University of
Western Sydney

CENTRE FOR THE STUDY OF
CONTEMPORARY MUSLIM SOCIETIES

Sharī'ah and Legal Pluralism

One day conference
University of Western Sydney
Bankstown Campus, Building 5.LG.15
7th of July 2010

Legal pluralism has often been associated with post-colonial legal developments especially where common law survived alongside tribal and customary laws. Focusing on Sharī'ah, this conference will examine the legal policies and experiences of various societies with different traditions of citizenship, secularism and common law. Where large diasporic communities of migrants develop, there will be some demand for the institutionalization of Sharī'ah at least in the resolution of domestic disputes. This one day event will test the limits of multiculturalism by exploring the issue that any recognition of cultural differences might imply a recognition of legal differences, and will explore the debate about post-secular societies specifically to the presentation and justification of beliefs and institutions by both religious and secular citizens.

Program

10:00 to 10:30	Prof. Nancy Wright (University of Western Sydney): Opening of the morning session.
10:30 to 11:10	Prof. James Richardson (University of Nevada, Reno): "Religious Freedom and Legal Pluralism: A Structural and Socio-Legal Analysis"
11:10 to 11:50	Prof. Bryan Turner (City University of New York and University of Western Sydney): "Comparative Analysis of Legal Pluralism: citizenship, sovereignty and post-colonialism"
11:50 to 12:30	Ms Jamila Hussain (University of Technology, Sydney): "More than one law for all: Legal pluralism in our near north".
12:30 to 13:15	Lunch
13:15 to 13:30	The Hon. Paul Lynch M.P. (Minister for Industrial Relations, Minister for Commerce, Minister for Energy, Minister for Public Sector Reform, and Minister for Aboriginal Affairs, NSW): Opening of the afternoon session.
13:30 to 14:10	Dr. Jan Ali (University of Western Sydney): "Dual Legal System in Australia: Sharī'ah and Secular Law".
14:10 to 14:50	Prof. Razeen Sappideen (University of Western Sydney): "Islamic Banking in Australia: The need for meaningful pluralism".
14:50 to 15:30	A/Prof. Malcolm Voyce (Macquarie University): "Legal Pluralism, Family Personal Laws and the Rejection of Sharī'ah in Australia".
15:30 to 16:00	Afternoon Tea
16:00 to 17:00	A/Prof. Adam Possamai (University of Western Sydney): Concluding comments and further discussion

The MC for the Conference is A/Prof. Adam Possamai.
Event organised by the Centre for the Study of Contemporary Muslim Societies (http://www.uws.edu.au/cscms)

Part 1: Sharīʻah and Legal Pluralism: an overview

Religious Freedom and Legal Pluralism: A Structural and Socio-Legal Analysis

James T. Richardson

University of Nevada, Reno

The presentation will relate ideas and concepts from "The Sociology of Religion Freedom: A Structural and Socio-Legal Analysis" to theories of legal pluralism. It is posited that certain characteristics of legal systems such as presence of constitutional and other legal protections for religion, amount of religious pluralism, allowable autonomy and discretion of judicial systems, pervasiveness of the reach of legal norms, centralization of legal systems, type of system (adversarial versus inquisitional), among others, will assist in understanding how and the extent to which legal pluralism flourishes in contemporary societies. Reference will also be made to William Chambliss' dialectic approach to explaining the development of law, as his approach offers insight into the hybrid legal structures found in situations of legal pluralism.

Comparative Analysis of Legal Pluralism: Citizenship, Sovereignty and Post-colonialism

Bryan S. Turner

University of Western Sydney and State University of New York

Early British colonialism was originally driven by the pragmatic trading needs of the East India Company which only interfered with local custom and tradition in the interests of company profit. To some extent subsequent British governments adopted similar policies and this strategy partly explains why post-colonial states such as Singapore, Malaysia and most African states have always had legal pluralism. In many post-colonial societies there was in the late twentieth century a political drive by indigenous peoples for customary law and hence the principle of the unitary sovereign state was at least in Latin America weakened. In the contemporary situation, the prospect of accepting Shari'ah in many European and North American societies has been rejected on precisely the issue of sovereignty, despite the fact that for example religious courts (both Jewish and Muslim) have often operated in such societies. The recent protest against the Archbishop of Canterbury's public lecture is an obvious example. This paper argues that acceptance of religious law (of any variety) in the public domain can only work on the basis of strict secularization (the state's religious neutrality) and on the enforcement of gender equality. However, if accepting religious law means in practice accepting third-party arbitration, then legal pluralism is not a direct threat to state sovereignty. Furthermore with the Internet some degree of informal but popular arbitration takes place between individuals in ways that are compatible with Shari'ah as a consensus-seeking legal tradition. In a broader framework however the decline in direct personal taxation, the disappearance of conscription and the growth of legal pluralism (the framework of the nation state) does imply both the development of a post-national and weaker state, and the erosion of citizenship. We need to be worried about both.

