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# To Recognise or Not To Recognise, that is **NOT** the Question

**Family Law and the Muslim Community in Australia**

*By*

*Ghena Krayem*

Thesis submitted to fulfil the requirements of the award of Doctor of Philosophy  
Faculty of Law, University of Sydney

2011

## Declaration

I hereby certify that this submission is my own work and that to the best of my knowledge it contains no materials previously written or published by another person, nor material which has been accepted for the award of any degree at the University of Sydney or any other institution, except where due acknowledgement is made in the thesis. The interviews conducted as part of the research for this thesis were approved by the University of Sydney Human Ethics Committee.

Ghena Krayem

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# Translation and Transliteration

## 1. Translation of Verses from the Holy Qur'an

All verses from the Holy Qur'an have adopted the translation of A.Yusuf Ali, The Holy Qur'an, Translation and commentary, (Lahore, Islamic Propagation Centre, 1934)

## 2. Transliteration of Arabic words

In this thesis I have adopted the following system of transliteration as represented by the tables below. This system is known as the ROTAS system (Roman Transliteration of Arabic Script) which is a utility application that supports the transliteration of text from Arabic into English. This was developed by the International Islamic University of Malaysia and can be accessed at <http://rotas.iium.edu.my/>

Table 1

Transliteration of Consonants.			
Arabic	Roman	Arabic	Roman
ب	b	ط	ṭ
ت	t	ظ	ẓ
ث	th	ع	'
ج	j	غ	gh
ح	ḥ	ف	f
خ	kh	ق	q
د	d	ك	k
ذ	dh	ل	l
ر	r	م	m
ز	z	ن	n
س	s	ه	h
ش	sh	و	w
ص	ṣ	ء	'
ض	ḍ	ي	Y

Table 2

Transliteration of Vowels.			
Arabic	Roman	Arabic	Roman
اَ	a	أَ، أُ، إ	an
اُ	u	و	un
اِ	i	ي	in
أَ، إ، أُ	ā	وْ	aw
وُ	ū	يْ	ay
يْ	ī	وْ	unw, ū
		يْ	iiy, ī

# Acknowledgment

*No one who achieves success does so without acknowledging the help of others.*

*The wise and confident acknowledge this help with gratitude.*

*Author Unknown*

It has been an amazing journey, a journey that has taken me to the highest of heights and the lowest of lows. I have laughed much and cried even more, sometimes at the same time. There were times when I knew exactly where I was going and times when I had clearly lost my way. But above all else I was never alone, and I want to sincerely acknowledge and thank the many souls who provided the endless support that allowed me to complete this project.

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# Synopsis

The question of recognition of *shari'ah* in western liberal democratic states has resulted in controversial and divisive debates in several countries, including those examined in this thesis such as Canada, United Kingdom and Australia. The issue is often portrayed as one where the minority Muslim community seeks to set up a separate and parallel legal system to the official legal system. In particular the focus has been on the area of family law. However quite often the debate takes place amidst a lot of confusion and assumption, rarely are they informed by any detailed analysis of what the needs of the Muslim community are, nor the reasons why the question of recognition arises at all in these states.

This thesis undertakes a study of the Muslim community in Australia and the way in which it resolves family law matters. In particular it documents the informal and unenforceable community processes that are utilised by Australian Muslims as a means of navigating through the requirements of both Islamic and Australian family law. Whilst it questions the view that the only relevant law is that produced by the state, it also recognises the desire of community and religious leaders to seek ways to integrate these community processes into the official legal framework. This does not necessarily mean official recognition of *shari'ah* as this thesis considers several ways that this can be achieved without any significant legislative change, although as yet these options have yet to be fully explored. Thus far from being a call for a separate and parallel legal system, the research indicates the exact opposite with the more relevant question being – how can the existing Australian family law system meet the needs of its diverse population? A question that is central to any multicultural state such as Australia

# Chapter 1

## Introduction

### 1. Background

To many people, lay people in particular, the law and legal theory are dry and uninteresting subjects until they impact on them at a personal level. For Muslims however Islamic law and jurisprudence are an inherent and integral part of their day-to-day lives and every Muslim, regardless of their station in life, has a personal obligation to understand both, at least at a minimal level. Despite the commonly held view in western society that Islamic law has stagnated, it is in fact an ever-changing and evolving body of work as it seeks to address the innumerable emerging issues of modern 21<sup>st</sup> century life, from genetically modified products through to surrogacy. In many respects my own journey, both as a researcher and an individual, as well as this thesis, has mirrored this path.

As a practising Muslim woman living in a modern secular society I was, and continue to be, faced with the challenge of finding ways to accommodate the obligations imposed on me by religious laws within the context of a society and legal system which not only does not recognise such laws but which, in some instances, is diametrically opposed to them.

This challenge takes on another dimension when, in addition to being a young Muslim woman, one is also a student at law. As my understanding of the issues and the dynamics of the Australian Muslim community evolved, then so did the focus of



my research. As a Muslim I was at the beginning of developing my understanding of Islamic principles. Whilst conducting this research I was working closely within the NSW Muslim community as a community spokesperson on issues to do with Muslim women and Islamic family law. In the course of my dealings within the community I was privy to the thoughts and observations of several key community leaders about the way that Islamic family law, or what is often referred to as *Shari'ah*, was being applied in Australia. In particular I was aware of their desire for change and the suggestion that there was a need for official recognition or accommodation of *Shari'ah* in Australia. As a lawyer I was encouraged by several community leaders to explore this issue. I had observed that, in regards to marriage and divorce, Muslims in Australia went through various processes to satisfy the requirements of both Australian law and their religious principles. As a Muslim woman I had noticed the difficulties faced by some women in navigating their way through these overlapping processes, particularly in securing a religious divorce, although I had no real understanding of their experiences. There is no doubt that various aspects of my identity played a significant role not only in my choice of research topic but also in how the research was conducted, and this I will explore further a little later.

All these factors drew me closer to a research project about Islamic family law in Australia. My initial focus was of a comparative law nature, to compare various aspects of Islamic family law or *Shari'ah* with Australian family law. This choice of focus clearly demonstrated my somewhat limited understanding of *Shari'ah* or Islamic law at the time. I made some assumptions that were limiting the scope and the depth of the research project, namely that there was this body of law called *Shari'ah* that was applied in Australia and could easily be compared to Australian law. I quickly found out that this was a somewhat naive assumption, and that the more

relevant issue was to explore what aspects of Islamic law were in fact being applied and how they were being applied by the Muslim community in Australia. It became clear very early that the `how` question was just as important as the `what` question. I thus changed my focus to understand and document what was actually happening at a community level, rather than to make a comparison of legal principles. I began my empirical research to explore this issue.

## **2. An International Issue**

At the early stages of conducting the empirical research I was also conscious of the fact that Australian Muslims were not alone in facing this issue. Muslim minority communities all across the western world are confronted with the same issue of having to find a way to develop processes to satisfy the requirements of both Islamic law and official state law. This is well documented in the UK context, where Pearl and Menski<sup>1</sup> describe the unofficial community processes that exist alongside British law and which facilitate the application of Islamic legal principles in the areas of marriage and divorce.

Accepting that Islamic principles of family law are being relied upon and applied by Muslim minority communities in liberal democratic states such as Australia, UK, Canada and the US leads to another important question about how these states should deal with this issue. As Pearl and Menski point out, the options available to states

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<sup>1</sup> David Pearl & Werner Menski, *Muslim Family Law* (3<sup>rd</sup> ed, 1998).

range from expectations of assimilation to policies of accommodation,<sup>2</sup> however Pearl and Menski also argue

Western traditional model jurisprudence appears to leave no formally recognized space for a personal law system based on different religious and cultural traditions – Muslim law is pushed into the realm of the unofficial, the extra legal, the sphere of cultural practice rather than being treated as officially recognized law.<sup>3</sup>

Soon after I had begun my interviews to explore the application of Islamic law in this unofficial realm in the Australian context, an interesting development took place in Canada - A controversial public debate about the desirability of incorporating these unofficial community processes that seek to apply Islamic law into the official legal framework via the use of arbitration processes. Whilst this is explored in some detail in chapter 4 of the thesis, I mention it here because the debate had an impact on the development of my own research project. I realized that the issue of recognition or accommodation of Islamic law was central to my own research in the Australian context, and certainly one that I had to explore further. This then influenced the methodology of my empirical research and will be discussed further below. A few years after the debate in Canada, the same issue received widespread public attention in the UK. This confirmed the importance of exploring the issue of recognition or accommodation of Islamic law in my own research.

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<sup>2</sup> Id at 51.

<sup>3</sup> Ibid .

### 3. Research Objectives

I had several key objectives for my research project:

1. To understand the relevance of Islamic law to Australian Muslims.
2. To document how Islamic law was being applied in the Australian Muslim community and its intersection with Australian law.
3. To consider and engage with the issue of official accommodation or recognition of Islamic law in the Australian context.

### 4. Methodology

In order to answer the research questions set out above and to address the need for information about how the Muslim Community deals with matters of a family law nature, I chose to undertake an empirical research project. I will now outline the methodology I adopted in this research.

I chose to conduct my empirical research by interviewing members of the Australian Muslim community. Initially the focus of the interviews, consistent with the focus of the research, was to gather data to ascertain in what ways Islamic family law was relevant to the lives of Australian Muslims, and how they applied Islamic laws of marriage and divorce in the Australian context. To this end I set out to interview religious leaders or *'imāms*, community leaders and community workers as well as community members who had been through the experience of marriage, divorce or both in the Australian context. I sought ethics approval to begin my interviews in

2003. It is important to mention that as part of the ethics approval process I was required to provide evidence of support from the Muslim community in NSW for my research. I thus obtained letters from key Muslim organisations and community leaders indicating their approval and authorisation for the research to be conducted. This process was a valuable opportunity to explain my research to community leaders and ask for their assistance in spreading the word to potential interview participants.

There is no doubt that from the outset my research was affected by my status as a researcher from within the community. Thus clearly I was involved in what is termed 'insider research' where 'the researcher has a direct involvement or connection with the research setting'.<sup>4</sup> My involvement in the community was integral to the conduct of the research and had an impact on many aspects of the research project. I believe, as Rooney notes, that insider research has the potential to increase the validity of the research project 'due to the added richness, honesty, fidelity and authenticity of the information acquired'.<sup>5</sup>

My identity also made the process of selecting interviewees much easier than if I was an outsider to the community. I produced an information sheet that was made available in both English and Arabic, and I began personally approaching *'imāms*, religious leaders, community leaders and community workers in various Muslim organisations to inform them of the research project and ask for their participation. I also left information sheets with them that I asked to be shown to their clients or other interested community members. Most of those I approached indicated a strong willingness to participate and stressed their support for the research project. This

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<sup>4</sup> Pauline Rooney, 'Researching from the inside – does it compromise validity? A Discussion' (2005) 3 *Level 3* at 6 [http://level3.dit.ie/html/issue3\\_list.html#](http://level3.dit.ie/html/issue3_list.html#) accessed 12 October 2010.

<sup>5</sup> *Ibid* at 7.

initial point of contact was followed through with a call to make an appointment for an interview. This was the approach used to recruit the religious leaders, community leaders and workers as research participants. In total I interviewed 20 community leaders and workers, and 15 religious leaders.

The religious leaders or *'imāms* come from the following cultural backgrounds – Lebanese, Egyptian, Syrian, Jordanian, Fijian/Indian and Palestinian. Most of the religious leaders interviewed (13) were born overseas, with 2 interviewees being Australian born *'imāms* who have travelled overseas to gain their qualification. All have attended recognised Institutions of Islamic learning in various overseas countries. When interviewed these religious leaders ranged in age from 28years to 73 years.

The community leaders and workers who participated in the research were all well known community members, often heading or working with key Muslim organisations in New South Wales. They have various cultural backgrounds including Lebanese, Syrian, South African, Palestinian, Bosnian, Indian, Egyptian and Turkish. They included social workers, academics, teachers, lawyers, psychologists and health care professionals. The majority of those interviewed (19) had some form of tertiary qualification with 12 interviewees having university qualification. Their ages ranged from 26years to 60years when interviewed.

In regards to my sample of community members who were willing to share their experiences with me, these were recruited in various ways; some had read the information sheet left with the community leaders and at community organisations;

some I met when I went to interview religious and community leaders and they were waiting to see these leaders themselves; some contacted me because they had heard about the research and wanted to share their stories. In this recruitment process, I acknowledge the important role played by the religious leaders, community leaders and community workers themselves in promoting the research and encouraging people to participate. In total I interviewed 30 community members who shared their experiences and views with me.

These 30 interviewees came from a broad range of cultural backgrounds that make up the Muslim community in Australia, including Lebanese, Palestinian, Syrian, Jordanian, Egyptian, Bosnian, Iraqi, Iranian, Turkish, Bangladeshi, Pakistani, Indian and Algerian. They ranged in age from 22 years to 63 years and were engaged in various occupations including teachers, lawyers, doctors, engineers, IT consultants, office managers, librarians, academics, small business operators, cleaners and shop assistants. Their educational backgrounds varied from those who had not finished any formal schooling (3 interviewees) to those who had university qualifications (18 interviewees).

There is no doubt that my identity as an insider was of immense value in the recruitment process and in allowing the interviewees to be more forthcoming in their responses. This is because at the time I was conducting interviews, the Muslim community in Australia was under intense pressure with various domestic and international events drawing public scrutiny on the community. Almost all of the leaders whom I interviewed made mention of this. I certainly recognised, being a community member myself, that these leaders had immense pressure on their time

and resources and were not interested in talking with people they perceived to be wasting their time. I witnessed this when I saw an intense reluctance by these same people to talk to journalists and others interested in the very same conversation that I was engaging in with them.

