OCEANS APART : THE COCOS ISLANDERS' VIEW OF AUSTRALIAN FAMILY LAW

The communities of the Cocos and Christmas Islands constitute a small but unique minority in the Australian political system. The two groups of islands are geographically remote from Australia, being about 2,800 kilometres northwest of Perth in the midst of the Indian Ocean. A substantial majority of the inhabitants on the Cocos Islands and a substantial minority on Christmas Island are of Malay stock, speak the Malay language and profess Islam as their religion.

In recent months the voices of the inhabitants of this normally peaceful backwater have been loudly raised in indignation. Faxes, letters and phone calls have gone back and forth between the islands and Canberra and the protest has reached as far abroad as Malaysia and Indonesia where the islanders have made appeals for help against what they see as the high-handed attitude of the Australian government. The reason for all this furore? The Australian government has, in its wisdom, repealed the Muslim Ordinances which formerly regulated the islanders' personal and family relationships, and imposed the Commonwealth Marriage Act 1969 and Family Law Act 1975 on them.

The historical background to this event is quite interesting. Up to 1955, the Cocos Islands were British territory but under the control of the Clunies-Ross family who administered the islands as a personal domain. In that year they became non-self-governing territories under Australian control. No wide reaching changes were made to the legal situation on the islands, which was then based on existing Singapore laws.

In 1984, under United Nations supervision, the Cocos Islanders voted for integration with Australia as an alternative to independence (not really feasible with a population of only 400 or so people), or partial integration, which they feared might have left them dominated by the Clunies-Ross clan. No doubt the Australian government's promise of A$8 million towards a

housing programme acted as an incentive to integration, and thus the Cocos Islanders became Australians.

At the time, the Australian government promised the islanders that it would leave the community "to manage its own affairs to the greatest extent possible, and without interference in its culture, traditions, religion and land use ...".[1] However, it would extend all "appropriate" Commonwealth legislation to the territory.

In June 1992, the Government introduced the Territories Law Reform Bill into Parliament. It was passed on 27th June and took effect from 1st July 1992. This Bill introduced a larger number of Commonwealth and West Australian Acts to the territories. Among them were the Marriage Act and the Family Law Act which govern the matrimonial affairs of all other Australians. The islanders objected strongly, both to the legislation itself, and also to the way in which it was introduced.

In the first place, they said, they had been operating under the Muslim Ordinances for many years, certainly since well before the islands came under Australian control, and they were quite satisfied with the operation of these Ordinances which were similar to those which currently operate in Singapore and in Malaysia as the personal laws of Muslims. If there was any need for updating, the Brother Hikmatullah Asikin, the Imam (religious leader) of Christmas Island, was prepared to revise them in accordance with Islamic law.[2]

Secondly, although there had been some discussion of possible legal changes with representatives of the Australian government between 1989 and 1992, the islanders had not been told specifically that the Government intended replacing the Muslim Ordinances with Australian Family Law legislation, and they felt that they had not been properly consulted about changes which would have a radical effect on their religion and culture. The view of the community was expressed in a joint press statement issued by all the Imams of Cocos and Christmas Island in November 1992 in which they said:

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[1]Australian Government Information Paper quoted in correspondence from Australia Federation of Islamic Councils (AFIC) to Regional Islamic Dakwah Council of South East Asia and the Pacific (RISEAP) 1.12.1992 p 1.

[2]Letter from Imam Hikmatullah Asikin to Christmas Island Consultative Committee 4.11.1992.

> Since integration with Australia, the Government has been quite happy telling us what to do all the time. But they don't listen to us. Our religion is something they know nothing about and shouldn't interfere with.[3]

In fact, in 1989-1990, the House of Representatives Standing Committee made an investigation of the laws in operation in the Islands and published a report whimsically named "Islands in the Sun", which concluded that the laws which operated on Cocos Islands were outdated and in need of a total overhaul. It seems that few islanders made submissions to the Committee, for the reason, no doubt, that few of them speak English adequately,[4] and most are almost totally ignorant of the Australian political system and the operation of Australian law. Even after the report was published, few of them had any idea of its contents, as the report was not translated into Malay which would have enabled them to read it. According to the Australian Federation of Islamic Councils (AFIC) of which the Cocos Island Community is a member: "The consultation process was clearly inadequate...The Government has interpreted community silence as being acceptance, when a lack of understanding was obviously the reason."[5]

