LESSONS FROM SINGAPORE: AN EVALUATION OF THE SINGAPORE MODEL OF LEGAL PLURALISM

Ann BLACK

The University of Queensland
Asian Law Institute, National University of Singapore, Singapore

a.black@law.uq.edu.au

ASLI Visiting Fellow
(05 September 2011 to 05 October 2011)

July 2012
The **ASLI Working Paper Series** is published electronically by the Asia Law Institute, whose Secretariat is based at the Faculty of Law, National University of Singapore.

© Copyright is held by the author or authors of each Working Paper. ASLI Working Papers cannot be republished, reprinted, or reproduced in any format without the permission of the paper’s author or authors.

**Note**: The views expressed in each paper are those of the author or authors of the paper. They do not necessarily represent or reflect the views of the Asia Law Institute or of the National University of Singapore.


**Asia Law Institute**
c/o Faculty of Law,
National University of Singapore
Eu Tong Sen Building
469G Bukit Timah Road,
Singapore 259776
Tel: (65) 6516 7499
Fax: (65) 6779 0979
Website: [http://law.nus.edu.sg/asli](http://law.nus.edu.sg/asli)
Email: asli@nus.edu.sg

**The Asian Law Institute (ASLI)** was established in March 2003 by a group of leading law schools in Asia. Its goal is to facilitate academic exchanges as well as research and teaching collaboration among colleagues from the thirteen founding institutions. The establishment of ASLI stems from the recognition that the diversity of legal traditions in Asia creates an imperative for Asian legal scholars to foster greater engagement with each other through collaborative research and teaching. The acronym "ASLI", which means “indigenous” in the Malay and Indonesian languages, represents the commitment of the founding institutions to establish a truly home-grown law institute in Asia. The ASLI membership has grown beyond the founding members and includes 36 new member institutions.
In the Asia-Pacific rim, Singapore and Australia are two democracies with multi-ethnic, multi-faith populations in which Muslims are a recognizable minority group: 3% in Australia and 15% in Singapore. Both were former colonies of Great Britain and consequentially share the institutions and processes inherent in the common law tradition. Due to such commonalities, some Australians have recently looked to Singapore’s model of legal pluralism as a viable one warranting consideration for transplantation to Australia. The Singapore model is seen as a more successful approach than the English network of Arbitration Councils (also known as tribunals and courts), which operate as informal, non-government regulated or funded bodies, whose decisions in the form of arbitral awards may be enforced by the civil courts. What Singapore showcases is a workable example of formal legal pluralism. Co-existing with Singapore’s well respected common law system is its Syariah system, in which a Syariah court applies special laws enacted exclusively for Singapore’s Muslim population, separately administered yet fully government-funded. Importantly, it appears that on the whole, Singapore’s model of legal pluralism is well accepted by the nation’s Muslim and also its non-Muslim communities. The model is promoted as a workable, ongoing and respectful manifestation of legal co-existence which functions effectively because of ‘the mutual respect the Muslim and the non-Muslim community have for each other.’ Therein lies its appeal. Currently, Australia has an ad hoc, unofficial system in which Muslims can, on their own volition, find individuals or Islamic entities to give guidance and legal rulings on Syariah for personal status and other matters of importance in their lives. The idea of transitioning

---

1 The author is from the Faculty of Law, University of Queensland.
2 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 H. Patrick Glenn, Legal Traditions of the World, 2d ed. (Oxford: Oxford University Press, 2004) at 170-221 and Wael B Hallaq, Introduction to Islamic Law (New York: Cambridge University Press, 2009).
from an informal ‘shadow’ system to a formal parallel court system - identified as the Singapore model - is the focus of the analysis that follows.

This paper explores the viability of the Singapore model for Australia. To highlight the difference in approach between these two jurisdictions, this paper commences with a comparative analysis of two key components of Syariah family law, namely marriage and divorce, to outline how these are managed differently in Australia’s secular ‘one law for all’ system in comparison to Singapore’s formal dual court system. The second part of the paper identifies some of the key features or attributes of Singapore’s model of legal pluralism, and assesses the applicability of each to an Australian context. These provide some lessons for secular jurisdictions that are considering the emulation of the Singapore model.

It should be added at the outset that 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 a widely accepted goal. Whether formal accommodation of certain aspects of Syariah would achieve this goal is far from clear; however, the issue of whether Australia can, or should, establish Syariah Courts or Islamic arbitration tribunals applying some parts of Syariah law remains very much in the public arena and open for debate. It does warrant consideration and attention from Muslim and non-Muslim Australians as a shift to a plural legal system based on religious affiliation would be a very significant change to Australia’s existing system of law.

II. COMPARISONS: HOW SYARIAH INFORMS THE LIVES OF AUSTRALIAN MUSLIMS

A. Marriage

Australia has approximately 500,000 Muslims. The adults amongst them will probably marry and do so in accordance with Syariah law. Australia’s Marriage Act 1961 (Cth.), allows Islamic marriage ceremonies to be performed and registered by a recognised marriage celebrant or minister of religion, which, for Muslims, will usually be an Imam from their mosque. The majority of marriages between Muslims are therefore simultaneously valid under Islamic law and Australian law. A small percentage (actual

---


5 The precise number of Muslims is not known because many do not declare their religious status for census purposes. However, at the last census in 2006, the Australian Bureau of Statistics stated the numbers at 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 generally “Australian Government Department of Foreign Affairs and Trade: about Muslims,” online: <http://www.dfat.gov.au/facts/muslims_in_Australia.html>.

6 Marriage is seen as desirable, and even as an obligation to Muslims.
numbers are unknown) will have a marriage contract (nikkah) and an Islamic ceremony to make their union a valid Islamic marriage, but do not register the marriage in accordance with the Marriage Act. There are several reasons for this. First, the person performing the Islamic ceremony is not qualified or registered by the government to conduct marriages. Second, the marriage may not meet Australia’s requirements for a lawful marriage. One or both parties may be under the lawful age for marriage, which is 18 years. Such a marriage is unlawful and is also an offence under section 95 of the Marriage Act 1961 (Cth.). Such a marriage may also be unlawful if the marriage is polygamous, which is the offence of bigamy. Third, the marriage may not be registered because it may be a ‘forced’ or ‘servile’ marriage, as opposed to an arranged or facilitated marriage. Whilst it is more typical for the victim of a forced marriage to be taken overseas to wed under the national law of another country, marriages where there has been physical, emotional or financial duress or deception do take place on shore. Forced marriage is, of course, contrary to Islamic law. However, such marriages do occur, officiated by Muslim sheiks and Imams, possibly under the misguided belief that the child’s family is ‘protecting their child or preserving cultural or religious traditions.’ The Australian government believes that cases of forced marriage are widely under-reported. The government conducted an enquiry from 2011 to 2012 which looked into the problem of forced marriage, with the aim of enacting a new criminal offence along the lines of the English legislation to reduce its incidence. In 2012, a bill criminalizing forced marriage with a seven-year maximum imprisonment term was introduced into the Parliament by the Attorney-General. Fourth, not registering the marriage allows a husband a quick and easy talaq divorce (right of a husband to divorce unilaterally by pronouncement) should he want to keep this option at the ready.