My personal contact with them over a number of years had established a degree of trust that encouraged them to participate in the interviews, particularly on a topic as sensitive as marriage and divorce. In particular they seemed to trust my representation of their views on this issue. This factor was recognised by Denscombe, who points out that ‘the effect of the researcher’s identity, in practice, will also depend on the nature of the topic being discussed. On sensitive issues or on matters regarded as rather personal, the interviewer’s identity assumes particular importance’.<sup>6</sup> This point equally applied to the community members who volunteered to share their personal stories of marriage and divorce with me. I should say that I had no personal connection or prior relationship with any of these interviewees, but there is no doubt that my personal identity was an integral factor in their willingness to participate.

The interviews were conducted in a semi-structured or guided way. I had a list of issues to be addressed and questions to be answered, but I ‘was prepared to be flexible in terms of the order in which the topics are considered, and to let the interviewees develop ideas and speak more widely’ on the topics.<sup>7</sup> This approach allowed the interviewees to elaborate on the points they considered of great importance and it

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<sup>6</sup> Martyn Denscombe, *The Good Research Guide for small-scale research projects* (3<sup>rd</sup> ed., 2007) at 184.

<sup>7</sup> *Ibid* at 176; Scott W Vanderstoep & Deidre D Johnson, *Research Methods for everyday life: Blending Qualitative and Quantitative Approaches (Research Methods for the Social Sciences)* (2009) at 225.



allowed myself as the interviewer to at times deviate from the set questions as needed and to pursue certain paths that I had not considered before.<sup>8</sup> This flexibility was crucial, especially when I was interviewing those who had been through the community processes of divorce.

The interviews were all face to face one-on-one interviews. Their duration varied, ranging from 1 to 3 hours. Interviews with *'imāms* or religious leaders, community leaders and community workers were all held in their own offices. The interviews with community members were held in different locations: some were held in the homes of the interviewees (this was particularly the case for women), some were held at the premises of community organisations where the interviewees felt comfortable. I acknowledge the assistance of the United Muslim Women Organisation who assisted with the use of their premises on several occasions. Other interviews were conducted in public places such as cafes and parks. These locations were not ideal in terms of privacy or noise, but were nominated as the best places to meet by some interviewees.

For several of the interviews another person, who was instructed to not participate in the interview and had agreed to keep the contents of the interview confidential, accompanied me. The reason why I chose to do this was due to the religious requirement in Islam that men and women who are not related should not be alone in a closed private room. I considered this important when interviewing male religious and community leaders. I think that having this awareness of the religious needs of the participants contributed to the rapport building between the interviewees and myself as the interviewer. Another example of this is being aware that for many

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<sup>8</sup> Id.

Muslims they would not shake the hand of a member of the opposite gender, nor would it be a good idea to be physically too close during the interview. This demonstrates an advantage to insider research that an insider has already acquired an enormous amount of cultural knowledge that an outsider would have to acquire.<sup>9</sup>

Each interview began with an explanation of the research project, with direct reference to the information sheet that was provided to all participants. They were informed that the interview was confidential and that their anonymity would be guaranteed with no names being mentioned in writing up the research. They were also told that they could withdraw from the interview or the research at any time. They were then asked to sign a consent form that mentioned that the interview would be audio recorded. The interviews were conducted in both English and Arabic (I have fluency in both languages) depending on the participant's level of proficiency in English, and at times there was use of both languages in the one interview. When the participant was more fluent in Arabic, the information sheet and consent form were given to them in Arabic.

Again, there is no doubt that my identity had a role to play during the course of the interview. Denscombe argues that 'research on interviewing has demonstrated fairly conclusively that people respond differently depending on how they perceive the person asking the questions'.<sup>10</sup> In particular this has a bearing on the amount of information people are willing to reveal and their honesty.<sup>11</sup> This was especially

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<sup>9</sup>Paul Atkinson, Amanda Coffey & Sara Delmont, *Key Themes in Qualitative Research; Continuities and Change* (2003) at 39.

<sup>10</sup> Denscombe, above n6 at 184.

<sup>11</sup> Ibid.

noticeable when community leaders prefaced some of their comments with expressions such as:

*You must understand that I couldn't say this to anybody.*<sup>12</sup>

It was also evidenced by the initial hesitation of many interviewees to criticise certain things. They often spoke of the need to understand the context of their criticism and they felt that as a Muslim I appreciated this context. It was also noticeable when women were sharing their experiences about marriage and divorce, sometimes revealing quite intimate details of their experience. I believe that this would not have been possible if they were not talking to a Muslim woman. As Rabbitt notes, insider research provides the opportunity for the researcher to be privy to insider information that would not be trusted to a stranger.<sup>13</sup>

The interviews were then transcribed. Initially, I was assisted in this process as it became very time consuming, but after having 2 interviews transcribed by others I recognised that it was more effective for me to do it myself. Not only would this provide me with greater familiarity with the data, but having the mix of two different languages in the one interview meant that with my own fluency in both languages it was easier to translate and transcribe at the same time. The data was then analysed and coded according to the themes that began to emerge.

In summary, there were 65 interviews conducted in total, 15 with 'imāms or religious leaders, 20 with community leaders and community workers and 30 with other

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<sup>12</sup> Community Leader, interviewed 23 January 2006.

<sup>13</sup> Elaine Rabbitt, *Insider Research: The implications of conducting research in your home locale* (2003) Australian Association for Research in Education at 1  
<<http://www.aare.edu.au/03pop/rab03740.pdf>> accessed 2 December 2010.

community members. I started conducting interviews in 2003, but due to personal reasons was not able to conduct any in 2004 and 2005. The rest of the interviews were conducted between 2006 and 2008. To ensure validity of the data, particularly as the research was conducted over a long period of time, I had the opportunity to check my data/analysis with several of the *'imāms*, community leaders and community workers by meeting up with them or speaking to them over the phone. On these occasions I would relay to them the current state of the research project and my preliminary findings. At times these conversations were recorded as a follow up interview and at other times in a more informal conversation. I should also mention that on several occasions the interviewees, particularly religious and community leaders, would contact me to inform me of a particular issue relevant to the research. When this occurred I made notes about the conversation and added it to the interview transcript of the interviewee. This reflexive engagement ensured that my interpretations of the data were valid and accurate.<sup>14</sup>

I have previously mentioned my role as an insider researcher. It is important to mention that by the time this research project had concluded I had been identified as having developed an expertise in this area of research, both by members of the Australian Muslim community as well as by the wider Australian community. For example I was invited to give many presentations on the issue of Islamic family law. I was also consulted by various government departments and statutory bodies who had initiated projects or programs on this issue, namely the Australian Human Rights Commission and Legal Aid New South Wales. In late 2010 I was awarded a traineeship with Legal Aid NSW to complete training towards gaining accreditation

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<sup>14</sup> Vanderstoep & Johnson, above n7 at 192.

by the Attorney General as a Family Dispute Resolution Practitioner. This was part of a Legal Aid initiative to move towards more culturally and religiously appropriate family dispute resolution processes. I have also been invited to speak on this issue by various media outlets such as ABC radio and the Australian print media. This important role that I played gave my research greater credibility within the Muslim community and demonstrated the level of trust that community leaders had in my work as serious thoughtful research as opposed to tabloid misrepresentation of the issues. Thus there is no doubt that my identity and the way that I was perceived within the community placed me in a unique and valuable position to conduct this research.

However many would argue that there are disadvantages to being so close to the research setting, namely a compromise of objectivity. This concerns the extent to which the research can produce findings that are free from the influence of the researcher who conducted the enquiry.<sup>15</sup> This is an important argument, but it needs to be recognised that no research data is ever free from the influence of those who conduct it, as ‘the researcher’s self...the researcher’s identity, values and beliefs cannot be entirely eliminated from the process of analysing qualitative data’.<sup>16</sup> Every researcher has a gender, race, ethnicity, culture, nationality, religion, family and many other parts of their identity that filter their observation of the data.<sup>17</sup> There are two ways that one can approach this, firstly one could attempt to distance oneself from one’s beliefs and suspend judgement on social issues whilst conducting the research.<sup>18</sup> Or one can acknowledge that identity, values and beliefs play a role in the production

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<sup>15</sup> Descombe, above n6 at 300.

<sup>16</sup> Ibid.

<sup>17</sup> Vanderstoep & Johnson, above n7 at 171.

<sup>18</sup> Descombe, above n6 at 300.

and analysis of the data.<sup>19</sup> I favour the latter view, as it is argued that 'it is necessary and desirable to recognise that we are part of what we study and are shaped and affected by our fieldwork experiences....to deny the self an active and situated place in the field is only fooling ourselves'.<sup>20</sup>

However this does not mean that objectivity is necessarily compromised when one acknowledges the role that one plays as a researcher. As a researcher one can be at times both an insider and an outsider in the one project.<sup>21</sup> For example I have already mentioned the valuable role that my identity as an insider played in the recruiting process and in developing a rapport with the participants. However, my use of flexible interviewing practice allowed the interviewees to explore issues that they regarded as being important rather than those that I thought I needed to hear about. Furthermore, in regards to the actual topic of the research, I was not an insider. I am a Muslim but I have not accessed the community processes myself and thus was very much relying on the research project itself to inform me about how these processes operated. Thus, as Gallais argues, there is fluidity about the research stance 'which should be embraced for the richness of insight that it offers'.<sup>22</sup> The awareness that comes with appreciating the role that one plays as a researcher means that certain reflexive practices can be undertaken to ensure that the identity of the researcher does not compromise the data.<sup>23</sup>

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<sup>19</sup> Id.

<sup>20</sup> Atkinson, Coffey & Delamont, above n9 at 57.

<sup>21</sup> Patricia O'Connor, 'The Conditionality of Status: Experience-based Reflections on the Insider/Outsider Issue' (2004) 35 *Australian Geographer* 169 at 175.

<sup>22</sup> Tricia Le Gallais, 'Wherever I go there I am: reflections on reflexivity and the research stance' (2008) 9 *Reflexive Practice* 2 145-155 at 153.

<sup>23</sup> Ibid.

## 5. Limitations of the research

As with all research projects there existed some limitations that need to be acknowledged. The Muslim community in Australia is an extremely diverse community and it is a challenge for any research to be truly representative of this. The diversity within the community is both religious and cultural. In terms of religious differences, there are two identifiable groups, these being the *Sunni* community and the *Shi'a* community. Whilst initially the consultation was with members of both communities, for several reasons I made the decision to focus on the *Sunni* community.

Secondly, the interviewees came from many different backgrounds, but most came from the more established Muslim communities (Lebanese, Turkish, Bosnian, Egyptian, Jordanian, Syrian, Pakistani, Indian). Thus the data is not representative of the experiences of newly emerging Muslim communities such as the Afghan or African communities.

Furthermore due to the relatively small number of people from the Muslim community interviewed as part of my sample it needs to be acknowledged that the data may fail to take into account the different ways that Australian Muslims practice their faith and seek to rely upon Islamic principles when dealing with issues of marriage and divorce. This is almost unavoidable when doing a qualitative study of a community that is as diverse as the Australian Muslim community.

Other limitations to the research are that, of the 30 community members who were interviewed to share their personal experiences of marriage and divorce, 25 were

women. Thus there was more data about how women experienced the processes than men. This was probably because of the support that Muslim women's organisations gave to this project and the reluctance of Muslim men to talk about their experiences.

It also needs to be appreciated that the way that the community deals with matters is dynamic and to a certain extent subject to change. Whilst I have been mindful of this when conducting the research, and I have made every effort to go back to community leaders to ensure that the data remains valid, we need to remember that the community situation is always changing and developing and it is very hard for a research project to always capture this change.<sup>24</sup>

One final limitation of this research that needs to be acknowledged relates not to the empirical part of this study but goes to the methodology adopted in regards to researching Islamic law. As this thesis will clearly demonstrate Islamic law is complex and diverse with key issues that are covered by this thesis (concerning marriage and divorce) being enriched by the different opinions of classical Islamic scholars on these matters. However as this thesis is an empirical study on how family law disputes are resolved in practice and not a theoretical study of Islamic law in the abstract, I have chosen to rely on a number of secondary sources to give the reader a basic understanding of the Islamic legal principles rather than engage with the classical sources myself. I have chosen to do this in order to retain a focus on how Islamic law is being practiced in Australia rather than simply producing a thesis on the theory of Islamic Family law without reference to its implementation in a specific geographical and cultural context. I also thought that there was not the scope to fully

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<sup>24</sup> Vanderstoep & Johnson, above n7 at 175.



explore some of the differences between the Islamic schools of laws in a thesis of this nature, although as will become evident from the later chapters of the thesis I have sought to at least identify the existence of differing views on certain key issues as they arise in the discussion.

## 6. Structure of the Thesis

The central question at the heart of the thesis is the kind of recognition or accommodation that should be given to the laws, principles and practices of minority groups within a liberal democratic state. This question will be addressed by considering the demand by Muslim minority groups in these states for the official recognition or accommodation of Islamic family law or what is sometimes referred to as *Shari'ah*. In particular, the thesis will examine this issue in the Australian context.

Chapter 2 will introduce the reader to key characteristics about the Muslim community in Australia. It will outline a brief history of Muslims in Australia, and demonstrate the diversity that is the Australian Muslim community – a diversity reflected in culture, language, ethnicity and religiosity. However there is also unity to be found in religious identity that can encompass this diversity and, as identified by Saeed, there is the emergence of an identifiable Australian Islamic identity.<sup>25</sup> This chapter will also introduce the structure of the community in terms of leadership and organisation, as a necessary background for the later discussion which documents the informal community processes that exist to deal with family law issues.

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<sup>25</sup> Abdullah Saeed & Shahram Akbarzadeh 'Searching for Identity: Muslims in Australia' in Abdullah Saeed & Shahram Akbarzadeh (eds) *Muslim Communities in Australia* (2001) at 5.

