia) domain for just one site *Islam Q&A* well over a million and seventh out of 128 nations (after Saudi Arabia, the United Kingdom, France, the Netherlands and the United States). Whilst this might seem democratic there is also the concern that providing wide divergent views on what is *halal* (permitted) and what is *haram* (forbidden) could lead to information anarchy (Black and Hosen 2009a: 421). In the context of on-line use almost anyone can set themselves up as an authority and issue legal

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opinions. The practice of asking foreign Islamic websites<sup>71</sup> (not Australian ones) can also be problematic, as foreign Muslim scholars who answer the questions may not understand life in Australia. If the question closely relates to life and social interaction in Australia, the answer might not be contextually suitable.<sup>72</sup> Of course, Singapore's Muslims can also go on-line to surf the 'inter-madhab' net, but the presence of a national *ifta* body is a stabilising and unifying force.

Australia does have a Grand Mufti but *ifta* has not been undertaken in any public or open sense. Traditionally, and as occurs in Singapore, the Mufti is a religious authority to provide guidance and religious leadership where the majority of Muslims are of the same *madhab*, ethnicity and cultural background. Australia's diversity makes this very difficult. The Grand Mufti of Australia is not appointed by the government, but is elected by just one of Australia's several national organizations, once AFIC, but now, ANIC. The Grand Mufti therefore cannot speak on behalf of all Muslims, just the one representative body (Kilani 2011). In practice the position has been quite divisive. The first Mufti (1989-2006) was Egyptian born Sheikh Taj Din al-Hilali who proved to be a controversial figure in part because of inappropriate statements and actions.<sup>73</sup> The third<sup>74</sup> and current

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<sup>71</sup> *Islam on-line*, based in Doha, Qatar with fatwas issued by a committee of scholars headed by Dr. Yusuf Qardawi.

<<http://www.islamonline.net/livefatwa/english/select.asp>>; *islamtoday*, based in Saudi Arabia with fatwas issued by committee of scholars supervised by Sheikh Salman bin Fahd al-Oadah.

<[http://www.islamtoday.com/fatwa\\_archive\\_main.cfm](http://www.islamtoday.com/fatwa_archive_main.cfm)>; *Ask the Imam*, South African site with fatwas issued by Mufti Ebrahim Desai, <<http://islam.tc/ask-imam/index.php>>; *Islam Q&A*, based in Saudi Arabia with fatwas issued under supervision of Shaykh Muhammad Saalih al-Munajjid

, <<http://63.175.194.25/index.php?ln=eng>>; *Fatwa on-line*, Saudi Arabian site designed to give English speaking Muslims access to translations of officially published Arabic fatwas, <<http://www.fatwa-online.com/>>.

<sup>72</sup> An example given is the issue of saying 'Merry Christmas'. In Australia this is a cultural practice to mark the season not a religious observation or one identifying a theological battle between Islam and Christian. Overseas online websites routinely forbid it, for example, the Indonesian website, Syariah Online,

<[http://www.syariahonline.com/new\\_index.php/id/1/cn/24458](http://www.syariahonline.com/new_index.php/id/1/cn/24458)> strongly forbids it as does, Islam Q&A, <http://www.islam-qa.com/en/ref/947/Christmas.>>

<sup>73</sup> For example, his sermons claiming women invite rape by the way they dress (with the uncovered meat for cats analogy); that women were Satan's messages

Grand Mufti, Dr Ibrahim Abu Muhammad, elected in 2011 by ANIC, is another Egyptian born scholar who has lived in Australia for two decades. However, like al-Hilali he does not speak English and relies on a translator for interviews and interaction with the wider community, Muslim and non-Muslim. Over one third of Australian Muslims are born in Australia and there is a growing number who only speak English. Although a highly respected scholar, his publications are in Arabic not in English. Such concerns over communication, authority and consistency in jurisprudence do not arise in the Singapore model.