Muslim couples who marry in Australia in accordance with Islam must meet the formal requirements of a valid Islamic marriage, which include a marriage contract (nikkah) that

7 S. 5 of the Marriage Act 1961 (Cth.), reads: (a) a minister of religion registered under Subdivision A of Division 1 of Part IV; or (b) a person authorised to solemnise marriages by virtue of Subdivision B of Division 1 of Part IV; or (c) a marriage celebrant.
8 S. 1 of the Marriage Act 1961 (Cth.). reads: ‘Subject to section 12, a person is of marriageable age if the person has attained the age of 18 years’. S. 12 allows a person who has attained the age of 16 years but has not attained the age of 18 years to apply to a Judge or magistrate for an order authorising him or her to marry a particular person of marriageable age. The judge will require the circumstances of the case to be so exceptional and unusual as to justify the making of the order.
9 It is a defence to a prosecution under s. 95 for the defendant to prove that he or she believed on reasonable grounds that the person with whom he or she went through the form or ceremony of marriage was of marriageable age, or had previously been married, or had the consent of the court to do so in accordance with the Act.
10 Marriage Act 1961 (Cth.), s. 94.
11 Such marriages performed under duress also occur in mainly South Asian and Middle-eastern ethnic communities and are not confined to Muslim adherents. Coptic and some other Christian sects, Hindu and ‘traveller’ families also engage in the practice.
14 Crimes Legislation Amendment (Slavery, Slavery Like Conditions and People Trafficking) Bill 2012 (House of Representatives).
may contain contractual conditions and mahr provisions. The latter were the traditional legal means for protecting and empowering a wife for the duration of the marriage. Mahr was an important resource by which a wife could finance her post-marriage period. In Australia, marriage takes place in a very different legal and social milieu from a Muslim nation. Wives are able to receive social security payments, and husbands may be required by the Family Court to provide spousal maintenance. In addition, as Part VIII of the Family Law Act 1975 (Cth.), on “Spousal Maintenance” is gender neutral, it may be the wife who is required to financially support her husband, if she is independent and financially more secure than him. The Islamic rules that what a wife earns is hers and hers alone, and that mahr is her entitlement should the marriage end, do not have any bearing in a court’s determination on either spousal maintenance or property settlements. How to treat mahr in this modern secular paradigm is an ongoing issue; hence, when a marriage breaks down, the mahr is a recurring source of dispute, contention and angst amongst Muslims. It would be second only to the question of custody of children.

Whilst Australia has one marriage law, in Singapore, the applicable marriage law depends on the religion of the parties to the marriage. For Muslims, the laws pertaining to marriage validity are in the Administration of Muslim Law Act 1966 (hereinafter “AMLA”). For all other Singaporeans, whether or not a marriage is valid is determined by the law provided in the Women’s Charter. Similarly, registration of marriage in Singapore is a dual system. The Registry of Muslim Marriages (ROMM) has exclusive jurisdiction to register marriages where both parties are Muslim, whilst the Registry of Marriages (ROM) registers all other Singaporean marriages including marriages between a Muslim and a non-Muslim. The result is that marriages between a Muslim man and kitabiyah woman (person of the Book) fall under the jurisdiction of the civil ROM registry. In some schools of Islam, Hanafi, a marriage between a Muslim man and kitabiyah woman who is a Christian or Jew, is lawful although it is generally regarded as undesirable. However, Shafi’i school, the dominant legal tradition in Singapore and Southeast Asia, adopts a narrower interpretation of kitabiyah which requires 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. Consequentially, in practical terms, this amounts to a de facto not de jure prohibition.

Whilst there are no restrictions on religious grounds on who one can marry under Australian law, which means that marriages between Muslims and non-Muslims face no legal obstacle under the Marriage Act 1961 (Cth.), most Muslims prefer to marry within their faith tradition. In Australia, they can also choose to co-habit without marrying, either as a de facto couple in which case they will receive legal protections as though they

---

19 The Prophet married a Christian and also a Jewish woman.
were a married couple, or they can simply ‘live together’. The latter attracts no penalty, whereas in Singapore, such cohabitation would be a criminal offence attracting fines and/or imprisonment under section 134 of the AMLA. In Australia, for an Islamic nikkah, it is left purely to the parties and the Islamic body performing the marriage to determine the form and procedure. This is the same for all faith traditions. In Singapore, marriage between Muslims is regulated by Part VI of the AMLA which, among other things, codifies the role of the wali, who is defined in section 2 of the AMLA as ‘the lawful guardian according to Muslim law for purposes of marriage of a woman who is to be married’. AMLA has provisions, however, for a kadi (judge) to intervene in cases where a woman has no wali, or where the wali refuses to consent to the marriage.  

In summary, in Australia, religious affiliation plays no role in marriage validity or its registration. There is complete freedom given to the individual to follow his or her religious or non-religious traditions for marriage ceremonies, provided there is compliance with the *Marriage Act 1961* (Cth.). In Singapore, the one difference is that there are separate legal pathways provided for Muslims, who are governed exclusively by the AMLA.

**B. Divorce**

In Singapore, divorce between Muslims falls within the jurisdiction of the Syariah Court and there is codification of many of the classic Syariah divorce and ancillary matters. However, this is not a comprehensive codification and the Court has general jurisdiction to apply Muslim law as varied where applicable by Malay custom. Therefore, the Court can turn to primary sources of law, the Quran and Sunnah, as well as the writings of classic jurists and scholars for elaboration and interpretation. The Court has a streamlined and accessible procedure for divorce applications. One of the main reasons given by Muslim advocates in Australia for a formalized Syariah based court is that such a court would produce easier, fairer and better outcomes for Muslim women seeking divorce. Unlike marriage, there cannot simultaneously be a valid Australian (that is, secular) divorce which also serves as an Islamic one. For example, a *talaq* divorce proclaimed by a husband in Australia has no formal legal status, although it has in his eyes, and in the eyes of his family and the Muslim community. Although *talaq* has no legal consequences under Australian law, it may be used to mark the commencement of the required 12-month separation period needed to prove ‘irretrievable’ breakdown of the

---

20 *AMLA*, s. 95.
21 *AMLA*, s. 35(3).
23 President of Australian Federation of Islamic Councils, Iqbal Patek, stated that there is ‘a clear need for mainstream law to take account of the difficulties some divorced Muslim women experienced in persuading their former husbands to grant them a religious divorce. If that doesn’t happen, she is in limbo -- she cannot move on’. See Chris Merritt, “It was a mistake to mention sharia law, admits Islamic leader,” *The Australian* (17 June 2011), online: <http://www.theaustralian.com.au/>. Also, Ismael Essof, “Divorce in Australia from an Islamic Perspective” (2011) 36:3 *Alternative Law Journal* at 182-186. Essof argues that because there are few safeguards which protect Muslims, in particular Muslim women, against recalcitrant spouses in the divorce process, the Family law court should provide these.
marriage – the only ground for divorce under section 48 of the *Family Law Act* (Cth.). Similarly, a divorce decree (absolute) under Australian secular law will not be recognized as ending the religious Islamic marriage.