Chapter 3 establishes a theoretical framework for the thesis. It begins by offering legal pluralism as a useful way to understand how law operates in society. A basic premise of legal pluralism is that state law is not the only legal order that applies in a particular space, thus questioning the common assumption that everybody abides by one law. With this understanding of law comes an appreciation that there exist multiple legal orderings, thus raising the question ‘Can the State, with its institutions ignore the emerging non-state normative orders or must it....eventually accommodate these orders?’<sup>26</sup> This question takes us to the next element of the theoretical framework of this thesis – the theoretical reasons for the accommodation of religious or cultural practices of minority groups within the liberal state. To do this, I consider the theory of multicultural citizenship and in particular the work of Will Kymlicka. Finally the chapter will consider an important critique of policies of multicultural accommodation, posed by Susan Moller Okin in her work ‘Is multiculturalism bad for women?’<sup>27</sup> This critique will be a constant theme throughout this thesis, as one of the strongest arguments made against the recognition or accommodation of Islamic family law is that it would compromise the rights of women. In response to this critique I will set out the work of Ayelet Shachar who recognises the challenges posed by such policies but argues for a way to respect the intersectionality of women’s lives, where religious law and processes have a significant role to play.

Chapter 4 examines the issue of the official accommodation of Islamic family law or *Shari’ah* in liberal democratic states which have minority Muslim communities. The chapter considers in detail the public debates that have taken place in the UK and Canada as Muslim communities in those countries have sought to merge or harmonise

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<sup>26</sup> Margaret Davies, ‘Ethos of Pluralism’ (2005) 27 *Sydney Law Review* 87 at 97.

<sup>27</sup> Susan Moller Okin ‘Is Multiculturalism bad for women?’ in Joshua Cohen, Mathew Howard & Martha C Nussbaum (eds), *Is Multiculturalism Bad for Women?* (1999) at 7-26.

their informal family dispute resolution processes with the existing official legal framework, namely through the use of 'faith based' arbitration. As the chapter details, the public reaction to this was largely a sensationalised one of fear and animosity, with the media and politicians alike seeing it as a threat to society and a disaster for women. What emerges from an examination of the events that took place in the UK and Canada is an acute need for clarification of what the Muslim communities were trying to do. It became quite evident that, despite the reality that Muslims had been relying on Islamic family law for quite some time, there was a perception that the status quo was that only the state law was applicable. The public debate was also based on many misconceptions, such as the mistaken view that Muslims wanted to set up a parallel legal system that could enforce punishments such as stoning and limb cutting. Furthermore there was a common argument made that religious law or principles had no role to play in a modern legal setting and in particular that this would be bad for women. In fact, it was this latter argument that was most prominent in the Canadian context.

In chapter 5 the discussion focuses on the Australian context. It begins with an examination of multiculturalism both as a descriptor of Australia's demographic make-up and as official government policy, which in recent years has been focused on the Muslim community. The chapter will then turn to the question of how the official legal system has dealt with issues of accommodation of the particular needs/concerns of minority groups in the area of Family law. Finally the chapter will consider the public reaction to the suggestion of any official accommodation of Islamic family law or faith-based dispute resolution processes in Australia, which like the international debates, has been overwhelmingly negative. Also, like the international context

discussed in chapter 4, there is a need for more detailed information about the operation of existing community processes in Australia so that a more informed analysis about the issue of recognition or accommodation of Islamic family law in the Australian context can take place.

Chapter 6 begins to detail the findings of the empirical research. In this chapter I will explain the relevance and importance of Islamic family law to the lives of Australian Muslims who find themselves navigating their way through the intersection of both Australian law and Islamic legal principles. For many Muslims, these principles are part of the “legal framework” that governs their family law issues, and in this respect they operate as “unofficial law” even though they are neither recognised nor enforced by the official legal system. The result is that many Australian Muslims move between two very different legal systems. The chapter will go on to detail these informal structures and processes that exist within the community that allow Muslims to resolve their affairs according to their religious principles. It is argued that understanding these processes is just as important as understanding the laws that they rely upon, because when we talk about recognition or accommodation of Islamic law, the thesis shows that we are not referring to the content of Islamic legal principles as much as we are talking about accommodating family dispute resolution processes that meet the needs of Australian Muslims.

The next chapter will document, based on the empirical findings of this research, the process that Muslims go through to get married in Australia. This includes the different stages of an Islamic marriage, the marriage contract, the role of the *Mahr* or dowry, and the financial rights of the spouses within marriage. For each issue I will

detail the Islamic legal principles and their intersection with Australian law to demonstrate how Muslims are generally quite skilful in their navigation between the two legal settings. In particular, when returning to the central question of recognition of Islamic family law, it will be shown that in the area of marriage laws there appears to be sufficient scope and flexibility within the existing official legal framework to address the needs of Australian Muslims. In fact it is in the area of marriage laws that we also find solutions to several key concerns that arise when Muslims find themselves at the intersection of Islamic and Australian laws of divorce.

Like the previous chapter, this discussion will continue with the findings from the empirical research, but the focus of the next two chapters is divorce. Chapter 8 will consider in detail the Islamic law of divorce including the various types of Islamic divorce for men and women and how they may occur. The chapter will also look at the Islamic laws governing the financial entitlement of the parties upon divorce, including a particular focus on how this applies to Muslim women. It is argued that there is an urgent need for scholarly attention to the issue of women's financial entitlements upon divorce.

Chapter 9 will build upon this analysis to document the process by which Muslims in Australia divorce and resolve their financial affairs upon divorce. In particular the discussion will consider how this process intersects with Australian divorce laws. This is crucial to the central question of this project about the recognition and accommodation of Islamic family law by the official legal system, as the thesis has demonstrated that this is a question of recognition of process rather than law. In responding to this issue the discussion will consider some of the gender concerns

raised in the international debates and how they may be addressed in the Australian context.

The final chapter will seek to tie in the empirical findings with the theoretical discussion to consider whether there is a need for accommodation or recognition of Islamic law or *Shari'ah* in Australia. Relying on the data gathered from this research, the chapter will closely consider what is meant by recognition or accommodation of Islamic law. It will clarify key aspects of the debate relevant to an Australian context, so that when the time comes for a public debate in Australia, it can be a more informed one than the debate that has occurred previously in Canada and the UK. This does not mean that the current community processes cannot be criticised: in fact this thesis raises a number of concerns about the existing process. However, it will be argued that these concerns can and should be addressed. This chapter will demonstrate how these community processes can be harmonised with the official family law framework, whether through the use of marriage contracts or by developing a dispute resolution process that recognises the emphasis found both in Islamic and Australian law on the amicable resolution of family disputes. Ultimately it will be argued that the research data raises the question of whether there really is a need for official recognition of Islamic family law in the Australian context, or whether it is more useful to consider ways in which the community processes and Islamic principles can fit more harmoniously within the flexibility offered by the existing Australian legal framework of family law.

## **Chapter 2**

### **Muslims in Australia**

#### **1. Introduction**

Australia's population is made up of people with diverse cultural, religious, ethnic and linguistic backgrounds, and Australian Muslims are a part of this mosaic that makes up multicultural Australia. As this thesis focuses on the Muslim community in Australia, it is important to begin to understand some key characteristics of Muslims in Australia. This chapter will begin by considering the history of Muslims in Australia and the development of the community, particularly its organisational and leadership structure. It will be argued that despite the common assumption that the Muslim community is homogenous, the reality is that it is incredibly diverse in terms of its cultural, ethnic and linguistic make-up. It is also diverse in the sense that it is made up of more established communities such as the Lebanese and Turkish as well as newly emerging groups such as the Afghan and African communities. Yet despite this diversity, the chapter will consider the growing emergence of what is known as a uniquely Australian Muslim identity. This chapter will provide an important background to the rest of the thesis which explores the way in which the Muslim community in Australia deals with matters of a family law nature.

## 2. A Brief Statistical Profile of the Community

The latest census figures puts the Muslim population in Australia at 1.7% of the total Australian population, that is, 340 000 people. The Muslim community in Australia has ties all over the world as it comes from countries in the Middle East, Africa, and Asia. The most frequently cited country of birth for Australian Muslims is Australia, with 36% of Australia's Muslim population being born in Australia,<sup>28</sup> 30% of the Muslim community claim Lebanese ancestry and 18% claim Turkish ancestry.<sup>29</sup> This diversity has led some commentators to write about 'Muslim communities' rather than a Muslim community. Wise and Ali note that 'contrary to popular discourse, Muslim-Australians are a heterogeneous community. Muslim communities in Australia come from a range of theological traditions and encompass different cultural, sectarian, linguistic, and ethnic values.'<sup>30</sup> As Yasser Soliman from the Islamic Council of Victoria said in 2002:

At the moment we are not that unified and that's a misunderstanding that a lot of the Australian community has. They think we are all lumped in together as one solid unit. And the real truth is that we have lots of differences and opinions amongst us.<sup>31</sup>

The migration of Muslims from such a variety of cultures and religious interpretations has resulted in a diverse and heterogeneous series of communities. Of this Muslim population, over three-quarters live in either Sydney (47.3%) or Melbourne (30.3%)

<sup>28</sup> Abdullah Saeed, *Muslim Australians, Their Beliefs, Practices and Institutions ; A partnership under the Australian Government's Living in Harmony Initiative* (2004) at 5.

<sup>29</sup> Janet Phillips, *Muslim Australians E-Brief* (2007), Parliamentary Library, Parliament of Australia [http://www.aph.gov.au/library/INTGUIDE/sp/muslim\\_australians.htm](http://www.aph.gov.au/library/INTGUIDE/sp/muslim_australians.htm) accessed 27 November 2010.

<sup>30</sup> Amanda Wise & Jan Ali, *Muslim-Australians & Local Government: Grassroots strategies to improve relations between Muslim and non-Muslim Australians Final Report* (2008) at 11.

<sup>31</sup> ABC Television, 'Encounters With Islam', *Compass*, 21 April 2002, <<http://www.abc.net.au/compass/s538946.htm>> accessed 2 December 2010.



but in more recent years there have been significant percentage increases in Adelaide, Brisbane and Perth.<sup>32</sup>

It is important to remember that this diversity is not just limited to cultural backgrounds and languages spoken, but also to the make-up of the community, which ranges from newly arrived migrants such as recent refugees to more established groups that have generations of Australian born Muslims. The implication of this is that the needs and concerns of Australian Muslims can vary enormously.

This research project has focused on the Muslim community in New South Wales, and it is interesting that almost half of all Australian Muslims live in Sydney<sup>33</sup>, making up 3.9% of Sydney's population. Within Sydney, there are certain suburbs or localities which have concentrated Muslim populations. Of specific relevance to this study are the 2006 Census Local Government Areas (LGAs) statistics. These show that the highest proportion of Muslims living in NSW is located in Auburn with 24.8%, followed by Bankstown 15.2%, and Canterbury 13.7%, see Table 3 below.<sup>34</sup>

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<sup>32</sup> Department of Immigration and Citizenship, *Muslims in Australia – a snapshot* (2006) <[www.immi.gov.au/media/.../Muslims\\_in\\_Australia\\_snapshot.pdf](http://www.immi.gov.au/media/.../Muslims_in_Australia_snapshot.pdf)> accessed 4 June 2010

<sup>33</sup> Australian Bureau of Statistics, *Media Fact Sheet – Census shows non-Christian religions continue to grow at a faster rate* (2007). <<http://www.abs.gov.au/ausstats/abs@.nsf/7d12b0f6763c78caca257061001cc588/6ef598989db79931ca257306000d52b4!OpenDocument>>

<sup>34</sup> Wise & Ali, above n 30 at 10.

**Table 3.****LGA total population x % of Muslims**<sup>35</sup>

<b>LGA</b>	<b>% Muslims</b>	<b>Total Population</b>
Canterbury	13.7	130.428
Liverpool	8.4	164.962
Fairfield	4.4	179.931
Parramatta	8.2	151.297
Blacktown	4.6	272.230
Bankstown	15.3	170.260
Auburn	24.7	65.601

### 3. A Brief History

Muslims in Australia have a very long and rich history, with Muslims working and visiting for at least 200 years.<sup>36</sup> Some of the earliest contact came long before European settlement with the Macassans (from eastern Indonesia) visiting Northern Australia in the 17<sup>th</sup> century.<sup>37</sup> These Muslims made annual trips between December and May to catch and process a sea slug called trepang.<sup>38</sup> During the time of early European settlement in Australia, there are records of several Muslim sailors and

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<sup>35</sup> Id.

<sup>36</sup> Saeed & Akbarzadeh, above n25 at 1.

<sup>37</sup> Saeed, above n28 at 7.

<sup>38</sup> Bilal Cleland, "The History of Muslims in Australia" in Saeed & Akbarzadeh, above n25at 13.

convicts who came on the convict ships<sup>39</sup>, although their names quickly disappear from the records.<sup>40</sup>

The next significant period in which Muslims feature in Australian history, although they have received very little recognition for their contribution, is the latter half of the 1800s. During this time, the exploration of the vast interior of the continent was only made possible by the Afghan Cameleers who helped to open up the dry inlands of the continent. These Cameleers are the real founders of Islam in Australia.<sup>41</sup> They were always outsiders, but there is evidence suggesting that the first Muslim settlement and first mosque was developed at Bellana Station in the Flinders Ranges.<sup>42</sup> Other early mosques were built in Broken Hill in 1891 and in Adelaide in 1888.<sup>43</sup>

By the early 1900s, and after the enactment of several pieces of legislation by the new Commonwealth Parliament aimed at discouraging the entry of “coloured” people into Australia, there were very few Muslims who could gain entry into the country. However, despite this, the research indicates that by 1913, there were Muslims living in nearly every corner of the country, with many of these communities establishing mosques, Islamic societies and *imāms*.<sup>44</sup>

In 1947 the Muslim population in Australia was about 2704, but by 1971 it had increased to over 22 000.<sup>45</sup> A majority of Muslims migrating to Australia at this

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<sup>39</sup> Saeed, above n28 at 7.

