

IS IT FEASIBLE TO ESTABLISH A “SHARIA COURT” IN AUSTRALIA? HOW WILL IT WORK?

By:

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Abstract

For Muslims living in non-Muslim majority states, professing their religion is one thing and having religious freedom and their religious law and institution being legally recognized is quite another. While the former may be legally guaranteed, the mere mention let alone debate on the latter seems to spark outrage amongst the non-Muslim local and international communities. The absence of such recognition in those countries leaves the minority Muslims with their endless struggle and fight to have their religious rights and obligations legally enforced according to the demand of their religion. This paper attempts to analyze this issue and its implications in the context of Australia, being a secular multi-cultural country with a rising Muslim population. The main question to be addressed is “is it feasible to establish a Sharia court in Australia and how will it work?” This inquiry is further confined to the relevance of the system in tackling Muslim personal and family laws as opposed to the overall spectrum of Sharia. The investigation will cover a number of angles namely the feasibilities and challenges from the legal, political, social and economic perspectives of the country. It will then proceed to explore the alternative legal means that could be considered by the Muslims in Australia in lieu of a Sharia court system. This paper will conclude that the idea of having a Sharia court could not federally materialize under the present constitutional law in Australia. At the state level, various impediments against the thought exist from the legal, social, political and economic perspectives. Except for voluntary contractual agreements on settlement of disputes between Muslim subjects, it seems that the alternatives explored are also bound to be thwarted by similar obstacles.

Keywords: Sharia, court, minority.

INTRODUCTION

The issue of minority Muslims in foreign countries putting forward institutional claims is not new. This happens gradually and can be well illustrated in the manifestation of Islam in Europe. In the 1960's, the first generation of Muslim emigrants in Europe observed their religious duties in non obvious and milder ways as their priority was settling into the new host territory.

Permanent settlement in Europe in the 1970's became a turning point where Muslim infrastructures such as prayer halls, religious schools and publications started to emerge in a more visible fashion. Between the 1980's to 1990's, the number of places of worship increased to 3000. Later the Muslims' presence was publicly felt with the building of mosques and other Islamic symbols. With the increase in the number of Muslims acquiring the nationality of many European countries, the interests pursued began to take the forms of not merely social and cultural but also legal and political (Ferrari & Bradney (eds) 2000).

Among the persistent crucial issues being raised until now is the legal recognition of Muslim family law which unsurprisingly invites wide objection by the non-Muslims. In Britain, the pressing needs saw the creation of an intricate unofficial network of dispute settlement processes and fora, a self-help approach gradually developed to address the conflict between civil and Islamic personal laws particularly relating to marriage, custody and inheritance.

This later led to the establishment of the Islamic Sharia Council in 1980, which was modeled after the Beth Din, a quasi-judicial organization responsible for regulating the affairs of the majority British Jews. In the latest related development, the Archbishop of Canterbury faced demands to quit when he sparked fierce criticism and rage amongst the non-Muslims by commenting that it was unavoidable for elements of Sharia law to be introduced into the British legal system (UK Independent, 5 September 2008).

This controversial view was endorsed by a very senior and high ranking judicial authority in England, The Lord Chief Justice, Lord Phillips saying that Islamic principles could govern financial aspect as well as family and marital disputes. Contractual agreements could be the basis of parties to agree to settle their disputes by using other than English law. However he signaled that the punishments and rulings must still abide by English Law (Mail Online, 5 September 2008).

In a similarly important development in Canada many years back, it was reported that informal Sharia tribunals existed in several provinces including Ontario. In 1991, the Ontario Government enacted the Arbitration Act (the "Act") to allow religious and secular-based claims to be handled and settled out of the court system with enforceable arbitration verdicts so long as they are not against Canadian law.

However in 2003, the Islamic Institute of Civil Justice proposed the setting up of Muslims Arbitration Boards as a Sharia arbitration body whose judgments could be enforced by Canadian law. This created massive resistance and public debate including amongst the Muslim women rights organizations in Canada, finally resulting in a proposed bill to amend the Act. The amendment among others seeks to remove the legal enforcement of decisions in religious-based arbitration.

The above observation indicates that until now, legal and institutional recognition of Sharia in the West have not been able to proceed unchallenged. Even decision-making bodies such as Sharia tribunals which are restricted to mundane subject matters under Muslim personal law have not been legally and politically accepted.