More than one law for all: Legal pluralism in our near north

Jamila Hussain

UTS, Sydney

It is virtually an article of faith for politicians and lawmakers in Australia and other common law countries that there must be 'one law for all.' For these people, equality under the law means that all people must be treated in exactly the same way by the legal system, regardless of differences in cultural background or religious belief. Among neighbouring countries to our near north, this is not the case. Legal pluralism exists in Malaysia, with a formal system of Shari'ah for Muslims and a separate system of Shari'ah courts. Additionally native courts exist to resolve problems relating to members of indigenous communities. In Indonesia Shari'ah courts exist alongside the civil courts to hear family law and inheritance matters relating to Muslims. In some areas of Indonesia, broader Shari'ah laws and regulations have been introduced. Islamic finance flourishes in both countries with its own structures and regulations. Adat (customary) rules also continue to exist alongside the formal legal system. Legal pluralism is not without its difficulties. There have been problems of jurisdiction, difficulties in deciding whether a person belongs in a particular category subject to a certain law, what to do when a person evinces a desire to leave a category and what to do with cases involving persons from two or more different legal categories. Despite these problems it can be argued that in Malaysia at least, legal pluralism works reasonably well. This paper examines the origin of legal pluralism in Malaysia and Indonesia and outlines ways in which governments have sought to deal with the challenges it presents.

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Part 2: Sharīʿah and Legal Pluralism in Australia

Dual Legal System in Australia: Sharīʿah and Secular Law

Jan Ali
University of Western Sydney

Legal pluralism or dual legal system is in essence a post-colonial phenomenon. People movement – migration – from a poor South to a rich North started in earnest at the end of the colonial era. Many Muslims were part of this migration process and as a result we see today visible Muslim presence in many countries of the West.

In a number of countries of the West today, the demand by Muslims for dual legal systems, is fast growing and is a direct legacy of post-colonial migration processes. Great Britain, which has over two million Muslims, for example, in late 2008 officially endorsed sharīʿah (Islamic law) tribunal governing marriage, divorce, and inheritance to make legally binding decisions when parties involved agree.This paper looks at the issue of dual legal system in Australia in relation to the establishment of sharīʿah tribunals or courts. The paper explores the existence of the need for sharīʿah tribunals or courts in Australia. It argues that the demand for the establishment of sharīʿah tribunals or courts is a rational and practical one. Given that Islam is a permanent feature of Australian multiculturalism and Muslim population through migration and birth is fast increasing, sharīʿah tribunals or courts governing marriage, divorce, and inheritance should be permitted to made legally binding decisions when parties involved are in agreement.

Islamic Banking in Australia: The need for meaningful pluralism

Razeen Sappideen
University of Western Sydney

This discussion examines and comments on the benefits and detriments of having a parallel system of banking law for Islamic banking within a predominantly non-Islamic legal environment. The key point made here is that unlike personal systems of law such as marriage and inheritance, banking and commercial laws are primarily tax driven and as such Islamic banking loses out on the tax benefits available to conventional banking practice.

Legal Pluralism, Family Personal Laws and the Rejection of Shari'ah in Australia

Malcolm Voyce
Macquarie University

In some western countries, which have Muslim minorities, in the last few years there has been a debate about the role of Shari'ah law in the context of domestic family law. In Australia there has been a negative response to the adoption of Shari'ah law as this form of law has been seen as divisive, patriarchal and inconsistent to the notion of the rule of law. Underlying these comments about Shari'ah has been the implication that Islamic law was backward and patriarchal whereas western law was both secular and egalitarian. The aim of my paper is to do two things. First, to show the extent that matrimonial settlements by Muslims on divorce reflect a variety of personal practices and strategies towards Shari'ah law and Australian family law. Second, we wish to examine the values of Australian law and how law as a 'form of practice' excludes Muslim values.

Biographies

Dr Jan Ali is a Sociologist of Religion (Islam). He lectures in Islamic Studies in the School of Humanities and Languages and simultaneously holds a title as the Community and Research Analyst in the Centre for the Study of Contemporary Muslim Societies at the University of Western Sydney. His main sociological focus is on the study of existential Islam. In recent years Jan has been invited by a number of organizations in Sydney to deliver Public Lectures and late last year he was invited by the New South Wales Police to deliver a Public Guest Lecture entitled Improving Relations Between Muslim and non-Muslim Australians Using Community Level Initiatives. Jan has published a number of journal articles on different aspects of Islam and has just completed a book tentatively entitled Islamic Revivalism Facing the Modern World: A Study of the Tablīgh Jamāʿat which will be published later in the year by New Dawn Press.

Jamila Hussain is a Senior Lecturer in the Faculty of Law at UTS, teaching Islamic Law and Asian Law and Legal Systems to Australian law students. She has a Graduate Diploma in Shari'ah Law and Practice and a Masters in Comparative Law from the International Islamic University in Malaysia as well as BA & LLB qualifications from the University of Sydney. Before taking up academic work she practised as a solicitor in NSW, gaining much practical experience in Family Law and she has continued this interest in her academic career particularly concentrating on the needs of Muslim women.