<sup>40</sup> Cleland, above n38 at 14.

<sup>41</sup> Desmond Cahill, Gary Bouma, Hass Dellal & Michael Leahy, *Religion, Cultural Diversity and Safeguarding Australia: A partnership under the Australian Government's Living in Harmony Initiative* (2004) at 38.

<sup>42</sup> Ibid.

<sup>43</sup> Ibid.

<sup>44</sup> Cleland, above n38 at 18-21.

<sup>45</sup> Ibid at 24.

time came from Lebanon and Turkey.<sup>46</sup> In the 1950s, ethnically based organisations began to be formed, and indeed in 1956 the Lebanese Sunni Muslims established what is now considered to be one of the largest Muslim organisations in the country, the Lebanese Muslim Association (LMA).

It is this organisation that has been instrumental in addressing many of the needs of the emerging Muslim community, such as building the *'imām* Ali mosque in Lakemba, which was completed in 1972 and is regarded as a key meeting place for Australian Muslims, as well as establishing the first Muslim funeral service to cater specifically to the burial needs of Australian Muslims.<sup>47</sup> The LMA currently offers many different services ranging from those concerned with the welfare and settlement needs of the community to programs aimed at Muslim youth. The LMA stresses that the establishment of a youth centre is critical given that recent census figures show that nearly half of the Muslim population in NSW is less than 24 years of age. The LMA claim that such statistics:

clearly show[s] the paramount importance of establishing such a youth centre to help serve the needs of the increasing number of Muslim youth in Sydney. Therefore, this project was initially drafted as a direct response to the challenge to meet these demands as they arise rather than waiting for a crisis point to be reached.<sup>48</sup>

There are many Muslim based organisations established across the various states and territories of Australia. These ethnically based organisations came together in the mid

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<sup>46</sup> Id at 26.

<sup>47</sup> Lebanese Muslim Association website <[www.lma.org.au](http://www.lma.org.au)> accessed 2 December 2009.

<sup>48</sup> Information from Lebanese Muslim Association website <<http://www.lma.org.au/centre.php>> accessed 26 November 2009.

1960s to establish the Australian Federation of Islamic Societies, which later became the Australian Federation of Islamic Councils (AFIC).<sup>49</sup> AFIC was formed in 1976, based first in Melbourne then in Sydney. AFIC heads a three tiered structure. Below it are the Islamic Councils of each state and territory which are representative of the multitude of local Muslim organisations. The idea of AFIC was that it would be the sole representative of Muslims in Australia and thus become a unifying force for the multitude of organisations and societies that were being established. As Cleland writes 'Muslim immigrants from various backgrounds...sought to build a degree of unity'.<sup>50</sup>

However that clearly has not been the case, with AFIC finding itself embroiled in controversy after controversy, particularly with the organisations that it purports to represent, and as a result it has not had such a unifying role to play in bringing together all Muslims in Australia. As one community leader interviewed mentioned:

*AFIC as it currently stands competes in the same fields as the bodies it is supposedly unifying. Despite a unifying objective, its practice demonstrates that it sees itself as a competitor rather than as a leader.*<sup>51</sup>

This reflects the often repeated sentiment that there is a need for strong leadership within the community. We will return to a more detailed discussion of the leadership and organisational structure of the Muslim community later in the chapter. However, it is now important to look briefly at the Muslim population in today's Australia –

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<sup>49</sup> Cleland, above n38 at 27 -28.

<sup>50</sup> Ibid at 18

<sup>51</sup> Community Leader, interviewed 11 March 2003, 28 April 2008.

because whilst it is often assumed that Australian Muslims are a homogenous group, the reality is very different.

#### 4. Muslim Identity in Australia

As mentioned above, with over 1300 million Muslims throughout the world coming from various cultural, ethnic and linguistic backgrounds, it is necessary and very important to remember that they are not a homogenous group.<sup>52</sup> Similarly the Muslim Community in Australia is a reflection of this dynamic and diverse community, and as mentioned above, is made up of many different ethnic communities, the two largest of these being the Lebanese and the Turkish.<sup>53</sup>

However whilst culture has an important role to play, and indeed each one of these communities is very rich in its cultural heritage, when it comes to Islam in Australia there is a common bond that binds all the communities together, where religion takes precedence over cultural values and principles. It can be argued that the basis for this is the ‘feeling that all Muslims belong to one single community of believers wherever they live or reside...It is not a political idea but a religious one’.<sup>54</sup> Saeed describes this interpretation of Islam as one which, due to its reliance on scripture, ‘transcends ethno – national divisions and provides the foundation for the community of belief’.<sup>55</sup> This is borne out by the current research. One community leader interviewed related this back to the early Muslim community:

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<sup>52</sup> Saeed, above n28 at 4 ; Phillips, above n29.

<sup>53</sup> Saeed, above n28 at 5.

<sup>54</sup> Ibid at 26.

<sup>55</sup> Saeed & Akbarzadeh, above n25 at 3.

*Looking back at the migration of the Prophet (PBUH) and his companions from Mecca to Medina, moving from one place to another and being faced with the challenge of taking a group to accommodate itself with another group, this signifies to me that Islam from its very beginning had to deal with the accommodation of cultural differences, and indeed this was crucial to the success of the first Muslim community and formed the basis for the spread of Islam.<sup>56</sup>*

Others talked about the integral role that custom and culture can play in the religious life of the community:

*Custom, or what is known as 'urf', becomes part of the religion itself provided that it doesn't conflict with Islam.<sup>57</sup>*

Other interviewees stressed that Islam encompasses differences of culture and unifies the adherents in a bond of faith:

*Islam offers a community to its believers – whilst culture is important – it provides a place of belonging for Muslims, so for example as a Muslim from an Arabic speaking background I feel quite at home walking into a mosque run by a Turkish organisation or a Bosnian organisation. It is really interesting that this regularly happens in Australia, after all there aren't too many places around the world where you have so many different cultural groups living side by side.<sup>58</sup>*

Humphrey also identifies this, whilst acknowledging that the Muslim community in Australia is extremely diverse, he argues that 'Muslims transact over Islam as a

<sup>56</sup> Community Leader, interviewed 5 December 2007.

<sup>57</sup> Religious Leader, interviewed 6 August 2006.

<sup>58</sup> Community Member, interviewed 3 March 2006.

shared immigrant experience and as a representational identity'.<sup>59</sup> This issue was mentioned by several of the community leaders interviewed for this research, with many indicating that they had Muslims from various cultural and ethnic backgrounds seeking their advice and guidance:

*It pleases me that my advice is sought from people from all different cultures.*

*In fact it has given me an opportunity to get to learn the different practices of these cultures that make up the Muslim community.*<sup>60</sup>

Another good example of this is the Muslim Women's Association (MWA), a peak Muslim women's organisation in Australia, which has represented and been inclusive of Muslim Women from all different backgrounds for over 25 years. As one worker from the Association said:

*We pride ourselves at the MWA on being Australian Muslim Women and being able to service the Australian Muslim community, regardless of ethnicity, culture or language spoken – our doors are open to all Muslim Women.*<sup>61</sup>

It is interesting that on the one hand there is a commonality found in Islam, but this is clearly coupled with a recognition that beneath this unifying force is a whole range of diversity and difference that needs to be taken into account. For example, as pointed out by the manager of one of the key organisations:

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<sup>59</sup> Michael Humphrey, 'An Australian Islam? Religion in the Multicultural City' in Saeed & Akbarzadeh, *aboven24* at 35.

<sup>60</sup> Religious Leader, interviewed 25 January 2003.

<sup>61</sup> Community Leader, interviewed 5 June 2006, 23 July 2008.



*Whilst we are a religious based organisation, we are often dealing with cultural issues, so the 'imāms deal with the religious issues and we quite often find ourselves having to deal with the cultural stuff...this has meant that we need to have staff and management to be able to deal with the community issues...our experience demonstrates to us that it is valuable to have the diversity of our community represented in our staff.*<sup>62</sup>

There is also awareness that over the years, the community has had to deal with issues affecting some cultural groups more than others, such as settlement issues for refugee communities:

*As a community organisation we have constantly had to deal with the various issues affecting particular cultural communities within the Muslim community, particularly issues of crisis or need, in particular when we have had an influx of migrants from particular cultural groups each with their own issues and concerns. On the one hand we need to quickly step in to assess their immediate settlement needs, yet be mindful that the community as a whole is more than just recently arrived migrants.*<sup>63</sup>

It is obvious that with culture and religion operating in the same sphere, the important question to ask is how they fit together. One young religious leader interviewed for this research gave a very interesting picture to describe how he saw the intersectionality of Islam and culture. He relied upon the work of Dr 'umar Faruq Abd-Allah, a North American Islamic scholar who argues that:

<sup>62</sup> Community Leader, interviewed 15 March 2003.

<sup>63</sup> Community Leader, interviewed 5 June 2006, 23 July 2008.

In history, Islam showed itself to be culturally friendly and in that regard, has been likened to a crystal clear river. Its waters (Islam) are pure, sweet, and life giving but – having no color of its own – reflect the bedrock (indigenous culture) over which they flow. In China, Islam looked Chinese; in Mali, it looked African. Sustained cultural relevance to distinct peoples, diverse places, and different times underlay Islam's long success as a global civilization.<sup>64</sup>

However, one of the realities of such a diverse community is that there is confusion as to what constitutes an Islamic practice and what constitutes a cultural practice, as one community leader put it:

*Confusion is caused by people coming to this country and not leaving behind attitudes and behaviour that can cloud what is really permissible as Islamic behaviour. So you need to understand how much of the old traditions and customs are still practised and how much are Islamic – once you can make this distinction between culture and religion you can put your finger on the pulse and say that is the problem.*<sup>65</sup>

Muslims themselves not knowing the difference, as some community leaders and workers said, can experience this confusion between culture and religion:

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<sup>64</sup> 'umar Faruq Abd-Allah, *Islam and the Cultural Imperative* (2004) at 1.

<sup>65</sup> Community Leader, interviewed 10 March 2003, 1 July 2008.

*For a lot of the early Muslim migrants they would have gained a lot of their knowledge about Islam growing up in Australia – and that is a reality – it does not mean that they are not Islamic – they might be very pious but their degree of knowledge may not be very much.<sup>66</sup>*

*It is frustrating when I have to advise people that what they are purporting to do in the name of Islam is nothing more than a cultural practice and whilst this is ok if it does not contradict Islamic principles, it is hard when it actually goes against Islam, but people are convinced it is a religious practice because their parents and grandparents used to do it.<sup>67</sup>*

This was also raised by younger interviewees, such as one who was talking about how hard it was to organise her marriage because of cultural practices that she and her husband-to-be did not agree with:

*It was hard when our parents insisted on doing things in a particular way, but we knew that this is not really Islam, but rather cultural practices that we did not want to adopt.<sup>68</sup>*

Another said:

*As I have begun attending several Islamic classes, I have learnt that there are certain things that my family and friends have done in the past that I thought were part of Islam are actually not...this means that I certainly won't*

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<sup>66</sup> Community Worker, interviewed 6 June 2003, 7 July 2008.

<sup>67</sup> Religious Leader, interviewed 2 June 2006.

<sup>68</sup> Community Member, interviewed 17 January 2006.

*be doing it with my children....I want to clarify what is religious practice and what is cultural.*<sup>69</sup>

These sentiments reflect the importance that religion has for many Australian Muslims, particularly the younger generation. In research undertaken by Bouma and Brace-Govan in 2000, Muslim women ‘talked extensively in a personal context about the practice of religion as a significant and crucial platform for their identity’.<sup>70</sup> They also found that this was particularly so for young Muslim women.<sup>71</sup> This was also true for most of the people interviewed for this research, as one young woman said:

*Islam as a religion gives me my moral values and work ethics, as a Muslim I don't want to separate them – it forms the person of who I am – these religious principles define who I am.*<sup>72</sup>

Many of those interviewed were concerned that the confusion between culture and religion has had a negative impact on the way that the wider Australian community views Muslims, as one community leader said:

*The flipside of having a community that encompasses cultural diversity is that we have to deal with many issues that are cultural but come across as being a religious practice. The most obvious example of this that comes to mind is the actions of the Taliban and their treatment of women which*

<sup>69</sup> Community Member, interviewed 4 May 2006.

<sup>70</sup> Gary Bouma & Jan Brace-Govan, ‘Gender and Religious Settlement: Families, Hijabs and Identity’ (2000) 21 *Journal of Intercultural Studies* 2 159 at 167.

<sup>71</sup> *Ibid* at 168.

<sup>72</sup> Community Member, interviewed 21 June 2006.

*definitely has no basis in Islam, yet impacted greatly on the perception of the wider community about Islam and Muslims.*<sup>73</sup>

Not only is the distinction between culture and religion important to understand because of the need to more accurately appreciate the lives of Muslims in Australia, but it has also led many to believe that understanding the difference between religion and culture will pave the way for a more “Australianised” version of Islam to develop:

*Given the way Islam incorporates culture, there is nothing stopping Islam from incorporating an Australian culture, in fact it is inevitable that this will happen given that Islam encompasses the culture it finds itself in, so really the whole argument about the integration of the Muslim community is a moot one really, of course we will be part of the Australian community.*<sup>74</sup>

This has also been described by Professor Saeed as part of the ongoing process of the evolution of an Australian Muslim Identity.<sup>75</sup> Whilst the discussion above noted that the history of Islam in Australia is not a new phenomenon, the reality is that the Muslim community did not become a significant feature of the Australian population until the latter half of the 20<sup>th</sup> century, and in particular after the 1970s. This makes the Muslim community relatively young, and one that is still developing in terms of structure and identity. What this identity will be and what it will look like is yet to be seen, although several leaders who were interviewed had views about this. As one said:

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<sup>73</sup> Community Leader, interviewed 4 November 2007.