In Australia’s current ad hoc system, a wife seeking a Syariah divorce has to find ‘someone’ or some ‘organisation’ she believes can grant her a divorce in accordance with Islamic law. This may not be easy, especially for recent immigrants. There is also the likelihood of inconsistency in outcomes, concerns of unaccountability, and the possibility of error or bias. As no religious qualifications are laid down, and since religious functionaries are not assessed or appointed by the government, it is a system based on self-identification of expertise and/or an individual’s religious authority being accepted or recognised by other Australian Muslims. The men assuming this role are usually Sheikhs or Imams but this role could also be taken up by an individual Syariah scholar or a group of scholars or Imams (*majlis ulama*) who simply hold themselves out as sufficiently learned, pious or authoritative to make family law determinations, especially for the ethnic community with which they are aligned. These men who determine issues of Islamic divorce may look to contemporary juristic or modernist interpretations on matters such as polygamy, *talaq* divorce, *mahr* rulings, property settlement and child custody, or they may adhere to patriarchal, conservative and textualist interpretations prevalent in the more conservative Muslim nations or in the tradition of Salafi thought. It is known, for example, that certain Imams will not grant a *khula* divorce (divorce by redemption where the wife forgoes her *mahr* to buy her way out of the marriage) unless the husband first agrees to the divorce, nor will the wife be supported in her request for any remaining *mahr*. Also, a husband’s statement of facts may be accepted in preference to his wife’s in cases where she seeks a fault divorce, *fasakh*. This conservative approach may leave some Muslim women disadvantaged and vulnerable, especially recent migrants whose English is limited and who have little knowledge of other available avenues or contacts outside their immediate family or mosque. The phenomenon known as ‘limping’ marriages, where a secular divorce is

---

24 The Quran permits divorce but it is a disliked outcome, one that, if possible, should be avoided. Yet, the message in the Quran is also clear that couples need not stay in an unhappy or destructive marriage and should part ‘with kindness’. Men can divorce by *talaq* (pronouncement) and there are several forms of divorce available for women including mutual agreement (*mubarat*); *ta’liq* by breach of a marriage condition; *talaq-i-tafwid*, a delegated divorce; *fasakh*, an annulment or fault divorce; *khula*, a no-fault divorce but where a wife dislikes her husband and returns her *mahr*; and *dharar*, a dissolution because of a husband’s cruelty, and divorce by conversion.

25 Inconsistency may be simply a reflection of the diversity within the Australian Muslim population and a confirmation of the diversity of interpretations within ‘Islam’ itself.

26 There is a range of interpretations on this. In *khula*, the wife requests for a divorce and in return, provides her husband with compensation, which usually is the return of part or all of her *mahr*, or if deferred, to forego her rights to it, along with rights to maintenance during her *iddah*. The divorce is irrevocable. If the husband agrees, he will pronounce *talaq* on those terms, or a court will order him to do so once the court has settled the amount of the compensation payable by the wife. There is debate on whether the husband must agree to this and whether his lack of consent negates *khula*. For many centuries, the dominant position was that a grant of *khula* was contingent upon the husband’s consent. However, in recent times when this issue has been revisited, this fetter has often been removed.
granted or is available to a wife, but a religious one is denied, is well documented in Australia,\(^{27}\) in the United Kingdom,\(^{28}\) and even in secular but Muslim Turkey.\(^{29}\)

Whilst protection of all citizens is a goal for every legal system, is the realisation of problems such as limping marriages and related issues arising from religious or cultural rulings or practices, a sufficient ground for Australia to set up some form of Syariah Court? Several considerations are relevant. First, whether issues arising from divergence between religious law and state law are for the religion, in this case Islam in Australia, or for the government to decide. Similar conflicts arise in other faith traditions in Australia. Islam is not alone in requiring a religious divorce for its adherents. Other religions also do not accept that a divorce granted under Australian law dissolves a marriage which took place under their own religious law. Roman Catholics and Jews in Australia\(^{30}\) have an ecclesiastical or rabbinical court to make such determinations. These matters are internal to the religion and quite separate from the government which is not involved in any way. To make an exception for adherents of Islam would run contrary to accepted current practice. The second consideration is that whilst the Singapore model provides a formal Syariah court to which Muslim wives submit divorce applications pursuant to section 47 of the AMLA, this does not mean that an Islamic divorce will necessarily be granted. Noor Aisha Bte Abdul Rahman notes the dominance of ‘traditionalism’ in the court’s approach and interpretations.\(^{31}\) In upholding the view of the classic jurists that the husband must consent to a *khula* divorce, for example, the outcome is similar to that described in Australia as ‘patriarchal’\(^{32}\) and as one of the main contributors to ‘limping marriages’.\(^{33}\) Hence, the presence of a religious court would not guarantee modernist interpretations and in practice could restrict options available to Muslim women in Australia. Currently, if refused a *khula* divorce, she is able to seek out another scholar who may apply a different interpretation and grant the divorce. Moreover, she always has

---


\(^{30}\) In Roman Catholic Canon law there is no such thing as divorce, which means there is nothing for the church to recognize when a secular divorce is granted. Under Catholic Canon law, the exercise is not one of untying people from the marriage bond but of asking whether, according to established criteria, there was ever a marriage in the first place, that is, whether in the circumstances of the case there was ever a marriage, *ab initio*. Hence it is an annulment that parties must seek from the Church’s tribunal, an ecclesiastical court which consists of priests and lay men and women trained in Canon law.

\(^{31}\) It was noted above that ‘limping marriages’ can arise when an Imam requires a husband’s consent to his wife’s application for a *khula* divorce and he refuses to give his consent.


\(^{33}\) In limping marriages, the wife cannot remarry but the husband can because it is considered lawful for him in Islam to have more than one wife.
the right to obtain a secular divorce which will provide her with a financial and property settlement and a determination on parenting arrangements.

The result is that whilst the Singapore model provides Muslims with a separate, clear, consistent, and authoritative avenue for divorce and marriage, the ad hoc informal model in Australia offers wider choice in personal status matters.

III. LESSONS FROM SINGAPORE [THE SINGAPORE MODEL]

A. Grounded in History

Singapore’s model of legal pluralism is neither experimental nor reflexive. Formal legal pluralism has been a part of Singapore’s legal landscape for almost two centuries. The current conjoint system of Syariah and common law courts commenced in 1958 when the Syariah Court was established under the Muslims’ Ordinance 1957 (subsequently amended) which was replaced in the post-independence period by the AMLA. From independence, Singapore as a democratic Republic formally recognized that her Muslim citizens were legally entitled to have Islamic personal status law administered separately from the law which governed such matters for non-Muslims. This was a continuation of the legally pluralistic colonial model set up by the British in the 1820s in which, depending on one’s ethnicity or religion, separate legal orders for personal law operated. Sir Stamford Raffles negotiated with Sultan Hussein Muhammad Shah 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’. Syariah was formalized in three ways. First, there was the Mohammadan Marriage Ordinance (1880), which by 1957 had been amended as the Muslims’ Ordinance. Second, under the 1880 Ordinance, Islamic courts known as Kathi/Kadi Courts were established with exclusive jurisdiction over Muslims. In 1955, these were redesignated as Syariah courts. Third, separate administrative bodies were set up, including the Mohammadan Advisory Board established in 1915, which evolved into the Muslim Advisory Board in 1946. At the time of independence in 1965, Ahmad Nizam believed that the right for Muslims to adhere to Islamic law was so entrenched that the AMLA was facilitating ‘rather than creating a new jurisprudence of law.’ This is a significant factor underpinning the Singapore model.