In a like secular setting such as Australia, the feasibility of having a Sharia court would equally involve the question of legal recognition of the Sharia law and various other implications coming from different aspects. To start off the analysis on this controversial issue in the context of Australia, this paper shall firstly present some brief facts on Muslim presence in Australia. This will be followed by outlining what Sharia and the Sharia court are about.

The question of the feasibility of a Sharia court will then be examined by looking at the possibilities and challenges from the Australian legal, political, social as well as economic perspectives. It is also worthy to look at what are the alternatives that could be considered by Muslims in Australia in the absence of a Sharia court system.

MUSLIMS IN AUSTRALIA

According to the Australian Foreign Department of Affairs and Trade, Muslims were among the earliest visitors in Australia who made contact with the mainland as early as the 16th and 17th centuries. The Muslim population in Australia as at 2006 was 340,000 representing approximately 2% of the total population (Australian Government Department of Foreign Affairs and Trade, 5 September 2008).

Originating from more than 70 countries, today's Muslims in Australia are multicultural in character. This was partly the result of Australian tolerant immigration policy after the Second World War aiming at generating more human capital and economic growth and the introduction of the multiculturalism policy from the 1970's until now.

The majority of Muslims in Australia are born in the country itself, followed by Lebanon, Turkey, and the rest in Afghanistan, Bosnia Herzegovina, Pakistan and other countries like Indonesia, Iran, Egypt and Palestine. In terms of the economy, present Australian Muslims are involved in commerce particularly the export of *halal* meat, while the rest consist of professionals such as engineers, doctors and lawyers as well as students who choose to remain in Australia under its "skilled migration program" (Abdullah Saeed 2004).

Muslims in Australia are generally coping well with the basic values common to Australians such as parliamentary democracy, human rights, gender equality and freedom of speech, which are also recognized by their religion. These values coupled with other freedoms including the right to practice and disseminate one's religion are highly valued by the majority of Muslims in the country. Despite not having established themselves in the country's political arena so far, the Muslim community actively engages in discourses and debates to strengthen the concerns over interest and welfare of the minority groups in Australia. (Abdullah Saeed 2004)

As an immigration-based country, Australia adopts the policy of not enforcing any religious belief. Those who wish to become its citizens are free to practice any religion or to even embrace none. However any religious practice is still bound to observe the limits of the law.

Although similar in many respects with Canada such as having the federal system of governance, practicing the English legal system in a multicultural and pluralistic country and adopting tolerant immigration policies, Australia has so far never been confronted with any major political debate with regard to introducing Sharia into its legal system or having a separate legal system for the Muslims. Clashes involving Sharia and civil systems only exist on a minimal scale in the area of marriage and divorce.

However certain segments of the society believe that the concerns that perturb the Muslims in such area should not be downplayed considering the trend of continuing bargaining process between Muslims and the authorities in several countries such as Britain and Canada.

UNDERSTANDING THE SHARIA

Sharia derives from an Arabic word which denotes "the path to be followed" or literally "the way to a watering place". This is the path shown and ordained by Allah to guide mankind to Allah, the Creator and the Law Giver. It is also the path to be followed to realize the goal of Islam that is justice. Justice is enjoined in the divine revelations as an essential requirement to be implemented in the relationship between men and Allah and in the relationship between men. It is a universal notion which covers all the virtues of good behavior and values. In this context Sharia categorizes the deeds and values into several groups, namely obligatory (*wajib*), recommended (*sunnah*), neutral (*mubah*), disapproved (*makruh*) and forbidden (*haram*) (Abdul Rahman I.Doi 1989).

Sharia differs mainly from man-made law such as Roman or English Law in terms of its sources, primarily the al-Quran and the Sunnah (saying or practice of Prophet Muhammad (PBUH) and sources developed through other processes i.e. ijmak (consensus of opinion), qiyas (analogical deductions) and several other sources based on the process of *ijtihad*. Apart from that, Sharia does not separate law and morality. It is indeed not a law or code *per se* but a way of life, governing every aspect of human behavior.