<sup>74</sup> Community Leader interviewed 11 March 2003, 28 April 2008.

<sup>75</sup> Saeed & Akbarzadeh, above n25 at 5.

*We are a developing community.....and I am sure that we will see in the future a community that is identifiable as the Australian Muslim community, not just by name but maybe this will manifest itself in other ways such as our dress, for example we have a certain dress code as a Muslim but this does not mean that it cannot fit in to the culture that we find ourselves in, so we might find that there are particular colours or styles that become identifiably Australian, I mean what comes to mind is the burquini that became famous as Muslim women sought to join an iconic Australian organisation – Australian Surf Life Saving Association and adhere to their religious dress code as well.<sup>76</sup>*

Another area of diversity amongst Muslims is the differing degrees of religiosity that exist within the community, with some adhering to an Islamic way of life in all aspects of their day to day affairs, and others only identifying themselves as being Muslim and committed to the core principles of the faith with no regular adherence to the practice of the religion. However, the research clearly established that regardless of the degree of religiosity or of how closely people practiced their faith, when it comes to matters of marriage and divorce people seek to access the community processes and the validation that this gives them. As one community leader put it:

*I see people in my office asking for help in marital matters that I have never seen praying in the mosque or at any other communal acts of worship...but people think that they need to come and see people like me if things are going wrong with their husband or wife.<sup>77</sup>*

<sup>76</sup> Community Leader, interviewed 1 February 2007.

<sup>77</sup> Religious Leader, interviewed 17 April 2006.

This issue will be considered in more detail throughout this thesis as we begin to develop an understanding of the importance of religious principles to the way that Australian Muslims deal with their family law matters.

## **5. A Contextual Analysis of public sentiment towards Islam and Muslims in Australia post September 11**

Any discussion about the Muslim community in Australia would be incomplete without an awareness of the wider context that the community operates in. This is particularly so in the last decade with tragic world events shaping a somewhat difficult terrain for Muslims living in western countries. Many commonly held assumptions see Islam and indeed Muslims as a threat to society as a consequence of events such as 9/11, the Bali bombings and the various other 'terrorist attacks' that the world has witnessed since then. As Yasmeen argues that after September 11:

The vague notions of difference between Islam and the west began changing into an idea of an inherent clash between these two assumed identities. Australia as a western country was increasingly perceived as a possible target of Islamic militants.....Questions were raised about the loyalty of Muslims living in Australia, and the possible role they could play as the source of 'home grown' Muslim terrorists.<sup>78</sup>

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<sup>78</sup> Samina Yasmeen, 'Muslim Women as Citizens in Australia: Diverse Notions and Practices' (2007) 42 *Australian Journal of Social Issues* 41 at 48.

Furthermore she contends that the ‘negative characterisations of Islam reinforced the previously held biases among sections of the Australian population. This, in turn, impacted upon the treatment of Muslims after 9/11’.<sup>79</sup>

This has been well documented by the Australian Human Rights Commission in their 2003 report entitled *‘ism’a -Listen*<sup>80</sup> which explored whether Arab and Muslim Australians were experiencing discrimination and vilification post-September 11.<sup>81</sup> It found that the majority of participants in the project experienced various forms of prejudice because of race or religion, with such experiences ranging from offensive remarks to physical violence.<sup>82</sup> The report also noted that:

...these experiences are having a profound impact on Arab and Muslim Australians. The biggest impacts are a substantial increase in fear, a growing sense of alienation from the wider community and an increasing distrust of authority’.<sup>83</sup>

This idea that Muslims hold views and have values contrary to that of Australian society is largely based on misconceptions and generalisations. As Saeed noted in his report on Muslim Australians, some of these misconceptions include that Muslims worship a different God; Muslims hate Jesus; Islam is a racist religion; Islam condones the killing of innocent people; Islam is against democratic values; women are inferior to men; Islam is against integration and that Muslims want their own

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<sup>79</sup> Id.

<sup>80</sup> Australian Human Rights Commission, *‘ism’a-Listen: National consultations on eliminating prejudice against Arab and Muslim Australians* (2003).

<sup>81</sup> Ibid at 1.

<sup>82</sup> Ibid at 3.

<sup>83</sup> Ibid at 4.



system of law<sup>84</sup> These views led many in Australia to question the loyalty of Australian Muslims. The manager of one of the key Muslim women's organisations recalled the debate that occurred in 2005 about banning the dress of Muslim women:

*It was a very hard time for Muslim Women in Australia, it was as simple as saying that the way we look or dress excluded us from being Australian, this was devastating for many Muslim Women.*<sup>85</sup>

The events of 2001 and 2002 clearly placed the Muslim community under a spotlight, as a series of unrelated events culminated in a very negative view of Islam and Muslims in Australia. It is important to appreciate that the terrorist acts of 2001 were preceded by allegations of gang rapes by young men of Muslim background in Sydney and an influx of asylum seekers from Muslim countries. Tanjer Dreher, a researcher on Islam and the media, argues that:

What's been the most interesting finding really is going back over the coverage, the speed with which the sexual assaults in Bankstown were linked to the story of the Tampa refugees, which then became linked to the story of the events in the US on September 11....The key feature that was used to link these actually very different stories was the notion of Islam, the idea that there were Muslim people involved in these stories. So a very localised story about crime, a national debate on immigration policy and then a global or international debate around terrorism were all linked through the image of Islam.<sup>86</sup>

<sup>84</sup> Saeed, above n28 at 66-72.

<sup>85</sup> Community Leader, interviewed 5 June 2006, 23 July 2008.

<sup>86</sup> ABC Television, 'Encounters With Islam', *Compass*, 21 April 2002, <<http://www.abc.net.au/compass/s538946.htm>> accessed 2 December 2010.

These events and debates have, in the words of one leader:

*... meant that the community always seems to operate in crisis mode – dealing with one issue after the other – sometimes you feel you just want a break..*<sup>87</sup>

In a similar vein, Nada Roude, then media spokeswoman for the Muslim Women's Association and the Islamic Council of NSW, noted in 2002 that such events place greater pressure on Muslim women in Australia, as she said:

The extra challenge for us is that because we are highlighted as a community that's full of problems it makes our position a lot more harder because we have to consider the hostility that we often have to face from outside the community while we're trying to look after our own challenges within the home and within the community.<sup>88</sup>

However, as many of those interviewed were quick to point out, the attention on Muslims hasn't been all bad, with many initiatives being developed to address the misconceptions about Muslims. Some expressed the view that this was a positive thing with a noticeable increase in demand in people wanting to know more about Islam and Muslims:

*I would expect that we are on a whole new journey understanding what Islam is all about and more people are seeking that better understanding.*<sup>89</sup>

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<sup>87</sup> Community Leader, 17 June 2008.

<sup>88</sup> ABC Television, 'Encounters With Islam', *Compass*, 21 April 2002, <<http://www.abc.net.au/compass/s538946.htm>> accessed 2 December 2010.

<sup>89</sup> Community Leader, interviewed 6 August 2006.

*Our workshops on Islam have been full to capacity with an increasing number of people wanting to understand about Islam and Muslims...so really out of something negative there has been much benefit in clarifying what Islam is all about.*<sup>90</sup>

This is coupled by various government initiatives, many of which will be outlined in chapter 5, that have attempted to support a greater awareness of issues facing Islam and Muslims in Australia. For example, in 2005 the Muslim Community Reference Group was established for a one-year term to advise the government on Muslim community issues. In July 2006 the government developed a National Action Plan to Build Social Cohesion, Harmony and Security with a strong focus of researching and working with the Muslim community.

## **6. Leadership and Structure of the Muslim Community**

The discussion above has given an insight into the wider context in which the Australian Muslim community operates. It is now important to return to understanding the leadership and organisational structure of the Australian Muslim community. It is imperative to understand that there is no official religious hierarchy in Islam.<sup>91</sup> In matters of religious worship such as prayer, anyone with a basic understanding of Islam can be a leader, and ‘no one has to be appointed...in order to perform this function’.<sup>92</sup> However, as Saeed rightly observes in Australia ‘an *imām* is generally appointed at each mosque to look after the mosque, lead worship, and

<sup>90</sup> Community Worker, interviewed 10 June 2006, 4 July 2008.

<sup>91</sup> Saeed, above n28 at 53.

<sup>92</sup> Ibid at 53-54.

conduct other associated activities'.<sup>93</sup> Whilst this is true, there are also many *'imāms* who are not associated with one particular mosque, and who are employed in other capacities such as schoolteachers, chaplains or run their own businesses.

These *'imāms* usually have some training in Islamic religious disciplines, and quite often this is a degree from an Islamic University.<sup>94</sup> Most of these *'imāms* are from overseas, but there is an increasing number of Australian-born but overseas-trained *'imāms* emerging. The officially appointed *'imām* of a mosque has many different responsibilities which can vary from mosque to mosque and *'imām* to *'imām*, but usually include the following: providing guidance to the community in their religious life; running the daily affairs of the mosque; conducting regular prayers including giving the Friday sermon; providing religious education; representing the community and dealing with issues of a family law nature, including both marriage and divorce.<sup>95</sup> Some *'imāms* work on their own, being the only *'imām* assigned to a particular mosque or doing community work after hours. In contrast, some mosques, particularly the larger ones like Lakemba, have several *'imāms* to serve the needs of the mosque community.

The *'imāms* interviewed for this research all agreed that there are great benefits in working together with other *'imāms*, yet a few expressed a preference for working on their own out of frustration with what they saw as failed attempts at liaising with other *'imāms*, as one said:

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<sup>93</sup> Id.

<sup>94</sup> Ibid.

<sup>95</sup> Ibid.

*Sometimes it is a personality clash, just like in any workplace, we just find it difficult to agree on how to do certain things.*<sup>96</sup>

Yet, others have over the years come together at various times to work together, particularly on complex community issues such as family law matters. There are a couple of groupings of *'imāms* who do this. Some have their own established processes that are followed and a regular meeting time and place. Several *'imāms* spoke of the benefits of working together:

*As 'imāms we regularly work together, and in particular when it comes to issues of marriage and divorce we realised the need of collaborating on such matters where we can benefit from sharing our different perspectives and views – because this is part and parcel of Islam – accepting that there can be different views.*<sup>97</sup>

*As a younger 'imām it is great to be able to have access to and work with those more knowledgeable than myself.*<sup>98</sup>

In addition to the informal groupings of *'imāms* who work together, there are also in existence, State Boards of *'imāms* that were established in the 1990s with a purpose of bringing together *'imāms* to discuss matters of concern to Muslims. However as Saeed acknowledges, 'Although a Board theoretically represents *'imāms* of all mosques in the state, in practice only a small number actually take part in the weekly

<sup>96</sup> Religious Leader, interviewed 6 August 2006.

<sup>97</sup> Religious Leader, interviewed 7 July 2008.

<sup>98</sup> Religious Leader, interviewed 11 December 2003, 2 June 2006, 17 September 2008.

or monthly meetings'.<sup>99</sup> Finally there has been the recent initiative of the Australian National 'imāms Council (ANIC) which was established in late 2006 'as an umbrella organisation consisting of a Council of 'imāms, representing each Australian State and Territory'.<sup>100</sup> Its vision is 'to be a leading body representing mainstream Islam in Australia' and its mission is

to provide religious leadership, rulings and services to the Muslim community of Australia by supporting local Islamic organisations, developing educational, social and outreach programs and fostering good relations with other religious communities and the wider Australian society in an effort to promote harmony, cooperation and successful integration within mainstream society.<sup>101</sup>

As most of the interviews were concluded before the formation of ANIC, it is hard to comment on the impact of this body on the leadership needs of the community, although apart from its own annual meetings and a few press releases it has not had any great role to play in the community.

A central feature of the Muslim community is the mosque, often associated with a particular organisation and ethnicity. There are more than one hundred mosques throughout Australia, most being in Sydney and Melbourne, but all capital cities in Australia have mosques.<sup>102</sup> Generally speaking, Muslims feel comfortable praying in

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<sup>99</sup> Abdullah Saeed, *Islam in Australia* (2003) at 141.

<sup>100</sup> Australian National 'imāms Council website <[www.anic.org.au](http://www.anic.org.au)> accessed 6 July 2009.

<sup>101</sup> Ibid.

<sup>102</sup> Saeed, above n28 at 53-54.

any of these mosques regardless of their ethnicity, cultural or theological orientation.<sup>103</sup>

As previously mentioned, Muslims have formed a large number of Islamic societies, centres and associations in Australia. Some are based on ethnicity, such as those discussed above, for example, the Lebanese Muslim Association based in Lakemba, NSW and others are youth based, educational based, gender based or welfare based. These organisations theoretically fit into a three tiered leadership structure.<sup>104</sup> Firstly, at a grass roots level there exists a multitude of Islamic Associations and Societies that represent the diverse composition of the Muslim community. Secondly, these associations and societies belong to the Islamic Council of each State and Territory who in turn belong to the final tier, which is the Australian Federation of Islamic Councils (AFIC).<sup>105</sup> All three tiers are governed by constitutions, and leadership is composed of ‘lay leaders’ rather than *imāms* with specific religious training.<sup>106</sup> Saeed argues that ‘it is the lay leadership which plays a fairly substantial role in representing Muslims to politicians, the government, the media and other non-Muslim community organisations’.<sup>107</sup>

However for various reasons there have been tensions within such a leadership structure, with the end result being that, for many Australian Muslims, AFIC does not represent them. As Saeed describes

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<sup>103</sup> Id.

<sup>104</sup> Saeed, above n99 at 138.

<sup>105</sup> Ibid.

<sup>106</sup> Ibid.