34 Muslims (Amendment) Ordinance 1960.
35 AMLA.
36 Leong Wai Kum, Elements of Family law in Singapore (Singapore: LexisNexis, 2007) at 885-887. The Mohammedan Marriage Ordinance of 1880 allowed for the establishment of Kathi Courts.
37 Singapore was under the control of the Sultan of Johore, and Sultan Hussein was supported in that position by Sir Stamford Raffles. On the founding of Singapore, see Kevin Y L Tan, “Singapore: A statist legal laboratory” in E. Ann Black & Gary F. Bell, eds., Law and Legal Institutions of Asia: Traditions, Adaptations and Innovations (New York: Cambridge University Press, 2011) at 331.
The historical trajectory in Australia was quite different. In contrast, the colonial British government in Australia did not consider any form of legal pluralism. No recognition was afforded to the traditions, customs and practices of the Aboriginal and Torres Strait Islander peoples, and no treaty or arrangement was negotiated comparable to the negotiation undertaken with Sultan Hussein Muhammad Shah. From the time of the first (European) settlement, Australia was a ‘one law for all’ nation. When the six colonies federated in 1901, the Constitution omitted any recognition or acknowledgement of the first peoples of Australia.

As in past centuries, religious affiliation in Singapore continues to determine the applicable law and court for Muslims and for non-Muslims in a range of family law, succession and other matters. The High Court of Singapore has no jurisdiction to hear matters that fall within the exclusive jurisdiction of the Syariah Court. In family law matters, Singaporeans who are non-Muslims come under the jurisdiction of the Women’s Charter. Section 3 of the Charter sets out that it regulates ‘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’. Sections 35(2) and 35(3) of the AMLA sets out the areas of family law matters over which it has exclusive jurisdiction. However, the details and substantive aspects of what Muslim law is are ‘varied where applicable by Malay custom’ and hence, frequently left to the discretion of the court and the Legal Committee of Majlis Ugama Islam, Singapura (hereinafter MUIS). Section 33 of the AMLA directs the Majlis and its Legal Committee to ordinarily follow the tenets of the Shafi’i school; however, if it is against public interest to do so, another school can be followed with necessary explanations. Similarly, when the Majlis is requested for a ruling in relation to the tenets of another school of law, the Shafi’i school can be departed from. When the Syariah court has to determine the applicable law for issues of inheritance, section 114 of the AMLA sets out seven texts it recommends for consideration.

---

40 This was justified on the basis of the legal concept in international law, known as terra nullius – land belonging to no one. The validity of terra nullius in Australia was not considered by the High Court of Australia until 1992 in Mabo v. Queensland (No 2), [1992] HCA 23, 175 C.L.R. 1.

41 Currently, there is debate on the best way to redress this omission. To give recognition to the Aboriginal and Torres Strait Islander peoples in the Australian Constitution is seen as an important step towards building a nation based on mutual respect and understanding.

42 Supreme Court of Judicature Act (Cap. 322, 2009 Rev. Ed. Sing.), s. 17A(1).

43 See s. 3(2); Parts II to VI, Part X and s. 181-s. 182.

44 S. 35(3) states that “in all questions regarding betrothal, marriage, dissolution of marriage, including talak cerai taklik, khuluk, and fasakh, nullity of marriage or judicial separation, the appointment of hakam, the disposition or division of property on divorce or nullification of marriage, the payment of emas kahwin, marriage expenses (hantaran belanja) and consolatory gifts or mutaah and the payment of maintenance on divorce, the rule of decision where the parties are Muslims or were married under the provisions of the Muslim law shall, subject to the provisions of this Act, be the Muslim law, as varied where applicable by Malay custom”.

44 AMLA, s. 33(2).

45 AMLA, s. 33(3).

46 AMLA, s. 114(1) reads: “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 Quaran, by A. Yusuf Ali or
In secular Australia, religion has been seen as a private affair instead of a State affair, which is matched with a long history of distrust of sectarianism. At Federation in 1901 when the colonies of Britain united to form the Commonwealth of Australia, Christians made up over 95% of the population. Yet, the Constitution did not establish a state religion, opting instead for a de-establishment provision. Unlike the ‘pilgrim fathers’ in America who wanted to ensure their religion thrived, many of the free settlers who came to Australia sought to avoid the consequences that they had seen and experienced in the distrust and hatred arising from different Christian beliefs in God. Anti-sectarianism informed Australia’s secularism but there was always a space given for the practice of religion. Whilst Christianity dominated, Muslims were in Australia from the earliest days of settlement. Mosques were established along with churches, synagogues and temples. De-establishment means that the concept that adherents of one faith tradition must go to a separate system of religious courts for personal status matters (as in Singapore), runs counter to the established ethos of Australia. There is both a cultural preference and an entrenched practice for secularism to be prioritized over religiosity. In Australia’s secular system, each and every religious and spiritual tradition can request their adherents to apply their religious law and to follow their religious practices, but it must be voluntary adherence and not transgress any national or state law. For example, places of worship can be established; religious schools can be set up with government funding and assistance; counseling and community services are provided along religious lines; radio stations and newspapers can be run by religious bodies for their followers; burial places 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.

B. Determining Muslim Identity

The Singapore model shows that determining who is Muslim is a foundational question for the effective operation of the system. If the individual is Muslim, then the AMLA is applicable, whereas if the individual is non-Muslim, then the Women’s Charter will apply. Section 2 of the AMLA provides little guidance on who is a Muslim, simply stating that a Muslim is ‘a person who professes the religion of Islam’ and that the court’s jurisdiction applies to actions and proceedings in which ‘all the parties are Muslim or where the parties were married under the provisions of Muslim law’. There is


48 The pervasiveness and quality of secularism in Australia are explored by Bouma in Gary D. Bouma, Rod Ling, Douglas Pratt, Religious Diversity in Southeast Asia and the Pacific: National Case Studies (Dordrecht: Springer, 2010) at 4-14.

49 Ibid.

50 AMLA, s. 35(2).
consensus in Islam that a child born to a Muslim parent is by birth Muslim, as is a person who formally converts to Islam. Although the question of ‘who is Muslim’ may not frequently arise in the Singapore courts, it can be an issue in cases of mixed religious marriages or in situations of conversion, whether into or out of Islam. This is especially the case for marriage validity and for inheritance distribution where the estate of a Muslim must be distributed in accordance with Islamic inheritance laws. In a plural system where legal consequences and legal status flow from the Muslim designation, it can become a crucial determination. Apostasy, whilst a sensitive issue in Singapore, is lawful and does not have the legal ramifications as found in neighbouring Malaysia where an apostate can face not only legal difficulty converting out of Islam, but also criminal sanctions and/or detention in a Rehabilitation Centre. Unlike the compulsory reflection of one’s race on his Registration Identity cards, Singapore does not require one to state his religious affiliation. As ‘Malay’ is not defined in the Constitution as a person professing Islam, it is possible in Singapore to be racially and ethnically Malay but not be a Muslim. There are different views as to whether it would be the Syariah Court or the Civil Court which would make a determination on whether a person is Muslim, and it could fall within the jurisdiction of either court. In the Syariah system, a decision on religious adherence could be made by the person taking a religious oath in the Syariah Court declaring before Almighty God that he or she is or is not a Muslim; or a fatwa could be obtained from the Legal Committee of MUIS. Alternatively, in the civil courts, a statutory declaration could be made before a Commissioner of Oaths. Unlike in Malaysia, it is essentially for the parties to decide which court should make the determination in Singapore.