Many centuries ago, Caliphs and *Qadis* exercised *ijtihad* and dispensed rulings on wide-ranging subject matters covering daily activities, military, civil, criminal, political, family and commercial matters. Presently this is not the case anymore. Many aspects of the Sharia particularly those falling within the public sphere such as criminal and commercial laws have followed the Western-style code even in countries where Muslims are the majority (Mallat & Connors 1990). This largely stems from the contact between Islam and the West through colonization, the influence of secularization and the emergence of Muslim modernists.

It logically follows that Muslims in Western societies are not really concerned about establishing a separate Sharia or Islamic legal system in its complete sense but only in respect of Muslim personal law touching the areas of marriage, family, inheritance and custody laws among others. This is perhaps due to the fact that personal laws especially family matters are closely intertwined with religious belief and Islamic legal principles.

Family matters and personal status also occupy a high and respected place in the Muslims' belief as they relate to the preservation of their identity and the idea of honour thereby cannot be simply surrendered even when they are living in a non-Muslim state. In addition, Muslims in the West are also inspired by the legal systems in certain parts of Asia and Africa which are able to regulate distinctive personal laws within the diverse communities (Abdul Rahman I.Doii 1989).

As such, to be realistic in this topic, the discussion will be confined to the feasibility of having a Sharia court in Australia in the context of disputes involving Muslim personal laws.

SHARIA COURT AS A PARALLEL OR SEPARATE COURT SYSTEM IN AUSTRALIA

Legal Perspective

In discussing the question of whether there is any space for a Sharia court to operate within the Australian legal system, it is of paramount importance that the Australian judicature firstly be examined.

The provisions on Australian judicature are contained in Chapter III of the Commonwealth Constitution (the "Constitution"). The High Court is the highest court of law established by the Constitution. In addition to that, the Commonwealth Parliament is given the power to set up other federal courts. Including the High Court, there are four federal courts established by the Parliament thus far. The other three are the Federal Court of Australia, the Family Court of Australia and the Federal Magistrates Court of Australia.

Outside the federal structure, there are state and territorial courts. These courts have the jurisdiction to hear cases initiated under the state or territory laws, or those arising under the jurisdiction conferred by the Commonwealth Parliament or the federal laws. The court system also consists of specialist courts and tribunals. They include Family Courts, Children's Courts, Industrial Courts, Small Claims Courts and several other varieties of specialist courts (Crawford & Opeskin 2004).

There also exists a form of court which is community-based designed to cater to the special needs of aboriginal defendants of *koori* origin. The court known as the Koori Court is a branch of the Magistrates' Court of Victoria and is established under the Magistrates' Court (Koori Court) Act 2002. It operates in a less formal setting using plain and non-technical English and involves the participation of the elders and officers of the Koori Court, the defendant and his family. All offences can be tried by the Koori Court except those involving family violence and sexual offences (Department of Justice: *Koori Court*, 6 September 2008).

Family-related cases are normally heard by the Family Court. The Court deals, *inter alia*, with divorce, property and maintenance disputes, custody and other matters affecting children. However the jurisdiction over family matters is not exclusively held by the said Court. Certain family cases may be heard by the Federal Magistrates Court before they are heard by the Family Court. Such cases include applications to dissolve one's marriage, property disputes within the sphere of family law not exceeding \$300,000, spousal financial support and parenting orders provided the parties agree for the matter to be brought to the Federal Magistrate's Court (The Australian-Government: Attorney-General's Department: *The Courts*, 7 September 2008).

Based on the foregoing survey, a proposal to establish a separate or a parallel court that deals with family-related disputes based on a specialized law such as the Sharia may possibly be taken in the context of the setting up of another specialist court within the federal judiciary or a community-based court modeled after the Koori Court, operating as a branch of the Magistrate Court under state legislation. The issue is whether this can be legally done?

It is submitted that either means would be not be feasible in view of the following impediments:

a. Contravention of section 116 of the Constitution

Section 116 of the Commonwealth Constitution provides as follows:

“The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for 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”.