<sup>107</sup> Ibid at 138-139.

tensions within the Muslim communities and challenges to the AFIC's authority have somewhat weakened its influence...Despite this, the AFIC still functions as an umbrella organisation for many Muslims, although it has not been successful in bringing together several independent Muslim societies to create a strong, unified movement to lobby for the interests of all Muslims in Australia.<sup>108</sup>

The implication is that there is little coordination of projects and a duplication of work, and this is quite significant when most of these organisations have limited resources.

Nor is there one single religious figure or body that speaks on behalf of all Australian Muslims, despite the fact that for about 2 decades, until quite recently, *Shaykh* Taj al-Din al-Hilali, an *'imām* based in Sydney, was known as the "Mufti of Australia". However not all Muslims in Australia recognised him as such. In 2007, after a series of controversies surrounding him, ANIC, the newly formed National *'imāms* Council, decided to meet to consider who should be given the title of Mufti, and after much deliberation the board selected *Shaykh* Fehmi Naji al-*'imām*, a Melbourne based *'imām* to take on this role. However despite such a title, it is difficult to say that he represents the entire Muslim community in Australia, mainly because the community is so diverse and fragmented. Saeed argues that the only conclusion that can be reached about religious leadership in the Australian Muslim community is that it 'will remain divided for the foreseeable future'.<sup>109</sup> This is an accurate reflection that is well supported by the current research. As one community leader put it:

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<sup>108</sup> Id at 140.

<sup>109</sup> Ibid at 140-142.



*We will remain divided until the 'imāms find common ground to agree on and develop a framework which can accommodate their differences, differences which are inevitable in a community such as ours.*<sup>110</sup>

## 7. Conclusion

The discussion above has outlined the long history of the Muslim community in Australia, although clearly it was the post World War II migration of Muslims to Australia that saw the beginnings of a Muslim community in Australia. With a culturally and ethnically diverse make-up as described above, it may be more accurate to refer to Australian Muslim communities rather than a Muslim community, or at the very least the diversity of the community needs to be acknowledged. As the discussion above has demonstrated, the Muslim community has developed largely around various ethnic based community welfare and mosque organisations. Furthermore, despite attempts to unify these organisations within an umbrella like structure of state councils and a federal body, the reality is that most of the existing organisations fall outside of this structure. Again, in terms of religious leadership, despite various attempts at developing a unifying structure, this remains quite fragmented, although there has been a recent body set up to bring together the religious leaders across the country, although it is still too early to be able to assess this. However, despite the diversity of the Australian Muslim community, there seems to be an identifiable and emerging Australian Islamic identity which unifies this community.

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<sup>110</sup> Religious Leader, interviewed 7 April 2007.

## **Chapter 3**

### **Establishing a Theoretical Framework**

#### **1. Introduction**

The question of the accommodation or recognition of Islamic family law in Australia is at the heart of this research project, but before we can consider what this actually means in practice, it is imperative to consider why this question is relevant in the first place. Why does a secular liberal democratic state such as Australia need to be concerned with Islamic family law? The answer is relatively simple and derives in part from the data presented in Chapter 2 above. Australia, like many other countries around the world, has an incredibly diverse population drawn from all corners of the globe. With such a rich mix of differing cultural and religious groups, it is inevitable that such groups will at times have differing laws, practices and norms to the majority culture. Whilst it is accepted that all citizens are subject to the one legal system, it is acknowledged that for these minority groups, and in the case of the present research, for the Muslim community, that their various cultural and religious norms and laws also have a role to play in governing their lives. Indeed this thesis devotes considerable space to detailing the significance and application of Islamic family law for Muslims in Australia.

Understanding how Muslims in Australia resolve their family law disputes challenges the assumption that the only applicable law in Australia is official law. The reality reflects a very different situation whereby minority groups, and in the case of this research the Muslim community, resolve their family law affairs largely outside the 'official legal system'. In order to understand this, this thesis attempts to analyse this phenomenon by using the theoretical framework offered by legal pluralism. One of the aims of the discussion in this chapter is to set out this framework, to show that a better understanding of 'law' is to see it as being more than what is produced by the state. In the case of Muslims and their family disputes, principles of Islamic law have a central role to play even though they are neither recognised nor enforced by the official legal system.

With this understanding of law and an appreciation of the fact that various cultural and religious norms and laws that lie outside of the official legal system are relied upon to resolve family law issues, the question then needs to be asked, what should a liberal democratic state such as Australia do about this? The concept of multicultural citizenship as articulated by Will Kymlicka<sup>111</sup> is used to demonstrate a need for liberal democratic states to officially recognise and accommodate the different practices and norms of the multitude of minority groups found within them. Indeed this concept is the remaining part of the theoretical framework of this research and will be outlined in this chapter. However, one of the greatest arguments against official recognition of this diversity is that it fails to protect vulnerable members of these minority groups, in

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<sup>111</sup> Will Kymlicka, *Multicultural Citizenship: A liberal theory of Minority Rights* (1995).

particular women. This chapter will also explore this critique in some detail, and consider its relevance for the accommodation of Islamic family law in Australia.

## 2. Legal Pluralism

Questions of recognition or accommodation of *Shari'ah* or Islamic dispute resolution processes in liberal democratic states imply the existence of another legal order or system operating alongside the mainstream official legal system. One of the aims of this thesis is to document this phenomenon, to show how principles of Islamic family law are applied in Australia, and in particular to describe and analyse the community processes in place which seek to implement such laws and principles. Understanding these processes then allows us to explore the question of accommodation and recognition by the State.

However before we reach the point of such description and analysis, we need to acknowledge that we are questioning a widely held assumption that the only 'law' that is applied in Australia is the official state law. In other words we need to accept that this approach questions the assumption that law is mono and static and that one law applies to all. There has been widespread disbelief whenever it has been suggested that *Shari'ah* or Islamic Law has a role to play in countries such as Australia, UK and Canada, and it has been seen as an attempt to replace state law with a foreign law, leaving many arguing that this would create different laws for different groups.<sup>112</sup> Whilst this research is also about arguing that this call for accommodation by the Muslim community is not about setting up a foreign parallel legal system, it also attempts to show that an understanding of law that sees the state as the only

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<sup>112</sup> Lynda Hurst, 'Ontario *Shari'ah* Tribunal assailed women fighting use of it' *The Toronto Star* (22 May 2004).

producer of law is very much mistaken.<sup>113</sup> In this way, this research is adopting the theoretical framework of legal pluralism to attempt to understand the existence of multiple legal orders within one state.

## 2.1. What is Legal Pluralism?

Whilst there is no single definition of legal pluralism, a common premise of legal pluralism is that state law is not the only legal order applicable in a particular space, and therefore the official law cannot claim to be the only valid and applicable law in Australia. In fact the claim of legal centralism, that the ‘law is and should be the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions’ is seen as a myth or an illusion by legal pluralists.<sup>114</sup>

According to Hooker, the term legal pluralism refers to the situation in which two or more laws interact.<sup>115</sup> This is coupled by an understanding that the state is not the only producer of law, and that non-state communities can produce law as well.<sup>116</sup> Ehrlich, who in the early part of last century developed the idea that ‘a multiplicity of normative orders existed which deserved to be called law’, also considered that ‘the essence of law was not produced in texts, or by state authorities, but rather developed in society’.<sup>117</sup>

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<sup>113</sup> Ralf Michaels, *The Re-State-ment of Non-State law: The State, Choice of Law, and the Challenge of Global Legal Pluralism*, Duke Law School Working Paper Series (2005) at 12.

<sup>114</sup> John Griffiths, ‘What is Legal Pluralism?’ (1986) 24 *Journal of Legal Pluralism* 1 at 3-4.

<sup>115</sup> M B Hooker, *Legal Pluralism : an introduction to colonial and neo-colonial laws* (1975) at 6.

<sup>116</sup> Michaels, above n113.

<sup>117</sup> Ibid at 13.

Davies, who prefers to talk about an ‘ethos’ of pluralism rather than a theory, acknowledges that pluralism is itself pluralistic and cannot be reduced to a theoretical model.<sup>118</sup> She distinguishes between outward looking and inward looking pluralism. An inward or reflexive pluralism looks at state defined law and sees it as being inevitably plural. An outward-looking pluralism, which is what is most relevant to this thesis, sees a diversity of legal or law-like normative systems existing in the one space.<sup>119</sup>

Davies argues that pluralistic conceptions of law recognise multiple types of law, emphasise the heterogeneity of narratives constituting the law and identify several origins of law. This questions the orthodox jurisprudential, scholarly and practical conception of law as ‘monistic’, which depicts law as a single coherent structure of norms derived from a clearly located source – the state.<sup>120</sup> She describes it as a division between law as One and law as Many<sup>121</sup>, as a pluralist approach rejects ‘seeing law as a single type of object, a unit or as something which can be described and theorised as a totality or a system’<sup>122</sup>. Rather law is seen as fragmented, not systematic and cohesive.

However, it needs to be acknowledged that central to our understanding of legal pluralism is an understanding of what we mean by law. Whilst there is agreement that law is not restricted to state law, the problem as described by Merry is ‘where do we stop speaking of law and find ourselves simply describing social life?’<sup>123</sup> For

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<sup>118</sup> Davies, above n26 at 90.

<sup>119</sup> *Ibid* at 96.

<sup>120</sup> *Ibid* at 88.

<sup>121</sup> *Ibid*.

<sup>122</sup> *Ibid* at 91.

<sup>123</sup> Sally Engle Merry, ‘Legal Pluralism’ (1988) 22 *Law and Society Review* 869 at 878.

some, law is anything that fulfils the same functions as state law, such as social control or the resolution of disputes, whilst for others it is how people themselves view what they do, and whether they see this as being law.<sup>124</sup> Griffiths defines law as ‘the self regulation of a semi-autonomous social field’<sup>125</sup> whilst Galanter defines it in terms of the differentiation and reinstitutionalisation of norms into rules.<sup>126</sup> Tamanaha argues that one of the problems with legal pluralism is that there are competing definitions of law; definitions which he argues are either too broad or too narrow.<sup>127</sup> Tamanaha argues that law is a cultural construct and what it is and what it does cannot be captured in any single concept or by any single definition.<sup>128</sup> Rather than a concept or definition of law, Tamanaha argues for a criterion for the identification of law, as he states that ‘Law is whatever people identify and treat through their social practices as law.’<sup>129</sup>

A state of legal pluralism then exists whenever more than one kind of ‘law’ is recognised through the social practices of a group in a given social arena.<sup>130</sup> The identification of ‘law’ comes from the multiple sources of normative ordering in the social arena, which Tamanaha identifies as being:

- Official legal systems
- Customary/cultural normative systems
- Religious/cultural normative systems
- Economic normative systems

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<sup>124</sup> Michaels, above n113 at 17.

<sup>125</sup> Griffiths, above n114 at 38.

<sup>126</sup> Brian Tamanaha, ‘A Non-essentialist Version of Legal Pluralism’ (2000) 27 *Journal of Law and Society* 296 at 297.

<sup>127</sup> Ibid at 313.

<sup>128</sup> Ibid.

<sup>129</sup> Ibid.

<sup>130</sup> Ibid.

- Functional normative systems
- Community/cultural normative systems<sup>131</sup>

Each one of these makes one or more of the following claims:

- They possess binding authority
- They are legitimate
- They have normative supremacy
- They have (or should have) control over matters within their scope<sup>132</sup>

This means that there is potential for any one or more of these systems to clash with or at least intersect with the official state system. Santos discusses:

the impact of legal plurality on the legal experiences, perception and consciousness of the individuals and social groups living under conditions of legal plurality, above all the fact that their everyday life crosses or is interpreted by different and often contrasting legal orders and legal cultures.<sup>133</sup>

In this way, legal pluralism promotes a more inclusive concept of law and is more empirically useful because it more adequately captures the multiple normative engagements within contemporary society.<sup>134</sup> As Davies argues, it recognises that as legal subjects we do not act merely on the basis of legal prescriptions as they are identified and interpreted in a formal system, but on the basis of the intersecting

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<sup>131</sup> Tamanaha, above n126 at 297-299.

<sup>132</sup> Ibid.

<sup>133</sup> Quoted in Michaels, above n113 at 2.

<sup>134</sup> Davies, above n26 at 100.



demands of our own ethical beliefs, our location in a social field, prevailing discourses about right and wrong and any number of more practical considerations.<sup>135</sup>

If we understand law to be plural and we acknowledge the existence of multiple legal orderings, then we need to ask the question, ‘Can the State, with its institutions ignore the emerging non-state normative orders or must it...eventually accommodate these orders?’<sup>136</sup>, as legal pluralism is more than mere respect for cultural and moral pluralism.<sup>137</sup> This is one of the fundamental questions addressed by this research project, how a state deals with a plurality of legal (official and unofficial) orderings. Tamanaha recognises that a state has a number of options, it can condemn or disallow a contrary customary or religious or community norm or institution but take no action to repress it; it can formally endorse the competing system yet do nothing to support it; it can absorb the competing system in some way by incorporating or recognising its norms or institutions; it could take steps to suppress the contrary norms or institutions; or there might be complementary coexistence.<sup>138</sup>

Legal pluralists argue that the state should be willing to enforce decisions and laws of the diverse communities found within it. Davies argues that the development of legal pluralism, as opposed to (the often tokenistic) liberal legal tolerance of moral and cultural pluralism, is a necessary precondition for the equal co-existence of diverse social orders.<sup>139</sup> However Davies also recognises that the recognition of and co-existence with anything conventionally defined as ‘other’ to mainstream law will require a fundamental change in the conceptualisation and institutional manifestation

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<sup>135</sup> Id at 104.

<sup>136</sup> Michaels, above n113 at 20.

<sup>137</sup> Davies, above n26 at 97.

<sup>138</sup> Tamanaha, above n126 at 404 -405.