Although Singaporeans have greater autonomy over religious affiliation than in neighbouring 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 the Court has exclusive jurisdiction. This legal requirement is regarded differently by Singaporeans. Non-Muslims tend to call it a ‘concession’, some Muslims describe it as an ‘honour’ or ‘privilege’ given only to them, whilst others see it as their ‘obligation or duty’. There is a minority view that it is discriminatory and restricts their rights as Singaporeans by denying ‘the freedom of the individual to decide the forum to hear’ his or her dispute. This is because Muslims, or any person born to Muslim parents whether or not he or she practises or believes in Islam, are prevented from having the exclusive personal status issues determined by the civil court even when a Muslim prefers such an

51 Noor Azizan bte Colony (alias Noor Azizan bte Mohamed Noor) v. Tan Lip Chin (alias Izak Tan) [2006] 3 Sing. L.R. 707 (H.C.).
52 Re Mohammad Said Nabi, decd (1965) 31 MLJ 121.
53 AMLA, s. 111, s. 112.
55 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’.
56 An oath in Islam is a religious as well as legal procedure.
57 Supra note 36 at 891.
58 Supra note 3.
arrangement, or perceives that he or she may have a more advantageous outcome, or have his or her matter resolved more speedily.\textsuperscript{59}

Preventing access to the Federal Magistrates or Family Court in Australian court based on one’s religion would be unlawful discrimination in secular Australia. Even if a plural system designated on religious lines were introduced on a voluntary opt-in basis, rather than a mandatory rule, two problems would arise in Australia. The first is the concern that internal Muslim community pressure and informal coercion to choose the Islamic dispute resolution option could effectively undermine the free choice of Muslims, and in particular Muslim women. This was a concern raised in Ontario, Canada, which featured prominently in the objections by Muslim women’s groups regarding Islamic arbitration in the province.\textsuperscript{60} In Australia, echoing these sentiments is Joumanah El Matrah, the Director of the Islamic Women’s Council of Victoria, who argued that setting up a separate Syariah tribunal or court would amount to ‘legal ghettoization of Muslims’, and that ‘establishing a 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.’\textsuperscript{61}

The second concern is that Australia’s Muslim population is not as homogeneous as Singapore, where Malay ethnicity, language and culture and Shafi’i school dominate. Were there a Syariah Court established in Australia, which school of Islam would apply? There are Shia sects as well as a range of Sunni madhabs (schools of law). Which ethnicity would be given carriage of the court, given that Australian Muslims are made up of 56 ethnicities from 70 nations? Where would the court or tribunals be based, given the geographic spread of Muslims across Australia? Singapore has its only Syariah court located at Lengkok Bahru and kadies in districts easily accessible to all Singaporeans. In contrast, Australia is vast. The 500,000 Muslims in Australia are found in every city and also in many rural areas. Cairns is almost 3,000 kilometers from Melbourne, and Perth is 4,000 kilometers from Sydney, which is essentially the same distance between Perth and Singapore. An added difficulty is that there is a percentage of Muslims who are secular or nominal Muslims. What would the situation be with Australians born to Muslim parents who thereby are notionally Muslim but have embraced the Australian lifestyle – they do not attend the mosque, nor observe any of the five pillars of Islam, drink alcohol and have married non-Muslims? Could such a man suddenly choose a *talaq* divorce because he may see it as more advantageous for him than resorting to the Family Court? At the other end of the ideological spectrum, Australia has extremely devout textualist Salafi Muslims. This level of heterogeneity is a challenge to any entity claiming legitimate jurisdiction over dispute resolution for Muslims and stands in contrast to the Singapore situation.

In conclusion, it seems that the viability of the Singapore model rests heavily on the homogeneity of its Malay Muslim community who by and large are pleased to accept its

\textsuperscript{59} Supra note 22 at 415, 429.
\textsuperscript{60} Submission of Canadian Council of Muslim Women to the 2004 Review on the Ontario Arbitration Act and Arbitration Processes
\textsuperscript{61} Joumanah El Matrah, “A sharia tribunal is a contradiction of Islam” *The Age*, October 20, 2009
mandatory jurisdiction. Muslim identity can be readily ascertained from birth, conversion or marriage registrations with the Syariah court. Conversely, in Australia, neither religion nor race is put on official marriage, death or birth registers or certificates. However, as with marriage, parents can voluntarily choose to have their child undergo a religious ceremony such as a baptism, bar mitzvah, aqiqah, christening or other naming service, and similarly choose funeral and burial arrangements in accordance with faith requirements.

C. Working 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 and there is recurring interaction between the two. For example, the Syariah Court lacks powers of enforcement, so its orders for maintenance, mutaah (compensation), marriage expenses, custody, and property division are enforceable pursuant to section 53 of the AMLA but not reviewable, by the civil courts. 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, but all grants for of probate and letters of administration come from the civil courts. Also, disputes over the validity of wills are heard in the civil courts, but where the deceased was a Muslim, a fatwa from MUIS can be obtained to verify compliance with Islamic inheritance laws. A shared arrangement also operates with family law matters. Whilst the Syariah Court has exclusive power to hear and make an order on divorce, it does not have the power to determine matters of spousal maintenance or when a protection order should be issued. These must be remitted to the civil courts. 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’. This 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. The AMLA requires this to be with the consent of the parties and with the leave of the Syariah Court. Similarly, adoptions fall under the jurisdiction of the civil family court; the Court takes into account Islamic principles on adoption, to allow the child to keep the name of her birth parents, and not that of the adoptive family.

As section 42 of the AMLA states that the court will follow ‘the law of 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’, it appears that the Syariah Court applies the civil law of evidence rather than the Syariah law of evidence. Yet, it is difficult to...
ascertain the extent to which the obligation ‘not to apply’ is pursued. Knowledge of Singapore’s law of evidence is not a pre-requisite for appointment to the Syariah Court, but Hassan and Alhabshi note that a module on the civil law of evidence is offered in the MUIS training program.\textsuperscript{69} Many on the bench will have a background in the Syariah law of evidence. Similarly, the Syariah Court can apply legal principles from the civil law system when the issue is one not covered by Islamic law.\textsuperscript{70} Conversely, the civil courts will take legal advice on matters of Islamic law from MUIS. Lastly, the criminal offences contained in Part IX of the AMLA, 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,\textsuperscript{71} are heard, determined and sentenced in the civil courts.