Historical development shows that religious freedom is not a central quality in the evolvement of the Australian society despite the existence of Christian and non-Christian communities since 1788. Its Governments and laws have been developed based on English Protestant precepts and influenced by the Church of England. The Official Record of the Debates of the Australasian Federal Convention reveals that section 116 was driven by the motivation to ensure religion would not attract public debate and influence policy making process (Australian Parliament: Joint Standing Committee on Foreign Affairs, Defence and Trade: *Conviction with Compassion: A Report on Freedom of Religion and Belief*, 6 September 2008). The issue is how the establishment of a Sharia court at the federal level can contravene this provision. The wording of section 116 is wide enough for various interpretations against the idea of setting up a Sharia court possessing personal law jurisdiction over Muslims. It could be argued that imposing Sharia personal law on Australian Muslims is a form of imposing a religious observance and may amount to prohibiting

the free exercise of any religion i.e. by compelling a Muslim to submit to the Sharia law and the jurisdiction of the Sharia court. This seems to be quite a direct and plain interpretation of the section on this issue. "Religious observance" was considered in the constitutionality of the proposed amendment to the Family Law Act 1975 in the 1990's. The proposed amendment intended to address the conflict between civil and religious divorce prevailing in the Muslim and Jewish societies. The proposal required the court to defer the grant of decree for civil dissolution from becoming final and absolute under section 55 until it is satisfied that religious divorce has been granted to the applicant or plaintiff.

In the legal opinion of the then Acting Solicitor-General as submitted to the Attorney General, he found that such amendment would violate the observance clause in section 116 since a person is required by the law to participate in religious observances. It is also possible that the "free exercise" in the section is breached when a person is obliged to do something against what he believes (Australian-Government: Attorney-General's Department: *Civil and Religious Divorce*, 7 September 2008).

The application of this provision has also been tested in several court cases. In the DOGS case decided in 1981, the issue was whether the law providing for Commonwealth grants scheme to the state contravened section 116 when it was made conditional upon a percentage of the grants being donated to schools most of which were Catholic. The Court held that such law did not amount to establishing a religion despite indirectly aiding the practice of the religion. According to the Court, a religion may be established under section 116 in the case where it is recognized as a national institution by the civil authority (Australian Parliament: Joint Standing Committee on foreign Affairs, Defence and Trade: *Conviction with Compassion: A Report on Freedom of Religion and Belief* 6 September 2008). Applying the judgment on this issue, a purposive interpretation may find that the provision allowing for the establishment of Sharia court would necessarily require the formal and legal

recognition of the Muslim law, a step towards establishing the religion, which is strictly prohibited by the Constitution.

b. Contravention of Discrimination Laws

One may argue that section 116 does not apply to state laws and therefore legal avenues could be pursued under state or territorial laws for the establishment of the Sharia court. However it must not be forgotten that having a law be it federal or state allowing for the establishment of a Sharia court means granting a special preference or privilege to one section of the society on the basis of its religion.

At the federal level, such law may be in breach of the Racial Discrimination Act 1975 (Cth). This Act prohibits any policy, rule or public behavior which directly or indirectly offends, has an unfair effect or is discriminatory against a person or a class of people based on a particular race, colour, descent, national or ethnic origin. In relation to the issue of the Sharia court, the policy and rule in support of that may be unlawful as it is discriminatory against other ethnic groups on the ground of religion.

Anti-discrimination laws are also enforced in all states except in the state of Tasmania. Unlike federal law, most of the state anti-discriminatory laws contain direct or indirect discrimination on the basis of religion. However a few states provide some exceptions in certain circumstances. For instance, in the state of Victoria, discrimination is permissible if it could be shown that the discrimination concerned is necessary for a person to abide by his religious beliefs or principles. Whereas in New South Wales the ground of discrimination is restricted to "race", the definition of which does not cover "ethno-religious" background. (Australian Parliament: Joint Standing Committee on foreign Affairs, Defence and Trade: *Conviction with Compassion: A Report on Freedom of Religion and Belief*, 6 September 2008)

In those states adopting such broad exceptions as well as the state of Tasmania (which does not have any anti-discrimination law and the only state that legally acknowledges

freedom of religion), one may find that the establishment of a Sharia court is not entirely impossible. However it is not absurd to predict that such rule or law creating the Sharia judicial institution is still vulnerable to other legal challenges as elaborated next.

c. Contravention of Human Rights Laws

The application of Sharia law by the Sharia court is another legal consideration that will be analyzed by the policy makers in deliberating on the feasibility of establishing a Sharia court in Australia. Most of the human rights conventions ratified worldwide are drafted from the western dimension of human rights. The concept of gender equality imported from the western principles for instance is deeply embedded in several international human rights treaties such as the International Covenant on Civil and Political Rights and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Australia is a signatory to both of these Conventions (UN Office of the High Commissioner for Human Rights: Regional Office for the Pacific, 15 September 2009).