She has written and spoken extensively on this subject at conferences and seminars both in Australia and overseas, her most recent works being "Finding the women's space" in Tanja Dreher & Chris Ho (eds) Beyond the Hijab Debates, 2009 and a survey of the views of Australian imams towards women's issues in Shahram Akbarzadeh (ed) Challenging Identities: Muslim Women in Australia, 2010. She has also contributed the 'Australian Diasporas' entry to the Brill online Encyclopedia of Women and Islamic Cultures.

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Biographies (continued)

The Hon. Paul Lynch M.P. joined the NSW Branch of the Australian Labour Party in 1979 and has been the member for Liverpool – NSW Legislative Assembly for the Electorate of Liverpool – since 1995. He has been an international observer for the trial of Colombia Three (Bogota, Colombia) in 2003 and of the 2006 Marching Season (Belfast). He worked as a solicitor from 1980 to 1995, and he is now the NSW Minister for Industrial Relations, Minister for Commerce, Minister for Energy, Minister for Public Sector Reform, and Minister for Aboriginal Affairs.

Adam Possamai is Associate Professor in sociology at the University of Western Sydney (UWS). He is the author of Sociology of Religion for Generations X and Y, Religion and Popular Culture: A Hyper-Real Testament and In Search of New Age Spiritualities. He is a former President of the Australian Association for the Study of Religions, the current Secretary/Treasurer of the Executive Board of RC22 (Sociology of Religion) from the International Sociological Association, and was the 2002-2007 co-editor of the Australian Religion Studies Review. He is the current programme co-coordinator for the Sociology of religion section for the next World Congress of Sociology in 2010 in Sweden. He was one of the Associate Heads of School from the School of Social Sciences, UWS, specialising in research and has been acting as the director of the Centre for the Study of Contemporary Muslim Societies. His work has been published in English, French, Spanish, Romanian and Slovakian.

James T. Richardson, J.D., Ph.D., is Professor of Sociology and Judicial Studies and Director of the Grant Sawyer Center for Justice Studies at the University of Nevada, Reno. He also is director of the Judicial Studies graduate degree program for trial judges, a program offered in conjunction with the National Judicial College and the National Council of Juvenile and Family Court Judges, both of which are headquartered on the University campus. His research focuses mostly on comparative studies of law and religion and on use of expert evidence in legal systems. Recently he has been doing research on treatment of religion and religious groups in judicial systems such as constitutional courts and the European Court of Human Rights. His latest books include Regulating Religion: Case Studies from Around the Globe (Kluwer, 2004).

Professor Razeen Sappideen joined UWS as Foundation Professor of Law in 1994, and was for some time Dean of Law. Professor Sappideen holds the LLM (Hons) Syd, LLM (Pennsylvania) in Tax Law, LLM (Columbia) in Corporations Law, and the JSD (Columbia) in the area of Acquisitions and Mergers Law. He is admitted as a Solicitor and has been a Consultant to several leading Law and Accounting firms. He is also a member of the European Corporate Governance Institute.

Bryan Turner, the Director of the Centre for the Study of Contemporary Muslim Societies, is also Professor of Social and Political Thought in the School of Humanities and at UWS. Professor Turner wrote his first book Weber and Islam in 1974 and has since established an international reputation for his work. He has served as Dean of the Faculty of Arts at Deakin University; as Professor of Sociology at the University of Cambridge; and more recently as a Professor in the Asia Institute at the University of Singapore and as the Alona Evans Distinguished Visiting Professor at Wellesley College, USA. He is the founding editor of the journals Body&Society, Citizenship Studies and Journal of Classical Sociology, and an editorial member of numerous journals including: British Journal of Sociology, European Journal of Social Theory, Contemporary Islam and Journal of Human Rights.

Dr. Malcolm Voyce is an Associate Professor of Law at Macquarie University, Sydney. He holds a Doctorate in Law from London University (1983) in Indian Religions and a Doctorate in Sociology, on Foucault and 'governance', from Macquarie University, Sydney (2001). He is a member of the Centre for Social Inclusion at Macquarie University and a group of scholars working on religion and the law. He has published widely on religion and the law in such journals as The Journal of Legal Pluralism, Journal of Law and Religion and The Australian Review of Religious Studies.

Professor Nancy Wright is Acting Executive Dean of the College of Arts. She was Head of the School of Humanities and Languages from November 2006 to July 2009 and Deputy Dean from August 2009 to March 2010. Prior to her appointment at the University of Western Sydney, she taught at the University of Newcastle, NSW, and at Yale University, USA. She has been Visiting Professor of Law at the University of Western Ontario (Canada) and the University of Florida-Gainesville (USA). She has held fellowships at many international research centres, including the Humanities Research Centre (ANU), the Huntington Library (USA), the John Carter Brown Library (USA) and the Centre for the Study of Religion and Society (Canada). Her current research, funded by an ARC Discovery Project grant, studies the practices of collaboration by Indigenous and non-indigenous Australians working together on film and literature from the 1960s to the present. Her other research areas include: property rights in British settler societies, particularly Australia and Canada, the status of women in nineteenth-century Canada and Australia, and married women's property rights from the seventeenth to the nineteenth century.

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