The effectiveness and functionality of the relationship between the two legal systems and their respective courts are generally assumed. Lawyers in Singapore, non-Muslim and Muslim alike, rarely voice any criticism although there is often a concession that this ‘dichotomy is very sensitive’. Ahmad Nizam Abbas reflects the commonly expressed 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.\textsuperscript{72} Conversely, Leong Wai Kum sees the dual court system as ‘potentially problematic’. She argues that in resolving family law disputes, ‘apparent and real conflicts’ which cannot be resolved by ‘reference to a simple separation’ of jurisdiction of the two court systems do crop up.\textsuperscript{73} She concludes that as such conflicts are ‘notoriously difficult’ to resolve, ‘the eventual integration of the entire family law in Singapore to regulate all Singaporeans’ is likely.\textsuperscript{74} Abdul Rahman also identifies ‘significant problems’\textsuperscript{75} in the current system. While she does not favour cessation of the dual system, she advocates the 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 the AMLA, so the interpretation of Syariah resides with the judges of the court and with MUIS. As noted earlier, she feels the initial spirit of the framers of the AMLA, which was attuned to the contemporary needs of women, has been eroded by traditionalism.\textsuperscript{76} This becomes particularly important when Muslims are restricted from accessing the civil adjudicative forum for certain family law matters.

\begin{itemize}
\item \textsuperscript{70} Supra note 3 at 163, 174.
\item \textsuperscript{71} AMLA, s. 134, s. 135, s. 137, s. 139.
\item \textsuperscript{72} Supra note 3 at 163-187.
\item \textsuperscript{73} Supra note 36 at 903 with case examples of jurisdictional conflict given at 903-916.
\item \textsuperscript{74} Ibid. at 918.
\item \textsuperscript{75} Supra note 22 at 415, 416.
\item \textsuperscript{76} 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 the whole pattern which is put at risk’ as cited in Supra note 22 at 415, 416.
\end{itemize}
Clearly whilst there are some divergent views on the effectiveness of the relationship between the two courts, it is one of long standing with lawyers who are familiar and competent to be advocates in both.

D. Constitutionally Sanctioned

Singapore’s Constitution was drafted to entrench legal pluralism. It creates a special legal status for Muslims in recognition of Malays as ‘the indigenous people of Singapore’. The Constitution also guarantees its citizens ‘equality before the law’ and ‘equal protection’, but article 12(3) of the Constitution makes it clear that these guarantees do not extend to the regulation of personal law, which falls under the 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’ provided in article 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 article 12(3) is to allow judges, registrars, counselors and all personnel in the Syariah Courts system and in the Islamic Council – MUIS, to be appointed and funded by the government on exclusive religious lines. There is also a cabinet minister appointed to be in charge of Muslim affairs. In contrast, article 116 of 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 would prohibit any Australian government from establishing and funding a Syariah Court or Arbitral Tribunal where the qualification for judicial or arbitral appointment to office is a religious one. Whilst article 116 does not bind the states, family law is now a matter under Commonwealth, not state jurisdiction. Unlike article 153 of the Singapore Constitution which provides that the legislature can make laws for ‘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. The Australian federal 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 and the government-funded National Centre of Excellence in Islamic Studies established in 2007 during the time of the Rudd government to train Islamic scholars and Imams in Australia. Regulation and establishment of an equivalent entity to MUIS for adherents of one religion would most likely be held to be unconstitutional.

The Singapore Constitution facilitates legal pluralism whilst the Australian Constitution creates a significant roadblock to implementing a plural regime based on religious affiliation. Whilst it would be theoretically possible to amend the Constitution, this is a Herculean task requiring a referendum in which the majority of Australians and the

79 This was an initiative of the Howard government that came into operation in 2007. However, the training of Australian Imams proved impractical in the environment of an Australian University and all funding ended in 2011.
majority of voters in the majority of states support the change. Rarely are referendums successful. Just eight out of 44 referendums have succeeded, and political consensus for the change is essential. A contentious issue such as the introduction of legal pluralism akin to the Singapore model would not succeed. Governments of both political persuasions have consistently and publicly rejected the notion of Syariah law being applied in any formal sense in Australia.  

E. Professional and Transparent Operation

In contrast to Australia’s ad hoc system, Singapore’s model with a government funded and regulated Syariah Court creates a professional and transparent body. Trials and hearings are open with the power provided in section 46(2) of the AMLA for the court, if it thinks fit, to hold part or all of the proceeding in camera. This power is frequently exercised. Unlike in the common law courts, Syariah Court decisions are not formally reported and published, but there is an internal system of records which can be accessed by the legal representatives of the parties. This has allowed an informal system of precedents to develop, which facilitates consistency and predictability. Appeals are also possible. Decisions of both the Syariah Court and Registrars can be taken on appeal to the Syariah Appeal Board. This degree of transparency and the appellate review are two important safeguards lacking in Australia’s informal system. 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 and 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 are fair and accurate. Additionally, as discussed below, different outcomes are reached on the same issue. The Singapore model provides an oversight of legal decision-making, consistency in application of law, with the added safeguard of an appeal process.

---

80 Peter Costello, (Federal Treasurer) articulated the ‘One law for All Policy’ in “Worth promoting, worth defending- Australian citizenship, what it means and how to defend it”, Address to Sydney Institute, Sydney, 23 February 2006; Chris Bowen (Minister for Immigration) stated: ‘Anybody who calls for Shari’a law is not doing so in the name of multiculturalism. They are doing so as extremists and extremists need to be dealt with, whatever their creed’; see Sabra Lane, “Multiculturalism is back” interview with the Hon Chris Bowen, Minister for Immigration on ABC, AM program, 17 February 2011, online: <http://www.abc.net.au/am/content/2011/s3141073.htm>; Attorney General Nicola Roxon articulated 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’, cited in Patricia Karvellas, “Roxon baulks at role for Sharia by Australian Muslims”, The Australian (17 March 2012).

81 AMLA, s. 32(1), s. 46. S. 46(2) provides the Court with the power, if it thinks fit, to hold part or all of the proceeding in camera. This power is frequently exercised.

82 AMLA, s. 55. The minimum number of members on 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. See Supra note 3 at 163, 185.

The President of Singapore appoints the Presidents (senior judges) of the Syariah Court and also appoints ‘suitable male Muslims of good character and position and of suitable attainments’ to be kadies (judges) or naibs (assistant) kadies or Registrars of Muslim marriages. Other than gender, religion and suitability, the AMLA does not lay down specific qualifications or criteria for appointment to judicial office in the Syariah Courts as President, Deputy President, ad hoc Presidents, Kadis, or Registrars. In practice, the individuals appointed to these positions usually have knowledge and experience in either Syariah law or the common law, or both. There were discussions in 1997 at a Parliamentary Select Hearing on whether qualifications for the Syariah Court personnel should be mandated, but it was decided that none would be prescribed. Rather, it would be left to the government, through the Ministry of Community Development, Youth and Sports, to make appointments based on jurisprudential credentials, an upright and pious character, leadership qualities and familiarity with the civil law processes in Singapore. The latter is seen as important because the Syariah Courts do interact with the civil courts and should not be confined in their own ‘religious bubble’ removed from other legal and social processes.

Syariah Court appointments do not come with security of tenure, but are akin to those appointed by the Singapore Legal Service. This differentiates them from High Court judges in the common law system for whom there must be security of tenure. Parties are entitled to legal representation ‘by advocate or solicitor or by an agent, generally or specially authorized to do so by the Court.’ This does not exclude non-Muslims. As with judicial qualifications, the AMLA does not specify any qualifications or requirements for Syariah legal counsel. Ahmad Nizam Abbas notes that because there are no such mandated requirements or qualifications, a legal counsel must find the ‘motivation to equip oneself adequately’ in Syariah law and procedure, and the onus lies with the individual lawyer to engage in self-study, attend courses and seek guidance from experienced practitioners. Litigants frequently represent themselves, which is in keeping with the traditional practice in Syariah courts in the Middle East where each individual is accountable to and in dialogue with the qadi rather than allowing a lawyer to speak on his or her behalf. The Legal Aid Bureau can grant legal aid to litigants in the Syariah Court, when the means and merits requirements are met.