<sup>139</sup> Davies, above n26 at 112.

of the mainstream.<sup>140</sup> This is because traditional legal theory has traditionally marginalised types of law which do not have an institutional appearance comparable to Western law, ‘labelling such laws as defective, primitive or merely cultural practice’.<sup>141</sup> Davies goes on to say that ‘extraordinarily, in countries such as Australia, where alternative models of law are empirically obvious, this unitary concept has been maintained’.<sup>142</sup> Indeed, this research is a very good example of Davies’ observation, as it demonstrates that when the issue of recognition or accommodation of Islamic law has been raised in states such as Australia, Canada or the UK, the response has generally been to emphasise the unitary nature of the legal system, rather than to explore the important question of ‘how can we maintain the integrity of law as a system, while recognising the need for it to be more socially responsive, flexible, culturally inclusive and adaptive to other normative systems?’.<sup>143</sup>

### 3. Multicultural Citizenship

Accommodating the practices, laws and principles of minority groups is a challenge for any state. It is an even greater challenge in a country like Australia which has such a diverse population. Historically the response of states to such a task was to place the obligation on minority groups to assimilate into the majority culture and society. This meant abandoning any different practices they may have had. However, as the above discussion has indicated and as this thesis will demonstrate, this has not in fact occurred. Rather states have had to deal with the demands made by minority groups for recognition and accommodation of their cultural and religious

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<sup>140</sup> Id at 111.

<sup>141</sup> Ib at 108.

<sup>142</sup> Ibid.

<sup>143</sup> Ibid.

identity.<sup>144</sup> These demands are often articulated in terms of ‘group rights’ aimed at addressing the objectives of recognition and accommodation. In this way, minority groups are claiming differential or special treatment, implying that the existing avenues of rights protection are insufficient to protect their rights and interests.

Some argue that there is no need for any special treatment for minority groups, as one of the fundamental principles that govern our society is the concept of equality, meaning that all citizens of a state should be treated equally. In particular, if there is any transgression of individual rights then the current laws and human rights framework adequately deal with the situation. These are sometimes referred to as difference-blind rights, ‘rights not ascribed to or withheld from people on the basis of their membership of cultural or religious groups’.<sup>145</sup> A primary objective of these rights is to give people equal opportunities as the rule applies equally to everyone and gives them identical choices.<sup>146</sup>

However, scholars such as Will Kymlicka disagree, as they articulate a need for minority rights to be recognised to supplement traditional human rights.<sup>147</sup> Why? Because the assumption that underlies the current human rights approach that the State is neutral and quite separate from culture or religion is questionable. Kymlicka contends that whilst states might appear to be neutral between various groups by according universal individual rights to all their citizens, they can and do privilege the majority, as the decisions they make tend to reflect the norms of the majority.<sup>148</sup>

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<sup>144</sup> Andrea Baumeister, ‘Ways of Belonging: Ethnonational Minorities and Models of Differentiated Citizenship’ (2003) 3 *Ethnicities* 393 at 396.

<sup>145</sup> Nils Holtug, ‘Equality and the Rights of Religious Minorities’ (2007) 4 *Res Cogitans* 49 at 50.

<sup>146</sup> *Ibid* at 52.

<sup>147</sup> Kymlicka, above n111 at 6.

<sup>148</sup> *Ibid* at 51 ; Baumeister, above n144 at 397.

Some go further to argue that the law operates to maintain the hegemony of privileged and established elites.<sup>149</sup>

At the very least, it needs to be acknowledged that the laws of a state do indeed reflect the history and norms of the majority. Koenig argues that the classical nation state is 'considerably less secular and certainly less neutral than is often assumed'.<sup>150</sup> In the case of Australian family law, simply looking at the definition of marriage which is historically derived from Canon Law is a pertinent example of how the law itself, which purports to be secular and non-religious, actually reflects Christian ideals and traditions.<sup>151</sup> Kymlicka considers other state practices such as public holidays and uniforms, to argue that there is 'no way to have a complete separation of state and ethnicity'.<sup>152</sup> He argues that whilst this is an unavoidable situation, it is not necessarily a regrettable one, although certainly it supports the idea that minority groups have rights for differential treatment.<sup>153</sup> This is because the practices of the minority are seen as different<sup>154</sup> and perceived to be the 'other',<sup>155</sup> as the dominant cultural understanding and experiences tend to universalise themselves as the 'inevitable norm for social life'.<sup>156</sup>

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<sup>149</sup> Samia Bano, 'Muslim South Asian Women and Customary Law in Britain' (2000) 4 *Journal of South Pacific Law* at 3 < <http://www.paclii.org/journals/fJSPL/vol04/6.shtml> > accessed 2 December 2010.

<sup>150</sup> Matthias Koenig, 'Incorporating Muslim Migrants in Western Nation States – A Comparison of the United Kingdom, France and Germany' (2005) 6 *Journal of International Migration and Integration* 219 at 232.

<sup>151</sup> Belinda Fehlberg & Juliet Behrens, *Australian Family Law The Contemporary Context*, (2008) at 121.

<sup>152</sup> Kymlicka, above n111 at 115.

<sup>153</sup> Ibid.

<sup>154</sup> Baumeister, above n144 at 397.

<sup>155</sup> Adeno Addis, 'Individualism, Communitarianism, and the Rights of Ethnic Minorities' (1991-1992) 67 *Notre Dame Law Review* 615 at 619.

<sup>156</sup> Ibid.

This brings us to the concept of multicultural citizenship. It is not simply premised on the idea that the minority groups should be accorded special or differential rights. Rather it is a much more complex and nuanced concept, developed by scholars such as Kymlicka as a basis for justifying the accommodation and recognition of the many different cultural groups found within a liberal democratic state.<sup>157</sup> The concept is deeply embedded within liberalism, and not only does it attempt to address this need for differential treatment, but it also seeks to articulate the benefits of such treatment for a liberal democratic state. Liberal multiculturalism rests on the assumption that policies of accommodation can ‘expand human freedom, strengthen human rights, diminish ethnic and racial hierarchies and deepen democracy’.<sup>158</sup>

### 3.1. A Liberal Justification of Multiculturalism

The question needs to be asked, how can liberalism, with its well accepted emphasis on the importance of the individual, be capable of accommodating a notion of group or minority rights? Kymlicka certainly acknowledges the emphasis on the individual within liberalism, but argues that ‘the individualism that underlies liberalism isn’t valued at the expense of our social nature or our shared community’.<sup>159</sup> Rather, he defends minority rights by demonstrating that cultural membership has an important status in liberal thought and is an important good for individuals. Others such as Deets disagree with this, arguing that membership in certain types of communities does not constitute a primary good as understood within liberalism.<sup>160</sup> Part and parcel

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<sup>157</sup> Kymlicka, above n111 at 15.

<sup>158</sup> Will Kymlicka, *Multicultural Odysseys; Navigating the New International Politics of Diversity* (2007) at 18.

<sup>159</sup> Will Kymlicka, *Liberalism, Community and Culture* (1989) at 2.

<sup>160</sup> Stephen Deets, ‘Liberal Pluralism: Does the West have any to Export?’ (2002) 4 *Journal on Ethnopolitics and Minority Issues in Europe* at 4.

of individualism is freedom to make choices, and cultural membership allows individuals to make sense of their lives, by not only providing these choices but also by making them meaningful. Kymlicka contends that ‘Cultures are valuable, not in and of themselves, but it is through having access to a societal culture that people have access to a range of meaningful options’.<sup>161</sup> Thus culture and cultural membership have an important role in enhancing the choices made by individuals within society. However, members of minority cultural communities may face disadvantage with respect to the ‘good of cultural membership’ because their culture is not recognised or accommodated in the same way as the majority culture is. It is the rectification of such disadvantage that requires and justifies the provision of minority rights, and obligates a State to take into account and accommodate the various cultural communities that reside within it.<sup>162</sup> However, it is also this argument that can help to explain why religious principles and traditions rooted in the 7th century are relevant to the lives of Australian Muslims in Australia today. Kymlicka’s view clearly places a great deal of emphasis on the importance of culture, leading McDonald to argue that Kymlicka conflates the role of culture at the expense of ignoring the importance of other communities, such as religious groups, which help individuals make meaningful choices.<sup>163</sup> This point will be returned to later in this discussion.

Some also object to Kymlicka’s analysis on the basis that all citizens, regardless of culture or religion, are members of the one state, and this status affords people rights under the law quite independent of culture or religion. Whilst this is true, and reflects

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<sup>161</sup> Kymlicka, above n111 at 83.

<sup>162</sup> Kymlicka, above n159 at 2.

<sup>163</sup> Leighton McDonald, ‘Regrouping in Defence of Minority Rights: Kymlicka’s Multicultural Citizenship’ (1996) 34 *Osgoode Hall Law Journal* 291 at 298.

what Kymlicka describes as the existence of the political community, he also identifies the existence of a cultural community ‘within which individuals form and revise their aims and ambitions’.<sup>164</sup> In culturally plural societies such as Australia, these two communities do not coincide, and rather than ignoring the latter, Kymlicka argues that:

Liberalism has always included some account of our essential dependence on our social context, some account of the forms of human community and culture which provide the context for individual development, and which shape our goals and our capacity to pursue them.<sup>165</sup>

In the context of this research, this will be a central theme that will be returned to in later chapters when we consider why Islamic Law is relevant to Muslims in Australia. However, again it shows why it is important for liberal democratic states to understand and accommodate the various cultural communities that coexist within them.

### **3.2. A Question of Accommodation?**

How should liberal democratic states attempt to accommodate these different groups and their practices? Historically, migrant groups were expected to assimilate, in the sense that they were to conform to the existing cultural and political norms. It was hoped that over time ‘they would be indistinguishable from native-born citizens’ in their way of life, and if a group was perceived to be incapable of this then they were

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<sup>164</sup> Kymlicka, above n159 at 135.

<sup>165</sup> Ibid at 253.

excluded from entering the country.<sup>166</sup> An Australian example of this is the White Australia Policy.

However, by the 1970s things started to change as countries such as the US, Canada and Australia adopted more tolerant approaches, acknowledging the differences of the many different groups that had become part of the state. This policy or approach is often referred to as multiculturalism. However, as Kymlicka argues, this term can be confusing and somewhat ambiguous, as it can be used to describe many different things and at its broadest level it could encompass all the different lifestyles found in society. Vertovec and Wessendorf argue that ‘it is an illusion to consider multiculturalism as being one philosophy, structure, discourse or set of policy measures.’<sup>167</sup> In their report they present five ways that multiculturalism can be understood as:

- I) a way of describing the actual makeup of society;
- II) a general vision of the way government and society should orient itself;
- III) a specific set of policy tools for accommodating minority cultural practices;
- IV) specially created frameworks of governance allowing for the representation of immigrant and ethnic minority interests; and
- V) a variety of support mechanisms and funds for assisting ethnic minority communities to celebrate and reproduce their traditions.<sup>168</sup>

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<sup>166</sup> Kymlicka, above n158 at 71.

<sup>167</sup> Stephen Vertovec & Suzanne Wessendorf, *Migration and Cultural, Religious and Linguistic Diversity in Europe: An overview of issues and trends. A Working Paper* (2005) at.3.

<sup>168</sup> Ibid at 3 – 5.



Kymlicka uses the term multiculturalism to encompass a broad range of policies that aim to provide ‘some level of public recognition, support or accommodation to non-dominant ethnocultural groups’.<sup>169</sup> In particular he identifies three principles of a multicultural state, firstly the ‘repudiation of the older idea that the state is a possession of a single national group’, secondly a rejection of assimilationist policies and finally an acknowledgement where appropriate of any injustice done to minority groups by previous policies of assimilation.<sup>170</sup> Multicultural policies stem from the acceptance that such minorities should be accorded group-differentiated rights.

### 3.3. Different Rights for Different Groups

Kymlicka’s work looks not only at migrant groups but also indigenous populations and national minorities. In categorising minority groups in this way, he also makes a distinction about preserving the cultures of such groups as he argues ‘that national minorities typically have the sort of societal culture that should be protected, while immigrants typically do not, since they instead integrate into, and thereby enrich the culture of the larger society’.<sup>171</sup> One of the justifications for such a distinction is that immigrants voluntarily give up their right to live and work in their own culture.<sup>172</sup> Furthermore he assumes that they have an expectation that to succeed they need to integrate into the institutions of the society.<sup>173</sup> However, according to Kymlicka this does not mean that the state should do nothing about the claims of immigrant groups,

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<sup>169</sup> Kymlicka, above n158 at 16.

<sup>170</sup> Ibid at 66.

<sup>171</sup> Kymlicka, above n111 at 94.

<sup>172</sup> Ibid at 96.

<sup>173</sup> Ibid.

rather it needs to address the issue of how it can accommodate their needs and the expression of their differences.<sup>174</sup>

With a division of minority groups comes a division of rights. Kymlicka emphasises the targeted or group-differentiated nature of liberal multiculturalism, as he argues that it is ‘the outcome of multiple struggles by different types of ethnocultural groups, mobilising along different legal and administrative tracks and not a single unified struggle in the name of diversity’.<sup>175</sup> So a country can be very accommodating of some groups, e.g. indigenous populations, but not others, e.g. migrant groups. For Joppke this is a bad thing, as he asks ‘Which of the hundred-plus groups in the average immigrant receiving society are to be recognised?’<sup>176</sup> Also, within his categorisation of groups, Kymlicka identifies three forms of minority rights, which are: self government rights, which he sees as the rights of national groups to self determination<sup>177</sup>; special representation rights, which are ‘needed as a response to some systemic disadvantage or barrier in the political process which makes it impossible for the group’s views and interests to be represented’<sup>178</sup>, and polyethnic rights which are primarily concerned with the needs and interests of migrant groups.

The category most relevant to this research is that of polyethnic rights. These rights go beyond simply protecting minority groups from discrimination to articulating group-specific measures that are ‘intended to help ethnic groups and religious

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<sup>174</sup> Kymlicka, above n111 at 96.