At least from the Western perspective, Muslim family law may be perceived as comprising of several major rules that could possibly violate some of the freedoms espoused in such international treaties.

Certain practices such as polygamous marriage, the prohibition on Muslims marrying non-Muslims and the right of divorce known as *talaq* held by husbands are among the usual cases mentioned to support the claim of sexual discrimination that runs against the freedoms set out in human rights conventions.

In many Muslim countries, the ratification of such conventions is generally subject to some reservation to the provisions that are not in line with Islamic religious practices. For instance countries such as Egypt, Yemen, Indonesia, Iraq, Turkey and Bangladesh which are signatories to the CEDAW have made a reservation to the whole or part of Article 16. Article 16 obliges states among other things to take suitable

measures to eliminate discrimination against women in all matters relating to marriage and family relations.

The equality that states need to ensure to men and women include the same right to enter into marriage, the same right to freely choose a spouse and to enter into marriage with their free and full consent and the same rights and responsibilities during marriage and its dissolution (Mashood A. Baderin 2001).

In the case of Australia, Sharia court and Sharia law are therefore unlikely to find favour due to the possible violation of the above human rights conventions.

Social Perspective

Stereotypical and misguided conceptions about Islam and Sharia are still rampant in the West and other non Muslim countries. The usual misconceptions associated with Islam include that Islam is a racist religion, propagated with violence, backward, intolerant and places women inferior in status to men. Muslim institutions are often viewed as obstructing the path towards integration and that Muslims wish to operate their own system of law (Abdullah Saeed 2004). These are also the general views about Islam by an average Australian (Online Opinion, 8 September 2008).

Based on an inquiry made by the Joint Standing Committee on Foreign Affairs, Defence and Trade on Freedom of Religion and Belief, it was reported that although the multicultural environment in the country is generally well accepted by the Australians, concerns were still raised as to the potential tension that might be stirred in the culturally diversified society. Some were afraid of the possible danger and risk to Christianity that might result from the tolerant attitude and policy towards other religions.

As highlighted by the report, the NSW Anti-Discrimination Board found that doubt and suspicion of religions other than Christianity were identified among the Australians and such behaviors are not uncommon until now. In a series of consultations from 2005 to 2007 by the IDA (a public policy and political think tank based in Adelaide), it was concluded that Muslims are regarded as a source of threat more than other ethnic groups by the Australians. Professor Bob Birrell from the

Monash University attributed this phenomenon to the fear that the distinct and exclusive nature of the religion may lead to clashes with the fundamental rights and freedoms enjoyed by the society (Issues Deliberation: Australia/America, 7 September 2008).

Based on the above findings and the global events associated with Islamic extremism such as the September 11 Attack and the Bali Bombing, together with the constant negative portrayal of Islam by the media, the idea of having a Sharia court in the country would likely be inflammatory.

As to the question whether Muslims in Australia really wish to have a Sharia court, it can only be answered by conducting a nationwide poll similar to what has been done in Britain. Looking at the current scenario, the Muslims in Australia are still very small in number and voice. In terms of community and religious leadership, Muslims in Australia lack a centralized and autonomous body to represent them. Notwithstanding the establishment of the Australian Federation of Islamic Communities as a national body, the Muslim communities still strongly follow the leadership authorities within their own ethnic groups. (Dspace: Flinders Academic Commons, 7 September 2008).

The absence of such unified and independent leadership within the ethnical subdivided Muslim community signifies that they fail to have a strong let alone an authoritative platform or capacity to voice out their concerns over religious issues and difficulties faced by their community.

Political Perspective

The threat of terrorism has shaped the fear politics in this country and this is partly reflected in the recent reinforcement of the multicultural policy by the Australian Government. In the document updating the 1999 New Agenda for Multicultural Australia: Strategic Directions for 2003-2006, it is stated that:

Australians now see themselves as directly threatened by terrorism. In this context, community harmony and social cohesion are pivotal elements in enabling Australia to contribute effectively to the international effort to combat terrorism, and in safeguarding Australians domestically. The Government believes firmly that Australian

multicultural policy provides a framework of national unity and a coherent ethos for a diverse Australia at a time of conflict, as well as in times of peace. National security begins with domestic community harmony (Immigration Australia, *Multicultural Australia: United In Diversity: Updating the 1999 New Agenda for Multicultural Australia: Strategic directions for 2003-2006*, 7 September 2009).