A significant difficulty for Australia would be to find persons with the jurisprudential knowledge and adjudicative skills to operate an equivalent system of specialist courts, or

---

84 AMLA, s. 34(1).
85 AMLA, s. 91.
86 AMLA, s. 90.
87 Ad hoc Presidents are appointed by the President to act in specific cases. AMLA, s. 34(b).
88 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.
89 Personal communication.
90 President Alfian Kuchit studied Syariah at the International Islamic University, Malaysia and has an LLM from Columbia University. For his qualifications, see Supra note 70 at 189-213.
91 The President of Singapore may at any time, at his pleasure, cancel the appointment. AMLA, s. 91(5).
92 AMLA, s. 32(1), s. 39.
93 Supra note 3 at 163, 181.
a Council equivalent to MUIS which is able to issue rulings and hear appeals. Who would make appointments and provide oversight? What qualifications or skill set would be required? The scheme set up in 2007 to train Australian Imams ceased in 2011. Dr Mohammad Elmasry of the Canadian Islamic Congress raised similar concerns in Canada, where he believed there were only ‘a handful’ of scholars ‘fully trained in interpreting and applying Sharia law – and perhaps as few as one’. The second challenge is to find jurists who can apply the range of juristic interpretations of Islam to mirror the diversity found amongst Australia’s Muslims. Again, this is in contrast with Singapore’s relative homogeneity of Malays, Sunni tradition, and Shafi’i school of law which has been the dominant school of thought for centuries, and continues to inform the jurisprudence of MUIS and the Syariah Court. Unlike Singapore where ‘traditionalism’ has been the hallmark of its jurisprudence, 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’. Given this pluralistic context, a formalised and officially recognised Syariah Court system in Australia would face practical obstacles in terms of the jurisprudence to be applied, the interpretative approach to be adopted, the persons entrusted with the role of adjudication, and how appointment, oversight and enforcement would occur.

F. Jurisprudential Consistency

As noted above, the need for consistency in the interpretation of Syariah is essential to provide any measure of certainty and predictability in the application of Islamic law. Consistency is less likely in the ad hoc unofficial system in Australia. In Singapore, jurisprudential consistency comes not only from adhering predominately to Shafi’i tenets, but also from the supervisory role of MUIS through its Appeal Board and also the MUIS Legal Committee which can issue fatwas (legal opinions on matters of Islamic law). Section 31 of the 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. In keeping with the tradition of ifta in Islamic law, a question requiring a

---

94 AMLA, s. 33.
95 Traditionalism has been discussed earlier; it can be defined as ‘a dogmatic attitude that clings firmly to old ways, resisting innovations or accepting them only unwittingly’. See Supra note 22 at 415, 416.
97 AMLA, s. 33(1) specifies 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, s. 33(2) states ‘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.’
98 AMLA, s. 30.
99 Ifta (the issuing of fatwas)
Fatwa on any point of Islamic law can be asked by ‘any person’\(^\text{100}\) by a court of law, including the Syariah Court\(^\text{101}\) and the Committee can ‘of its own motion’ make and publish any ruling or determination.\(^\text{102}\) The process involves making a draft ruling which, if it is unanimously approved of by the Legal Committee,\(^\text{103}\) 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’.\(^\text{104}\) The goal of consistency is further promoted by section 33 of the 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.’\(^\text{105}\)

The role of the Legal Committee provides not only the Syariah Court with an authoritative source for interpretations of Sharia law, but also fulfils that role for the civil courts. Unlike the Syariah Court, the civil courts are not bound by the ruling of the Legal Committee, although the cases show consideration and respect for the Committee’s rulings.\(^\text{106}\) That the civil courts have one entity to which they can turn to for an Islamic law opinion is a valuable attribute of the Singaporean model. In Australia, who qualifies 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 more important fatwas are published in Malay, English, or both languages. They 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, and advanced medical directives, the permissibility of using ethanol as a food additive, and whether a particular group engaged in deviant teachings (on Islam). These questions would also resonate with many Muslim Australians. The role fatwas fulfill in the Islamic system is not limited to Muslim countries or to countries like Singapore which apply Syariah law. Fatwas are equally, if not more important, in countries like Australia with a preponderance of immigrants, rather than a long settled population. In order to accommodate Islamic religious requirements within a secular framework, fatwas are of particular significance for Australian Muslims.\(^\text{107}\) They facilitate social and cultural transformations at a personal, individual and private level. Alexandre Caerio’s research in Europe also found that the

\(^{100}\)AML\(A\), s. 32(1).
\(^{101}\)AML\(A\), s. 32(8).
\(^{102}\)AML\(A\), s. 32 (6).
\(^{103}\)AML\(A\), s. 32 (4) includes those members present and entitled to vote.
\(^{104}\)AML\(A\), s. 32 (7).
\(^{105}\)AML\(A\), s. 33(1) read with s. 33(2) state 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 AML\(A\), s. 33(3).
demand for fatwas in the West appears greater than in Islamic countries. He argues this because there is a discontinuation in the transmission of Islamic knowledge, which increases the need to find ways to adapt Islamic law to the western context and allow women to find ‘elaborate strategies of survival’ for the different normative orders.

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. Alternatively, it can be seen as a plethora of views which appropriately reflect the voluntary nature of ifta as a tradition and also gives voice to 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 Imams at their mosques; or to a scholar or organization in their country of origin; and last but not least, to the Internet’s many online fatwa sites. The process of searching Islamic websites for a religious ruling has been called ‘fatwa shopping’ or surfing the ‘inter-madhab net’. All sorts of new, alternative and diverse interpretations of Islam can be found online but traditional and more conservative versions appear dominant. The concern is two-fold. First, on the Internet, almost everyone can hold themselves out as an authority and issue legal opinions whether or not they have genuine Syariah credentials. Second, these foreign Islamic websites (not Australian ones) have Muslim scholars who answer the questions without necessarily understanding life in Australia. If the question closely relates to life and social interaction in an Australian context, the answer might not be contextually suitable. Of course, Singapore’s Muslims can also go online to surf the ‘inter-madhab net’, but the presence of a national

---


109 Ibid.


112 Islam on-line, based in Doha, Qatar with fatwas issued by a committee of scholars headed by Dr. Yusuf Qardawi, online: <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, online: <http://www.islamtoday.com/fatwa_archive_main.cfm>; Ask the Imam, South African site with fatwas issued by Mufti Ebrahim Desai, online: <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, online: <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, online: <http://www.fatwa-online.com/>.

113 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, strongly forbids it. See online: <http://www.syariahonline.com/new_index.php?id/1/cn/24458> strongly forbids it, so does, Islam Q&A, http://www.islam-qa.com/en/ref/947/Christmas.>
ifta body is a stabilising and unifying force, and fatwas issued by MUIS are cognizant of local conditions.

IV. CONCLUSION

Singapore shows the common law world that two separate legal regimes can co-exist, work effectively, and stand the test of time. Jurisdictional conflict does occur, and depending on one’s view, such conflict is either minimal or ‘notoriously difficult to resolve.’ However, legal uncertainties are worked through and on the whole, the model seems to have received a high level of acceptance amongst Muslims and Singaporeans generally. The AMLA and the Syariah system are said to be ‘cherished by the (Muslim) community’. This level of acceptance and viability of a plural model warrants consideration elsewhere as it has arguably been an avenue for social inclusion and generally harmonious relations between the Singapore’s Muslim Malays and its non-Muslim Chinese majority. 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. Also, 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 are evident. If Singapore’s form of legal pluralism sends a message of respect for Syariah which 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. Similarly, if the constitutionally sanctioned operation of Syariah Courts demystifies Syariah 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, and Muslims as citizens. Whilst it would be simplistic to conclude that the presence of the Syariah Court and the MUIS alone has resulted in a ‘harmonious’ Singapore, the end result is that legal pluralism is a viable option.