#### 4. Importing the Singapore Model to Australia

The legal pluralism model that operates in Singapore is an accepted part of the island's legal landscape - one that links back to the Raffles' era and the nation's founding. The resistance to enacting a similar scheme into Australia is essentially for the same reason that the Singapore model is accepted and works well in Singapore. Australia's 'one law for all' model is well entrenched and has garnished considerable respect, trust and allegiance. Although it is not without strong critics,<sup>75</sup> it has broad acceptance as an inclusive system in which no one is refused access on grounds of race or religion. The concept that adherents of one faith tradition could be required to go to a separate system of religious courts, Sharia courts, for personal status matters as happens in Singapore, runs counter to the established ethos of Australia and also counter to a cultural preference for secularism over religiosity,<sup>76</sup> and a long standing distrust of sectarianism. Whilst the plural system does embody the tradition and character of Singapore it does not reflect Australia's tradition and culture. There are philosophical, legal and

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sent to deceive men; endorsement of the September 11 terrorist attacks; and calls for a jihad against Israel, a meeting with Hezbollah, a prescribed organization under Australian law; claims on Egyptian television that there was no freedom or democracy for Muslims in Australia and that English people are the most unjust and dishonest in the world especially Australians who came to Australia 'in chains'. See The Age 2006; Zwartz 2007.

<sup>74</sup> Imam Fehmi Naji El-Imam was in poor health for some time and stood down for that reason.

<sup>75</sup> As noted earlier in Part II - 'The Australian Context'.

<sup>76</sup> The pervasiveness and quality of secularism in Australia is explored by Bouma et al. 2010: 4-14.

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practical arguments that mitigate against a formal Singapore-style model of legal pluralism.

### *Philosophical objections*

A plural system with two streams of courts with concurrent jurisdiction based on religious affiliation, undermines something quite culturally entrenched in Australia. At Federation in 1900 when the colonies of Britain united to form the Commonwealth of Australia, and Christians made up over 95% of the population, the *Constitution* did not establish a state religion, opting instead for a de-establishment provision. At that time many people who came to start their lives afresh in a new nation did so because of religious and sectarian strife particularly in Europe and Great Britain. Unlike the 'pilgrim fathers' in America, the free settlers did not come to Australia to ensure their religion thrived, but rather to avoid the consequences that they had seen and experienced in the distrust and hatred arising from different beliefs in God. Anti-sectarianism informed Australia's secularism, in which there was always a space for the practice of religion.<sup>77</sup> This sentiment continues as many recent Muslim immigrants to Australia left their homeland, some as refugees, others voluntarily, because of similar kinds of religious intolerance arising from state preference for one sect over another, which manifests in disadvantage, even brutality and civil war along sectarian lines. Any assumption that the majority of Muslim Australians would want to go down a sectarian preference route or a form of differentiation by which they were treated differently from other Australians by being required to go to Syariah Courts to have a religious system of personal status law applied, rather than the family law of Australia, is likely to be false. The lesson from Ontario Canada's failed experiment of legislating for faith-based arbitration which would have allowed Muslims access to Sharia arbitration for family law matters (Black 2008: 215)<sup>78</sup> cautions against any assumption that most Muslims, particularly Muslim women, want this. The Director of the Islamic Women's Council of Victoria, Joumanah El Matrah, echoed similar sentiments. She argued:

As Muslims, it is entirely bewildering that our concept, our cultural or religious recognition is now measured by the extent to

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<sup>77</sup> These views are expanded by Voyce and Possamai 2011: 339, 343.

<sup>78</sup> Canadian Muslim women effectively argued that they wanted the same rights under the *Charter* as applied to every other Canadian.

which the government is prepared to set us apart from the rest of Australian society. The legal ghettoization of Muslims does not recognize their difference: it would simply allow a government to delegate its responsibility for ensuring the rights and protection of people who are different. Essentially, it would be a government prepared to outsource and privatize justice and the protection of women. Establishing parallel system for Muslims does not ensure a culturally appropriate response to justice: it fundamentally locks out Muslims from services they as citizens have a right to access. (El Matrah 2009.)