To what extent then, will the Cocos Islanders be forced to compromise their religious beliefs and practices if they are obliged, as seems likely, to live under the Australian family law system? In a letter to Wendy Fatin, the Minister for Arts and Territories,[6] Imam Hikmatullah Asikin expressed doubts about some aspects of Australian family law, particularly divorce and "living together without marriage". Certainly, the Australian family law legislation is oceans apart from Islamic law in the sense that it is a completely secular system of fairly recent invention, whereas the Muslim Ordinances are derived from a 1,400 year old system of religious law which has been practised in vast areas of Asia, Africa and even Europe over all that period of time.

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[3]Joint Press Statement 23.11.1992.
[4]AFIC estimates that 80% of the Cocos-Malays are functionally illiterate in English.
[5]Letter from AFIC to RISEAP dated 1.12.1992 p 2.
[6]18.12.1992.

However, in relation to marriage, there may not be as much difficulty as the Islanders fear, since under the Marriage Act, couples in Australia have a choice of a civil ceremony or a ceremony conducted according to the rites of their particular religion.[7] The requirements of the Act are relatively simple - certain documentation must be completed and the marriage registered - but otherwise the couple and the celebrant have the right to choose the time, date, place and form of the ceremony. In mainland Australia, Muslim Imams have been appointed marriage celebrants and hundreds of marriages have been conducted according to Islamic law and the customs of different ethnic groups.

The Cocos Island Imams have already been appointed marriage celebrants and so they can continue to celebrate marriages in the same way as previously. The difference will be that if some couples choose not to be bound by the Islamic law of marriage, there will be no legal way of enforcing provisions which are not recognised by Australian law. For example, the Shafii school of Islamic law followed by the Cocos Islanders as well as most South-East Asian Muslims requires that a woman may not marry unless her *Wali* (guardian for marriage), usually her father, consents to the marriage. Under the Marriage Act, the position of the *Wali* is not recognised, and any young woman who chooses to marry without her *Wali's* consent would be legally able to do so. Likewise, the prohibition on Muslim women marrying non-Muslims and Muslim men marrying any other than *Kitabiyyah*[8] women would also be unenforceable.

At present also, Australian law neither recognises nor enforces the Muslim bridegroom's obligation to pay a dower (*Mahr* or *Maskahwin*), a gift of money or property to his bride; neither does it recognise any pre-marriage contract as being enforceable.[9] However, this may not pose such a problem for the Cocos Islanders as it has for Muslim migrants to Australia from the Middle East, since according to Malay custom, the *Maskahwin*

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[7]Marriage Act 1969 *s* 45.

[8]Women whose ancestors were Jews or Christians before the coming of the Prophets Jesus & Muhammad respectively, according to the Shafii School.

[9]However, the Australian Law Reform Commission has recommended that recognition be given to some pre-marriage contracts, see recommendation no 20, Report No 57, 1992.

is paid in a fixed lump sum at the time of marriage and is not usually deferred as it often is in other countries.

It is in relation to the Australian law of divorce that the Cocos Islanders are likely to encounter greater difficulties. Australian law does not recognise religious divorce, even though it permits religious marriages. The reasons for this are historical - as the Christian churches traditionally did not permit divorce, civil divorce was instituted by the state in the mid-nineteenth century and it has continued ever since. In Islam, divorce is also part of religious law, and must conform to the rulings laid down in the Qur'an and the Sunnah of the Prophet Muhammad.

Australian family law recognises only one ground of divorce - irretrievable breakdown of marriage - which is equally available to either spouse on the completion of the period of 12 months separation.[10] Fault is not taken into account.

Under Islamic law, the right to pronounce a divorce by *talaq* is the right of the husband and can be exercised at will, though the wife may apply to the court for divorce if she has good grounds for seeking the end of the marriage. However, the husband's previously unfettered right to divorce has now been modified by legislation in most Muslim countries, including Malaysia, as has the husband's right of polygamy. Polygamy is rare nowadays in any Muslim community, and is not an issue either with the Cocos Islanders or the mainland Muslim community. The main complaint which Australian Muslims seem to have with the law in Australia is that the waiting period of 12 months for a divorce is much longer than the 3 month period of *Iddah*[11] required under Islamic law.