The governments in power as well as the opposition side have not done enough to correct the misperception towards Muslims and Islam in Australia. Instead their involvement in world politics by persistently showing support to U.S policies particularly those affecting Iraq, Palestine and Lebanon exacerbates the negative stereotypes and may promote further tension between Muslims and non-Muslims in the country.

In light of such attitude, one can already expect the kind of political response to the idea of having a Sharia court in the country. Several politicians such as Peter Costello, the former Federal Treasurer are openly critical on this issue. In an interview with the Lateline three years back, Costello stressed that Australia is a secular country and will never accept Sharia. Reacting in anger to certain Muslim clerics whom he claimed to be teaching that there are two laws in force in Australia i.e. the Australian law and the Sharia, he commented that the people who hold to such belief have no place in Australia (Lateline, 7 September 2008).

In 1992, the recommendation by the Australian Law Reform Commission (ALRC) to amend the Family Law 1975 (Cth) to address the conflict between civil and religious divorce was rejected by the Government citing as one of the grounds that the secular tradition of separating civil and religious laws should always remain (Australian-Government: Attorney-General's Department: *Civil and Religious Divorce*, 7 September 2008).

Economic Perspective

Regardless of whatever benefits a specialist court such as a Sharia court might offer, its establishment would result in huge financial expenses. Substantial costs may be needed in building a separate court house, hiring judges and court staff who are well versed in Sharia law, training

pograms and administering the court. Whenever state money is involved, what more for a controversial purpose such as the establishment of a Sharia court, the path to implement the project becomes doubly challenging.

Alternatives to a separate or parallel Sharia court system

The preceding analysis shows that it is highly impossible for a separate or parallel Sharia court system to exist in Australia. It also demonstrates the difficult task shouldered by the authority in power to balance the freedom and protection to each ethnic or religious group in a multicultural society.

While it is admitted that conciliation, mediation and counseling services are encouraged as a better way to settle family disputes, the fact remains that they are only consultative and advisory in nature meant to facilitate the parties to achieve a peaceful settlement. Thus the question that still lingers is whether there are other alternative ways to accommodate the needs of the Muslims to have an enforceable legal system that could dispense justice on matters of personal laws. The following options are presented for discussion:

a. Arbitration

Arbitration has gradually become a preferred alternative dispute resolution method in commercial and family-related courses of action because of the many advantages associated with it. It is often said to be a time consuming and cost effective process which produces legally enforceable outcomes. The forum is less formal and more flexible where the parties may agree on the choice of an arbitrator or even the procedures to be followed throughout the hearing.

Under the Australian Family Law Act 1975, the court has the power to refer a party to divorce and financial proceedings to family counseling, family dispute resolution and other non-court family services. In relation to family arbitration, the reference to an arbitrator may be made with the consent of the parties. Under section 13 of the Act, the court may also issue orders to facilitate the arbitration, determine the questions of

law referred by an arbitrator, issue interim relief orders pending the award by the arbitration, register and also review the awards given by arbitration.

However, not all areas of family disputes can be arbitrated. While matters relating to spousal maintenance, property interests and ante or post nuptial settlements may be heard, parenting and child support matters are outside the jurisdiction of a family arbitration.

Can there be a possibility of having an arbitration that hears and decides on disputes based on religious law such as the Muslim or Jewish law in Australia? In the U.S, the Federal Arbitration Act permits parties to opt for religious panels and laws in considering or even settling family disputes. Contrary to belief, the U.S law has no restriction or impediment for the decision or award by such panels to be enforced. On the other hand, in Canada, the announcement to establish a Muslim arbitration has prompted the amendment to the arbitration statute in the Ontario province which conclusively prohibits the enforcement of award by any religious-based arbitration or tribunal. (Grossman, M.C. 2007)

In Australia, there seems to be no legal prohibition for an arbitrator to use its discretion in accepting evidence and arguments based on religious law in arbitrating a family dispute. However the parties face two main limitations, firstly the subject matters that can be arbitrated are very limited and secondly, the parties are merely to expect a settlement or an award that is not legally enforceable thereby denying finality in its quality. The inability to enforce awards in religious-based disputes is again the result of the constitutional limit imposed under section 116 as previously explained.

b. Contractual Arrangement

The doctrine of freedom of contract that is founded on the idea of voluntariness and obligation to honour promises has traditionally been respected and enforced worldwide.