However, it is equally clear as noted earlier, that there are Muslim spokespersons and representatives who believe that the ‘one law for all’ model is unfair and exclusionary. Formalisation of Sharia is advocated as a right that should come with citizenship in a liberal democracy (Ali 2011: 367). AFIC, for example, argued in its submission to government that in not recognizing Sharia law and in not allowing for Sharia Courts to be established, the Australian government is treating Muslims as ‘second class’ citizens.<sup>79</sup> This argument of exclusion is difficult to sustain because no religion has its body of law accorded legal recognition or is given preferential treatment. Islam receives preference in Singapore on the basis that Muslim Malays are the indigenous peoples of Singapore, but the spiritual traditions of Aboriginal and Torres Strait Islanders, the indigenous peoples of Australia, do not receive similar priority, nor does Christianity as the religion of the majority. El Matrah rejects the frequently made comparison equating the rights of indigenous Australians with those of Muslim Australians as ‘unethical.’ She writes that Muslims were “part of the process that dispossessed indigenous Australians” so indigenous entitlements are beyond “anything a migrant community should appropriately expect” (El Matrah 2009). In Australia’s secular system, each and every religious and spiritual tradition can ensure their adherents apply the religious law and follow the practices of their religion, in so far as they do not transgress national or state law. Places of worship can be established, religious schools set up with government funding and assistance, (Bouma et al. 2010) counseling and community services provided on religious lines; radio stations and newspapers can be run by religious bodies for their followers; burial places will have sections for religious and ethnic groups; religious observances, in terms of prayer times and holy days are allowed under industrial relations and anti-discrimination legislation. In Australia, you can wear hijab, dishdasha, a Sikh

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<sup>79</sup> See outline of the key arguments summarised above.

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turban, tallit, nun's and monk's robes (Buddhist or Christian) mini-skirts or shorts; you can change religion, you can proselytize, you can contest the ideas of religion itself or challenge one in particular, and even make fun of religion. Jokes involving priests and rabbis abound. More importantly religious tribunals, or individuals depending on the faith tradition, can make decrees and rulings to bind their own adherents – who you can marry, whether your marriage has dissolved, what foods you eat, what amount of money you are required to give to your religious body, how you should dress and conduct relations with others. The state will not interfere, unless there is contravention of a law of Australia. Nor will the state fund your religious entity although a range of taxation benefits and other legal exemptions may be given. That has been the accepted position.

### *Legal obstacles*

Provisions within the Australian *Constitution*, as noted earlier, create a significant roadblock to implementing a plural regime based on religious affiliation. Whilst it would be theoretically possible to amend the *Constitution* of Australia, this is a herculean task requiring a referendum in which the majority of Australians and the majority of voters in the majority of states support the change. Rarely are referenda successful. Just eight out of 44 referenda have succeeded and political consensus for the change is essential. A contentious issue such as legal pluralism along Singapore lines would be most unlikely to succeed.

Another constitutional issue is the de-establishment requirements in s. 116. This does not allow for one religion to be preferred over another, unlike s. 153 of the Singapore *Constitution* which provides that the legislature can make laws “regulating Muslim religious affairs and for constituting a Council to advise the President in matters relating to the Muslim religion”, the Australian government has no such authority. Whilst the Australian and State governments can, and do, have advisory bodies, such as the Muslim Community Reference Group (MCRG) set up by the Howard government in 2005 (Muslim Community Reference Group 2006) and the government funded National Centre of Excellence in Islamic Studies<sup>80</sup> to train Islamic scholars and Imams in Australia, the regulation and

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<sup>80</sup> The National Centre for Excellence in Islamic Studies as a means to train Australian Imams was an initiative of the Howard government and was set up in 2007 during the time of the Rudd government. This training objective was eventually considered impractical within the Australian university environment. The Centre's federal funding ended in 2011.

establishment of an equivalent entity to MUIS for adherents of one religion would be unconstitutional.

*Practical obstacles*

Unlike Singapore where its Muslim minority shares the same Malay ethnicity and thus the same Malay language, culture, values and practices, Australia's Muslim population reflects the cultural diversity found across the Muslim world. Of course Muslims in Australia are united by a shared belief in Islam and identify with the concept of *ummah*, a worldwide community of believers, but as the Muslim diaspora in Australia has its origins in 80 different nations and today represents 50 different ethnicities and cultures, and speaks a variety of languages in addition to English, (now the first language of the 30%-40% born in Australia) it personifies the breadth of Australian multiculturalism. Some Muslims are descendants of 19<sup>th</sup> century settlers, others have recently arrived as immigrants or as refugees, some have fled repressive regimes whilst others have come for economic and family reasons retaining close attachments to their country of origin, some have come from Muslim monocultures, others from nations with religious and ethnic pluralism, (Ali 2011: 361) and there is also a growing number of local converts to Islam. This diversity supports the notion of 'Islams' rather than one Islam (Al-Azmeh 2009; Glenn 2004: 203; Black 2008). This is quite different to Singapore's relative homogeneity of the Malays, Sunni tradition, and Shafi'i school of law. Shafi'i has been dominant school of thought for centuries and continues to inform the jurisprudence of MUIS (AMLA s. 33) and the Syariah Court. Unlike Singapore, where 'traditionalism' has been the hallmark of its jurisprudence and court decisions,<sup>81</sup> Australia's eclectic Muslim population holds diverse jurisprudential and doctrinal allegiances ranging from "liberal, progressive, modernist, reformist, secular at one end through to moderate, traditional, orthodox in the mid-range and to conservative, extremist, radical, literalist, neo-revivalist or fundamentalist at the other end" (Black and Sadiq 2011: 386).