Whether Singapore’s model of legal pluralism is one that Australia should adopt is another question, as transplants do not always work in the same way in a new

114 Supra note 36 at 918.
118 Kevin Dunn, “Australian public knowledge of Islam” (2005) 12:1 Studia Islamika at 1, 8
119 Scott Poynting et al., Bin Laden in the Suburbs: Criminalising the Arab Other (Sydney: Institute of Criminology, 2004); Centre for Muslim Minorities and Islamic Policy Studies; see also Muslim Voices: Hopes and Aspirations of Muslim Australians. [report] Monash University 2009, 6; ISMA, Listen: National Consultations on Eliminating prejudice Against Arab and Muslim Australians [report]. Sydney, HREOC, 2004, 45.
environment. This paper has reviewed six features of the Singapore system and drawn lessons from each. The first is that legal systems are very much grounded in their own history and circumstances. They evolve and develop in a way that resonates with the society they serve. In Singapore, Islamic law and the Syariah system are an indigenous and accepted part of the island’s legal landscape. Resistance to legal pluralism in Australia is also grounded in its history from colonial times. Both systems are well entrenched and have considerable respect, trust and allegiance. Although Australia’s ‘one law for all’ is not without strong critics (just as the Singapore model has its critics as noted earlier), it has attained broad acceptance as an inclusive system in which no one is refused access to any court on grounds of race or religion.

A plural system with two streams of courts with concurrent jurisdiction based on religious affiliation, undermines something still culturally and constitutionally entrenched in Australia. Unlike Singapore’s settled population, many recent Muslim immigrants to Australia left their homelands (some as refugees and others voluntarily) because of religious intolerance arising from state preferencing of one sect over another, which has manifested in disadvantage, and even in brutality and civil war along sectarian lines. The assumption that the majority of Muslim Australians would want to go down a sectarian preferring route in which they would be treated differently from other Australians by having to go to Syariah Courts where religious laws are applied is likely to be false. This was also the lesson from Ontario, Canada’s failed experiment of legislating for faith based arbitration. Although some Muslims argue that legal pluralism is a right that should come with citizenship in a liberal democracy and that the Australian government should follow the Singapore-style model, this is difficult to sustain when no other religion has its body of law accorded legal recognition or 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, and even Christianity which is the religion of the majority, do not receive similar priority. 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’.

---

120 Organisations voicing opposition include the Australian Federation of Islamic Councils, the Islamic Friendship Association, the Australian Islamic Mission, the Islamic Council of Western Australia, and Sharia4Australia.  
121 Supra note 49.  
123 Jan A Ali, “A Dual Legal System in Australia: the Formalization of Shari’a” (2011) 7:4 Democracy and Security at 354, 367. Also, AFIC argued in their submission to the government that by not recognizing Sharia law and not allowing for Sharia Courts to be established, the Australian government is treating Muslims as ‘second class’ citizens.  
124 Supra note 62.
In practical terms, Australian Muslims desirous of greater legal accommodation have made little headway in the quest for an official and government funded system of Sharia Courts or tribunals. It must be remembered, however, that legal pluralism still operates, but only at the unofficial, informal and extra-judicial sphere. This comes with many resultant problems as discussed in the paper but it does give Muslims in Australia the freedom to live their lives in accordance with Syariah, in so far as following a religious precept does not violate a law of Australia. As discussed earlier, a Muslim couple in Australia can marry according to Islamic law and have a valid nikkah which is also registered; they can choose just the Islamic marriage; they can bypass a religious ceremony in favour of a secular one; they can cohabit without marriage; and even enter a same-sex civil union. Australian Muslims are afforded the same relationship choices as other Australians: the decision is theirs to make. Conversely, Muslims have choices denied against them in Singapore.

Lastly, the crucial lesson from Singapore is that indigenous Malay homogeneity is more conducive to a formal Syariah model than Australia’s heterogeneity. For many in Australia, Islam remains central to their identity, but that Muslim identity is conceived in multifarious ways. Whilst Singapore taps into a predominately Malay ethnicity, language, culture, values and practices, Australia’s Muslims reflects the diversity found across the Muslim world. Although united by a shared belief in Islam and the concept of ummah, (a worldwide community of believers), 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). This diversity supports the notion of ‘Islams’ rather than one Islam. Authority within the Muslim community in Australia is factionalised and complex, marred by dissention and acrimonious disputes on leadership.

---

125 In 2005, Imam Abdul Jalil Ahmad of the Islamic Council of Western Australia proposed setting up a Court in Western Australia comprising ten Islamic leaders to deal with divorce and separation. See “Muslim Leaders call for a Sharia Divorce Court” The World Today, ABC Radio (7 April 2005). Also, the Australian Federation of Islamic Councils (AFIC) made a submission to the government in April 2011 entitled ‘Embracing Australian Values - Maintaining the Right to be different’ which made a similar case as have Muslims groups such as Islamic Friendship Association, Australian Islamic Mission, and Sharia4Australia.


127 For example, contracting for an under age marriage, facilitating a forced marriage or providing corporal punishment to a Muslim consuming alcohol violate Australian law.

128 A Muslim couple in Singapore must solemnize their marriage according to Islamic law (Part IV of the AMLA) and register the marriage with the separate registering body for Muslims (Registrar of Muslim Marriages (ROMM)) pursuant to Part VI of the AMLA. They risk criminal sanction if they were to live together without marrying.


representative bodies, there is no central, collective authority speaking for Muslims, and neither is there one issuing fatwas. This can be readily contrasted with Singapore where one organisation, MUIS, fulfils these roles. Internal Muslim pluralism and division militate against a formal Syariah court or tribunal system. However, one can be a good, pious or devout Muslim without such an institution and without enacted Syariah law. One of the larger immigrant communities in Australia is from Turkey, a secular Muslim nation which also does not have Syariah Courts or Syariah law. Since 1923, the Turks have resolved their personal status matters quite differently from their Muslim neighbours in Iraq, Iran and Syria and yet this does not make the 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 Islamic law, but also 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. 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. Perhaps, this plurality of views and competing juristic visions should be seen not as a deficiency, but as a healthy indication of freedom of religion and expression in a vibrant democracy.

---

131 E.g. Some of the bodies which claim to represent Muslim in Australia are: the Australian Federation of Islamic Councils (AFIC), the Darulfatwa Islamic High Council, the 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 as various Islamic Societies and Associations designed on ethnic lines. On the growth of this array of Islamic organizations, including those with connections to international movements, such as Al-Ikhwan al-Muslimin (the Muslim Brotherhood), see Jan A Ali “A Dual Legal System in Australia: the Formalization of Shari’a” (2011) 7:4 Democracy and Security at 354, 363-365.

132 Countries of birth data from ABA Census of Population and Housing conducted in 2006 shows that Lebanon, Turkey, Afghanistan and Pakistan 4.1% have 8.9%, 6.8%, 4.7% and 4.1% of the Australian Muslim population respectively.