In the family law area, contractual arrangements particularly in the form of prenuptial-agreements may be a

potential alternative that could help resolve some parts of the problems faced by Muslims. The idea of pre-agreed arrangements to be followed in the event of marriage breakdown and other family related disputes may include the option of voluntary agreement by the parties not to submit to the civil court jurisdiction until and unless evidence can be procured to satisfy the court that there exists no conflict between the religious law and the civil law in respect of the disputed claims.

In the event the court is convinced that such conflict still arises and justice cannot be done to both parties due to the conflict, then the court has the power to order the dispute to be settled out of court under the parties' religious law. Secondly the parties may contract in advance that once the court is convinced by evidence of the absence of the conflict, then the jurisdiction of the court to decide the dispute is final.

Such pre agreed arrangements will allow Muslim couples to manage their affairs according to their religious law unfettered. Further, what is actually enforced by the court is the agreement itself which will prevent the court and the parties from being caught by the constitutional hurdle. In Australia, pre-nuptial agreements are recognized under section 90B of the Family Law Reform Act 2000.

c. Status Quo

Given the constitutional sensitivity involved in legislating matters affecting religious law, another remaining option is to continue with the existing approach adopted by the Family Court.

According to the letter by the Australian Family Law Council to the Attorney-General dated 3 August 1998, it was admitted that the courts are left in the state of judicial limbo when faced with the conflict between civil and religious divorce. The courts however have attempted to address the problem in many ways on a case by case basis (Australian-Government: Attorney-General's Department, *Civil and Religious Divorce*, 7 September 2008).

Among the cases to illustrate such attempt is Steinmetz (1981)FLC 91-07, in which the court agreed to give an incentive to the husband by reducing the amount of maintenance, provided the husband agreed to grant a religious divorce to the wife. In other jurisdictions such as Canada, hindering the remarriage of one's spouse may trigger the court to reopen financial and custody settlements (Australian-Government: Attorney-General's Department, *Civil and Religious Divorce*, 7 September 2008).

However, the problems with regards to the current approach are firstly, the judges are left with their discretion on whether to consider any religious factor in hearing the disputes and secondly, the measures taken by the courts may not solve the problem or the issue as a whole.

CONCLUSION

It is safe to argue that any attempt to legally establish a Sharia court and enforce Sharia law would not pass the constitutional test under section 116 of the Constitution. The introduction of a Sharia court would fundamentally require the Constitution to be amended and for the affected laws to be reviewed and substantially adjusted. Obviously amending the Constitution is almost impossible to realize given the highly difficult process of getting the approval of the majority of the people. Even if the idea is pursued at the state level, mounting challenges from the legal, social, political and economic points of view lie in its path.

The alternatives listed do not shed much light of hope. So long as legal recognition and enforcement of religious laws are involved, the same obstacles come into picture. What is left for the Muslims is to make use of the pre-nuptial agreements by incorporating prior arrangement to settle disputes according to Muslim personal laws. At the very least this voluntary contractual arrangement would avoid a recalcitrant party from exploiting the conflict between Sharia and civil laws to the disadvantage of another.

With regards to national policy, although "uniformity in diversity" in increasingly multicultural countries like Australia and Canada might

be a realistic and relevant concept in today's world, the government cannot continuously ignore the presence of local customs, religions and other normative elements including Muslim law for fear of losing control and power. Positive and bolder steps should be explored to develop a new conceptualization of equity that reflects today's reality.