Given this pluralistic context, a formalised and officially recognised Syariah Court system in Australian would face practical obstacles in terms of the jurisprudence to be applied, the interpretative approach adopted, the persons entrusted with the role

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<sup>81</sup> Traditionalism is discussed earlier in III. Also it has been defined as 'a dogmatic attitude that clings firmly to old ways, resisting innovations or accepting them only unwittingly'. See Abdul Rahman 2006: 416.

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of adjudication, and how oversight and enforcement would occur. Such a court would need some degree of interpretative consistency. In Singapore, there is consistency as the “ordinarily the tenets of Shafi’i school” apply.<sup>82</sup> But which school of law should ordinarily apply in Australia – the one with the majority of followers, which would be Hanafi, or the one of the region, which would be Shafi’i, or should a Sharia Court just apply whatever the parties claim as their personal status law? This is not an issue that is unique to Australia, and scholars such as Yilmaz writing in the United Kingdom submit that a reformulated or composite form of Islam can emerge in Western and secular countries. Doctrinal difference can be overcome by using techniques such as *takhayyur* (Haj 2009: 150-151; Yilmaz 2003b; Muslim Arbitration Tribunal 2008) and *talfiq*. *Takhayyur* is selecting one juristic opinion irrespective of the school because it resolves an issue more fairly. It was a right given to an individual but in recent times has been used in Muslim countries legislating reforms particularly in family law.<sup>83</sup> *Talfiq* (meaning patchwork) allows various opinions to be combined to form a single new ruling. The resulting juristic fusion labelled *neo-ijtihad* could allow for a new form of Australian Islam to emerge, which attains unity from the current heterogeneity and divisions. This may be a laudable goal, however, it will take time and there are no guarantees as to what *neo-ijtihad* will produce. Whether the result is a traditionalist or a modernist interpretation of Islam will depend on who engages in the process. Which Australian scholars or which entity could assume authority for the collective *ijtihad* needed for an ‘Australian Islam’? It would be more difficult than in England where there is a dominant ethnicity (South Asian) and school of law (Hanafi) and a concentrated Muslim community. Authority within the Islamic community in Australia is already factionalised and complex, marred by dissention and acrimonious disputes on leadership (Black and Hosen 2009a 415-416). With a

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<sup>82</sup> AMLA specifies at s. 33(1) that ‘the Majlis and the Legal Committee in issuing any ruling shall ordinarily follow the tenets of the Shafi’i school of law’ unless that is contrary to public interest. In such situations the AMLA s. 33(2) provides that:

the Majlis may follow the tenets of any of the other accepted schools of Muslim law as may be considered appropriate, but in any such ruling the provisions and principles to be followed shall be set out in full detail and with all necessary explanations.

<sup>83</sup> An example is in Malaysia where more extensive Maliki school grounds for fault (*fasakh*) divorce rather than restricted Shafi’i ones were adopted. See the *Family Law (Federal Territories) Act*, 1984, which has 12 grounds specified. This was done on the basis of *maslaha* (public interest).

range of representative bodies,<sup>84</sup> who speaks with collective authority and for whom on issues of Islam in Australia can be readily contrasted with Singapore where the one organisation, the MUIS, fulfils this role. However, whilst consensus of this type is necessary for court adjudications, a plurality of views and competing juristic visions can equally be seen as a healthy indication of freedom of religion and expression in a vibrant democracy.