With regard to maintenance after divorce, under Islamic law, according to the majority opinion, a man is obliged to pay maintenance for his divorced wife during her *Iddah* and for his children until they are grown up. Mothers have only a secondary responsibility to support their children in case the father is not able to do so. This is in contrast with Australian law where both parties bear responsibility for the support of children.[12]

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[10]Family Law Act 1975 s 18.

[11]Period of waiting for a woman after a divorce or widowhood to ensure she is not pregnant.

[12]Family Law Act s 66A.

In matters of custody, the welfare of the child is the paramount consideration in both Australian and Islamic law, though under the latter a mother's right to custody of her children can be affected by her remarriage. Islamic law does not permit extra-marital relationships and a *de facto* relationship on the part of either parent would be strong reason against that person gaining custody.

The principles of property settlement are somewhat different. Under Islamic law, each party is entitled to retain his or her own property whether brought into the marriage or acquired afterwards, whereas the Australian system looks to see what property a couple has at the time of separation and then takes a number of specified factors into account in dividing it between them. However, if the Malay custom of *Harta Sepencarian*, which gives a spouse a share in property acquired in the course of the marriage, is taken into account, the result in practice, would not necessarily be greatly different from the result under the Family Law Act.

It is likely that the Cocos Islanders would be more disturbed by what Australian law does not do, rather than what it does say. For example, although the Family Law Act imposes a general obligation on each spouse to support the other to the extent that the spouse is unable to support himself or herself, a husband is not obliged, as he is under Islamic law to support his wife and she has no legal obligation to follow his instructions. However, if a Muslim man can show that his wife is *nusus* (unreasonably disobedient), he is not obliged to maintain her. There is no obligation in Australian law to support more distant relatives such as grandparents if need be, as Islamic law requires, but this is no doubt compensated for by the generosity of the Australian Social Security system.

Additionally, extra-marital relationships are not illegal under Australian law, and in fact are explicitly recognised under some Australian legislation.[13] There is nothing equivalent to the offence of *khalwat* (immoral behaviour) for which Muslims can be fined or imprisoned in the Shariah courts in Malaysia, and there would be no way, other than social disapproval, that the

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[13]Eg NSW De Facto Relationships Act 1094.

Cocos Islanders would be able to prevent couples living together without benefit of matrimony if they chose. Drinking alcohol and homosexuality are other activities which are strictly prohibited under Islamic law but are legal under Australian law.

Thus there are some very considerable differences between the religious personal law which the Cocos Islanders are used to and want to continue and Australian family law. However, these differences are not as great as they would have been before the passage of the Family Law Act in 1975, or even if, for example, the Islanders had been made subject to English, rather than Australian, family law since in England, Muslims do not have the same freedom of religious marriage as they enjoy in Australia.[14]

However, the present situation is that the islanders have had imposed on them a system of family law which they neither sought nor want. The islanders believe that Australian marriage and family laws are quite contrary to the teachings of their religion and that the Government has ignored the fact that Islamic law is an integral part of their religious belief and practice. They feel that "it is not unreasonable to have expectations that the law that is established ... is suitable for the population".[15] In the circumstances that almost all the population on Cocos belong to the one homogeneous, close knit community and the Muslims on Christmas Island are seen as an extension of that community, that opinion is not unreasonable.

According to Asif Saleem of AFIC, the Australian government may be missing a golden opportunity to demonstrate to the world, especially neighbouring Muslim countries such as Indonesia and Malaysia, how tolerant and accommodating Australian society can be. Certainly the Government's decision has been criticised in Malaysia as yet another example of the cultural insensitivity of Australians towards Asian cultures.

On the other hand, one can sympathise with the Australian government's point of view too - that is that it is desirable, even essential to have one law for all Australians. To allow otherwise

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[14]In England only Jews & Quakers, apart from Anglicans, have the right to marry in accordance with their own religious rites.

[15]AFIC letter to RISEAP 1.12.1992.

could lead to social divisiveness in society and to discrimination against some people who, being subject to one particular kind of personal law, would be treated less equally than others. For example, Islamic law forbids Muslim women from marrying non-Muslims, while Christian women are subject to no such disability.