BIBLIOGRAPHY

- Abdul Rahman I.Doi. 1989. *Shari'ah: The Islamic Law*. Kuala Lumpur: Malaysia.
- Abdullah Saeed. 2004 *Muslim Australians: Their Beliefs, Practices and Institutions*. Canberra: Commonwealth Government.
- Chibli Mallat, & Connors, Jane (eds.) 1990. *Islamic Family Law*. London: Graham & Trotman.
- Crawford, James & Opeskin, Brian. 2004. *Australian Courts of Law*. South Melbourne: Oxford University Press.
- Grossman, M.C. 2007. "Is This Arbitration?: Religious Tribunals, Judicial Review And Due Process". *Columbia Law Review*. Vol. 107. No 1.
- Pearl, David & Menski, Werner. 1998. *Muslim Family Law*. London: Sweet & Maxwell.
- Ferrari, Silvio & Bradney, Anthony (ed.). 2000. *Islam and European Legal System*. Aldershot: Ashgate.
- Mashood A. Baderin. 2001. "A Macroscopic of the Practice of Muslim State Parties to International Human Rights Treaties: Conflict or Congruence?". *Human Rights Law Review*. Vol.1. Issue (2).
- Moon, Richard (ed). 2008. *Law & Religious Pluralism in Canada*. n.p.p: UCB Press.

Internet

- Australia. Australian-Government: Attorney-General's Department. 7 September 2008. *Civil and Religious Divorce*.
<<http://ag.gov.au/agd/www/Flchome.nsf/Page/42D72C9333755A7FCA256B440010FAEE?OpenDocument>>

- Australia. Australian Government Department of Foreign Affairs and Trade. 5 September 2008. *About Australia*.
<http://www.dfat.gov.au/facts/muslims_in_Australia.html>
- Australia. Australian Parliament: Joint Standing Committee on Foreign Affairs, Defence and Trade. 6 September 2008. *Conviction with Compassion: A Report on Freedom of Religion and Belief*.
<<http://www.aph.gov.au/house/committee/jfadt/Religion/reindex.htm>>
- Australia. Immigration Australia. 7 September 2008.
MULTICULTURAL AUSTRALIA: UNITED IN DIVERSITY: Updating the 1999 New Agenda for Multicultural Australia: Strategic directions for 2003-2006.
<http://www.immi.gov.au/media/publications/pdf/united_diversity.pdf>
- Australia. The Australian-Government: Attorney-General's Department. 7 September 2008. *The Courts*.
<http://www.ag.gov.au/www/agd/agd.nsf/Page/Legalsystemandjustice_TheCourts>
- De Brennan, Sebastian. *Sharia Law in Australia*. (Online opinion). 7 September 2008.
<<http://www.onlineopinion.com.au/view.asp?article=4282>>
- Doughty, Steve. 5 September 2008. "Sharia law SHOULD be used in Britain, says UK's top judge". *MailOnline*.
<<http://www.dailymail.co.uk/news/article-1031611/Sharia-law-SHOULD-used-Britain-says-UKs-judge.html>>
- Humphrey, Micheal. 7 September 2008. "A Social Antidote on Abdullah Saeed: Islam in Australia". *Dspace: Flinders Academic Commons*.
<<http://dspace.flinders.edu.au/dspace/bitsream/2328/1203/1/23-24.pdf>>
- Jones, Tony. 15 September 2008. "Respect Australian values or leave: Costello". *LATELINE*.
<<http://www.abc.net.au/lateline/content/2005/s1444603.htm>> at 7 September 2008>
- Russell, Ben & Brown, Colin. 5 September 2008. "Archbishop of Canterbury warns Sharia law in Britain is inevitable". *UK Independent*. <<http://www.independent.co.uk/news/uk/home->

news/archbishop-of-canterbury-warns-Sharia-law-in-britain-is-inevitable-779798.html>

- n.a. 6 September 2008. "Australia Deliberates: Muslims and Non Muslims in Australia". *Issues Deliberation: Australia/America*. <<http://www.ida.org.au/UserFiles/File/AUSTRALIA%20DELIBERATES%20-%20FINAL%20REPORT%20-%20CHAPTER%202%20%20THE%20VOICE%20OF%20EXPERTS.pdf>>
- n.a. 15 September 2009. "RATIFICATION OF INTERNATIONAL HUMAN RIGHTS TREATIES: ADDED VALUE FOR THE PACIFIC UN". *Office of the High Commissioner for Human Rights: Regional Office for the Pacific*. <<http://pacific.ohchr.org/docs/RatificationBook.pdf>>

Acts

Australia. 1975. *Family Law Act*.

Australia. 2000. *Family Law Reform Act*.

The Australian Constitution.

Australia. 1975. Racial Discrimination Act (Cth).