## 5. Conclusion

Although Sharia is not recognised as a formal source of law in Australia and Muslims have made little headway in the quest for an official and government funded system of Sharia Courts,<sup>85</sup> legal pluralism does still operate in Australia but in the unofficial, informal and extra-judicial sphere. In this way, Muslims in Australia have the freedom to live their lives in accordance with Sharia, in so far as following a religious precept does not violate a law of Australia.<sup>86</sup> Or as Ali (2011: 371) points out, “a vast majority of Muslims don’t pursue lives based on Shari’a” but are “ beholden to multiple identities.” A Muslim couple can marry according to Islamic law and have a valid *nikkah* which is also registered in accordance with the *Marriage Act 1961* (Cth).<sup>87</sup> Or they can choose just the Islamic marriage and not have it registered, or bypass a religious ceremony in favour of a secular one. Furthermore, they can cohabit without marriage

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<sup>84</sup> For example, Australian Federation of Islamic Councils (AFIC), the Darulfatwa Islamic High Council, and National Council of Imams (ANIC), the Islamic Association of Australia; and a variety of state organizations including each of the state Islamic Councils and local *majlis ulama*, Imams, Sheiks. As well there a various Islamic Societies and Associations designed on ethnic lines. On the growth Islamic organisations and also ones with connections to international movements, such as *Al-Ikhwan al-Muslimum*: the Muslim Brotherhood, see Ali 2011: 363-365.

<sup>85</sup> In March 2012, Attorney General Nicola Roxon stated that: “there is no place for sharia law in Australian society and the government strongly rejects any proposal for its introduction, including in relation to wills and succession”, (Karvellas 2012).

<sup>86</sup> For example, contracting an under age marriage or facilitating a forced marriage violates Australian law.

<sup>87</sup> Providing the ceremony was performed by a recognised marriage celebrant. Many Imams are recognized as celebrants.

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altogether. Australian Muslims have choices, ones not available to a Muslim couple in Singapore who must solemnize their marriage according to Islamic law (Part IV AMLA), register it with the separate registering body for Muslims,<sup>88</sup> and risk criminal sanction if they were to live together without marrying. It is a criminal offence under AMLA for a Muslim to cohabit and live with a person outside of a registered Islamic marriage (AMLA s. 134<sup>89</sup>). Muslims in Australia are afforded the same relationship choices as are adherents of the other religions.

Whilst the Singapore model of constitutionally sanctioned legal pluralism manifested by the Syariah Court, a separate registration body, the Majlis (MUIS) with a Mufti and Legal Committee, has become a benchmark for other common law jurisdictions with Muslim minorities it is not one that could be readily or realistically replicated in the Australian context. The historical, cultural, demographic, sociological and legal settings mitigate against any similar entity being established in the near future. Crucial in this assessment is the difference between indigenous Malay homogeneity and the heterogeneity of Muslim Australia. It is accepted that for most Muslims Islam remains central to their identity in Australia, but that Muslim identity, for the reasons outlined above, is conceived in multifarious ways. One of larger immigrant communities in Australia is from Turkey,<sup>90</sup> a secular Muslim nation which does not have Sharia Courts. Since its founding as a secular Republic in 1923, Turks have resolved their

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<sup>88</sup> Registrar of Muslim Marriages (ROMM) AMLA Part VI.

<sup>89</sup> AMLA s. 134 provides:

(1) Any man who cohabits and lives with a woman, whether a Muslim or not, to whom he is not lawfully married, shall be guilty of an offence and shall be liable on conviction to a fine not exceeding \$500 or to imprisonment for a term not exceeding 6 months or to both.

(2) Any woman who cohabits and lives with a man, whether a Muslim or not, to whom she is not lawfully married, shall be guilty of an offence and shall be liable on conviction to a fine not exceeding \$500 or to imprisonment for a term not exceeding 6 months or to both.

<sup>90</sup> Countries of birth data from ABA Census of Population and Housing 2006 shows that Lebanon has 8.9%, Turkey 6.8%, Afghanistan 4.7%, Pakistan 4.1% of the Australian Muslim population.

personal status matters quite differently from their fellow Muslim neighbours in Iraq, Iran and Syria and yet this does not make Turks ‘lesser Muslims’. The same is true in Australia. The voluntary as opposed to mandatory application of Islamic law, allows Australian Muslims the choice, not only to follow a particular school of law, or to employ *takhyyur*, but to follow an interpretation of Islam that personally resonates. Progressive or liberal Muslims who accept modernist interpretations can follow that path, whilst traditionalist or textualist Muslims can adhere to the conservative perspective. This increases the internal pluralism in Australia. To give one institution a monopoly over interpretation and administration of Islam and Syariah law, as occurs in Singapore, would be counter-intuitive in Australia.

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