In Asia, and particularly in Muslim majority countries, the tradition has been, and in fact is required by Islamic law, that minority populations be permitted to live peacefully governed by their own personal law. This has enabled minority communities to preserve their own identity of culture and religion over hundreds if not thousands of years - notable examples are the Coptic community in Egypt & the Jews who flourished in Moorish Spain. On the other hand, criticism of this system says it perpetuates racial and religious division and militates against national unity as the Indian experience has recently shown. The practice in Europe among countries such as Britain, France and Germany which have in recent years found themselves with large non-European minorities among their home population, has been to ignore as far as possible, cultural and religious differences and make all conform to the same law.

The Australian government is relatively inexperienced in dealing with minorities, since until the post "White Australia" policy migration of the 1970's onwards, the only real minority it has to deal with were the aborigines.[16] The Government's treatment of them as a minority left much to be desired.[17]

To its credit, the Australian Government has been demonstrating much more cultural sensitivity in recent years. It has conducted inquires into the impact of the largely monocultural Australian law on both the aborigines and migrants to Australia.[18] Not unreasonably it concluded that the two should be consi-

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[16]There were other "pre-White Australia policy" minorities such as the Chinese, the Kanakas & the Afghans but the White Australia policy itself ensured their dissappearance.

[17]It took a referendum in 1967 to recognise the aborigines as citizens and not until the Mabo decision in 1992 was it recognised that Australia was not "terranullius" before the white man came.

[18]Australian Law Reform Commission - Reports on Aboriginal Customary Law 1986 (No 31) and Multiculturalism and the Law 1992 (No 57).

dered differently, for the aborigines were there when the white man came, whereas migrants chose to come to Australia and must thereby be considered to have agreed to accept, at least implicitly, the law they found in the country when they came. Nevertheless, they rejected the idea of permitting the aborigines to be governed by their own traditional law, and have declined to entertain any suggestion that separate laws should be enacted for different religious or ethnic groups of other origins in Australia . The Australian Law Reform Commission concluded that:

> the better approach in nearly all cases is likely to be a general amendment of Australian law to make it less narrowly monocultural and more flexible to accommodate individual differences. Imposing special laws on people because they belong to a particular ethnic group could introduce unjustified discrimination into the law, lead to unnecessary and divisive labelling of the people and be oppressive of individual members of that group.[19]

At the same time it recognised that "the goals of cohesion should not be used to justify the imposition of the values of a dominant group on a minority".[20]

So where does this leave the Cocos Islanders? Although they are neither original inhabitants nor migrants in the usual sense, the Government's view most likely will be that when they chose integration with Australia in 1984, they chose to become Australians and thus they must be subject to the same laws as every other citizen. This view will not be accepted by the Islanders. Perhaps a better policy might have been, considering the small numbers of people involved and their geographical remoteness, to have let sleeping dogs lie and allow the Muslim Ordinances to continue on the Islands for the present time.

Alternatively, the Cocos Islanders must learn to regulate their family law affairs within the framework of the Australian system, and/or persuade the Government to modify aspects of the system with which they find particular problems. For example, if the Government would allow people to obtain a religious divorce

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[19]Report No 57 *ibid* at p 12.
[20]*Ibid* at p 11.

as well as marrying according to religious rites, many of the objections that the Cocos Islanders and other Australian Muslims have to divorce under the Family Law Act could be overcome. At the same time the option of civil divorce would exist for those who wanted to opt out of the religious system. The Australian Law Reform Commission considered this point in its 1992 Report[21] noting that "recognising religious and customary divorce would be consistent with the principles underlying the Commission's recommendations" but concluded that they would be too many administrative difficulties and there was little community demand for such innovation.

As another alternative, the Islanders could set up their own equivalent of a Shariah court, or Tribunal which could arbitrate personal law disputes between Muslims and grant religious divorces. There is precedent for this in the Jewish *Beth Din* and in the Tribunal conducted by the Roman Catholic church to make religious declarations of nullity of marriage. These do not replace the civil court but provide an alternative and uphold the religious law.

A third alternative would be to accept Australian family law in its entirety, but unqualified acceptance of the secular system will in time undermine the religious values that the Cocos Islanders are so keen to maintain and lead to the loss of their cultural and religious identity.

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[21] *Ibid* at p 104.