<sup>175</sup> Kymlicka, above n158 at 79.

<sup>176</sup> Christian Joppke, ‘The Retreat of Multiculturalism in the Liberal State’ *Russell Sage Foundation Working Paper* (2003) at 203.

<[http://www.russellsage.org/sites/all/files/u4/Joppke\\_Retreat%20of%20Multiculturalism%20in%20the%20Liberal%20State.pdf](http://www.russellsage.org/sites/all/files/u4/Joppke_Retreat%20of%20Multiculturalism%20in%20the%20Liberal%20State.pdf)> accessed 11 January 2011.

<sup>177</sup> Kymlicka, above n111 at 27.

<sup>178</sup> *Ibid* at 32.

minorities express cultural particularity'.<sup>179</sup> Examples given by Kymlicka include demands by some groups for public funding of their cultural practices, exemption from laws and regulations that disadvantage them, such as Sikh men not wearing motorcycle helmets or different animal slaughtering legislation for Jews and Muslims.<sup>180</sup> In this research I will attempt to extend this to include the accommodation of community processes of Islamic family dispute resolution.

### 3.4. Can such Policies lead to State Instability?

There is an increasing fear that multiculturalism 'produces separateness and is counterproductive to social cohesion'.<sup>181</sup> In particular the criticism is that liberal multiculturalism fragments society, undermines its stability and ultimately erodes our ability to act collectively as citizens.<sup>182</sup> The argument is that recognition and accommodation of diversity means that cultural groups will remain as separate entities without developing any common bonds between them.<sup>183</sup> Kymlicka disagrees, arguing that 'there is no inherent trade-off between diversity policies and shared citizenship policies'<sup>184</sup> because the aim should not be to achieve a 'standard homogenizing model of citizenship'.

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<sup>179</sup> Id at 31.

<sup>180</sup> Ibid.

<sup>181</sup> Vertovec & Wessendorf, above n167 at 21.

<sup>182</sup> Will Kymlicka, *Finding Our Way, Rethinking Ethnocultural Relations in Canada* (1998) at 15.

<sup>183</sup> Ibid.

<sup>184</sup> Will Kymlicka, 'Ethnocultural Diversity in a Liberal State: Making Sense of the Canadian Model(s)' in Keith Banting, Thomas Courchene & Leslie Seidle (eds), *Belonging? Diversity, Recognition and Shared Citizenship in Canada* (2007) at 39.

Kymlicka recognises that in multicultural states there still are important policies designed to promote overarching national identities and loyalties such as official languages, core curricula in schools, citizenship requirements and state symbols, just to name a few.<sup>185</sup> However, liberal democracies should adopt multicultural policies to transform and supplement such nation-building policies so that they do not exclude minority groups.<sup>186</sup> These nation-building projects are a defining feature of modern democratic states.<sup>187</sup> According to Kymlicka there is no evidence to support the claim that multiculturalism promotes ethnic separateness or impedes immigrant integration, rather it allows difference to be respected and accommodated whilst simultaneously facilitating the integration of immigrants into a larger society.<sup>188</sup> Kymlicka describes this fear as a mirage without any basis in reality as he argues that ‘there is no evidence from any of the major western immigrant countries that immigrants are seeking to form themselves into national minorities, or to adopt a nationalist political agenda’.<sup>189</sup> He reminds us that to create a distinct parallel society is a difficult and arduous task that actually requires state support, something which liberal democratic states are unlikely to provide.<sup>190</sup> Furthermore, migrants have accepted the expectation that they will integrate into the dominant societal culture.<sup>191</sup> This is a central argument that will be explored in the thesis, as it is argued that attempts at seeking some form of official recognition or accommodation of Islamic law are attempts to try to fit into the mainstream legal structure and framework, rather than an attempt to set up a separate parallel system.

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<sup>185</sup> Kymlicka, above n158 at 83 – 84.

<sup>186</sup> Ibid at 83.

<sup>187</sup> Kymlicka, above n182 at 29.

<sup>188</sup> Ibid at 22.

<sup>189</sup> Ibid at 38.

<sup>190</sup> Ibid at 35.

<sup>191</sup> Ibid.

How is it that the polyethnic rights mentioned above promote integration into the larger society and not self-government by different groups?<sup>192</sup> This occurs for several reasons; firstly in demanding greater recognition or accommodation, these groups aim to modify the institutions and laws of the mainstream society to make them more accommodating of differences.<sup>193</sup> Fielding sees this accommodation as a cause of strengthening of civil society by creating a pluralistic public space.<sup>194</sup> It allows minority groups to more actively participate in civil society and reciprocate the tolerance shown towards them.<sup>195</sup> If minority groups are alienated then they are more likely to 'withdraw into their ghettoized communities'.<sup>196</sup> In the context of not allowing elements of *Shari'ah* or Islamic law to coexist with family law dispute resolution processes, such disputes 'will disappear into the dark corridors of the private sphere, far from the scrutiny, accountability and civic value of the public space'.<sup>197</sup>

What does such integration entail? Kymlicka describes integration as a 'two way process- it requires the mainstream society to adapt itself to immigrants, just as immigrants must adapt to the mainstream'.<sup>198</sup> This process may require modification to the institutions of the dominant culture to accommodate the differences and needs of minority groups. Also, it can be equally 'transformative' of the identities and practices of the minority groups, and that 'far from guaranteeing traditional ways of life of either the majority or minorities, liberal multiculturalism poses multiple

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<sup>192</sup> Kymlicka, above n111 at 31.

<sup>193</sup> Ibid at 11.

<sup>194</sup> Alex Fielding, 'When Rights Collide: Liberalism, Pluralism and Freedom of Religion in Canada' (2008) 13 *Appeal* 28 at 31.

<sup>195</sup> Ibid at 50.

<sup>196</sup> Ibid at 45-46.

<sup>197</sup> Ibid.

<sup>198</sup> Kymlicka, above n111 at 96.

challenges to them'.<sup>199</sup> In this way it is accepted that culture is not static but rather that it is adaptive and that cultural hybridism is the normal state of affairs.<sup>200</sup> It is important to remember that such policies are not about entrenching or preserving a particular culture, rather they are supporting the institutions that are 'of importance for those cultures to be sustained and to develop naturally'.<sup>201</sup> In the context of the present research, this is a critical point, for, as difficult as the question of religious accommodation of Islamic law may seem for a liberal democratic state, this thesis will demonstrate how this accommodation can assist in the integration of Muslims into Australian institutions and legal processes.

Multicultural policies that recognise and accommodate minority groups have a far greater integrationist effect, since they 'encourage integration into existing academic, economic and political institutions' and a modification of these institutions to include them.<sup>202</sup> The empirical research conducted by Modood in the UK lends support to such an argument as he finds that 'hybrid identities' in Britain are part of a movement of inclusion and social cohesion, not fragmentation.<sup>203</sup> Indeed studies across Europe have shown that the institutional recognition of minorities has had a positive impact on processes of integration.<sup>204</sup> It is argued that without such inclusion and accommodation, such minority groups might leave these public institutions and set up their own, hence leading to further isolation and marginalisation.<sup>205</sup> Where full

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<sup>199</sup> Kymlicka, above n158 at 100.

<sup>200</sup> Ibid at 101.

<sup>201</sup> F F Mansvelt Beck, 'Liberalism, Minorities and the Politics of Societal Differentiation' (Paper presented at the 2<sup>nd</sup> Pavia Graduate Conference in Political Philosophy 15 -16 April 2004) at 6.

<sup>202</sup> Kymlicka, above n182 at 45.

<sup>203</sup> Tariq Modood, *Multiculturalism: A Civic Idea* (2007) at 185.

<sup>204</sup> Vertovec & Wessendorf, above n167 at 26.

<sup>205</sup> Kymlicka, above n182 at 45.

equality within the mainstream society is unachievable, it is possible according to Kymlicka that some may question the goal of integration.<sup>206</sup>

### 3.5. A Retreat from Multiculturalism

Kymlicka's work is based on the assumption that multiculturalism is now widely accepted in most culturally plural societies. There are many who disagree with this and argue that there is actually a retreat from multiculturalism. These critics include Joppke, who makes the point that whilst Kymlicka devotes most of his attention to national minorities and indigenous groups, 'multiculturalism debates....have prominently been debates about coping with migration based ethnicity', which he argues that according to Kymlicka have the 'weakest claim to cultural protection'.<sup>207</sup> Furthermore, according to these critics, multiculturalism in Australia is far from being the robust concept described by Kymlicka and others who justify recognition of group rights, rather it is a weakened version that merely describes a plural society and emphasises the 'economic efficiency' of a diverse workforce.<sup>208</sup> In particular, the state seems to be doing no more than enforcing liberal democratic values and principles, certainly not engaging in multicultural recognition.<sup>209</sup>

Kymlicka discusses the retreat from multiculturalism, but argues that it has largely been restricted to immigrant multiculturalism, and largely in the context of Muslims, with many people questioning whether Muslims can fit in to a liberal democratic

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<sup>206</sup> Id at 35.

<sup>207</sup> Christian Joppke, 'The retreat of multiculturalism in the liberal state: theory and policy' (2004) 55 *The British Journal of Sociology* 237 at 239.

<sup>208</sup> Ibid at 247.

<sup>209</sup> Ibid at 254.

framework.<sup>210</sup> However, despite this, Kymlicka maintains that there has been ‘a baseline level of recognition and accommodation for immigrants....as an inevitable and legitimate aspect of life in a liberal democracy’.<sup>211</sup> His conclusion is that it would be rather simplistic to talk about the advance or retreat of multiculturalism because there are different types of ethnocultural diversity, each with its own story to tell.

### 3.6. A Backlash against Muslims

This research attempts to tell part of the story, the story of the way Muslim minority communities can be and are accommodated within liberal democratic states. However in order to tell this story, one needs to understand why there is a growing perception that the needs and demands of Muslim communities cannot fit in to a liberal democratic framework. This is particularly the case in Western Europe, where Muslims form a clear majority of the immigrant population, but arguably this is the case in other parts of the world, even in Australia where Muslims only make up just over 1% of the population. In fact Kymlicka argues that ‘public support for multiculturalism has declined as Muslims have come to be seen as the main proponents or beneficiaries of the policy’.<sup>212</sup> Modood also argues that ‘Muslims have become central to the merits and demerits of multiculturalism as a public policy’.<sup>213</sup>

The reasons for such a backlash are many and varied but according to Kymlicka an important factor is the perceived threat that ‘locally settled Muslims might collaborate

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<sup>210</sup> Kymlicka, above n158 at 124.

<sup>211</sup> Ibid at 128.

<sup>212</sup> Ibid at 126.

<sup>213</sup> Modood, above n203 at 4.



with external enemies of the West'<sup>214</sup>, thus posing a security threat to the State. This in turn is fuelled by the West's anxiety about 'the other', where diversity is something to be feared not accommodated. Vertovec argues that Islam is conceived as the other 'culture' or civilisation most at odds with and therefore most unassimilable and ultimately threatening to society.<sup>215</sup> Furthermore, according to Joppke, multicultural policies are all about the state accommodating Muslim groups with very little expected by these groups in return.<sup>216</sup> He argues that the retreat of multiculturalism is because of the unilateral direction of multicultural recognition and that 'Muslims are to be given their public law exemptions, but they are not asked to give anything in return. In fact, these exemptions are only used to withdraw from western norms and institutions that are denounced as decadent and corrupt'.<sup>217</sup> Unfortunately, Joppke fails to support this contention with any examples, which leaves the impression that, like much of the literature about Islam and Muslims, these ideas are sensationalised and misconceived.

However, it is such views that have led many to believe that Muslim groups are incapable of integrating. Sartori asks 'Am I mistaken, in maintaining that the Muslim immigrant is, for us, the most distant, the most foreign and thus the most difficult to integrate?'<sup>218</sup> This is extended to meaning that Muslim groups and their demands are perceived as being a threat to society. Joppke quotes a report from the International Crisis Group 2005 that concluded that 'the postulated antithesis between ordinary Muslims and Islamic activists is flimsy and liable to break down under pressure. And

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<sup>214</sup> Kymlicka, above n158 at 125.

<sup>215</sup> Vertovec & Wessendorf, above n167 at 14.

<sup>216</sup> Joppke, above n176 at 4-6.

<sup>217</sup> Ibid at 4.

<sup>218</sup> Vertovec & Wessendorf, above n167 at 12.

it can safely be said that most, if not all, Muslim populations today are living under great pressure'.<sup>219</sup>

Such statements and generalisations are part of what Modood calls "Islamophobia", which he sees as being a 'carelessness in argument and an appeal to taken for granted stereotypes'.<sup>220</sup> He goes on to say that this carelessness:

is not confined to bar-rooms and street corners but regrettably is found, unintended no doubt, even in someone of the stature and seriousness of Will Kymlicka, someone who is well known for arguing on behalf of oppressed minorities.<sup>221</sup>

Modood's criticism is not limited to Kymlicka. Rather it is a reflection of how issues to do with Muslims are dealt with by many academics.<sup>222</sup> Parekh contends that Muslims actually pose no major problem to multicultural accommodation as they ask for ways to be accommodated within the existing structure.<sup>223</sup> As the rest of the thesis will demonstrate, the issue of the accommodation of Islamic law is an example of the desire of Muslims to live according to both their religion and the laws of the state.

Kymlicka compares this perception of Muslims as being the 'other' to the situation of Catholics a century ago, and argues that one day Muslims will be seen as part of the

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<sup>219</sup> Christian Joppke, *Veil – Mirror of Identity* (2009) at 112.

<sup>220</sup> Tariq Modood, 'Kymlicka on British Muslims' (1993) 15 *Analyse & Kritik* 87 at 88.

<sup>221</sup> *Ibid.*

<sup>222</sup> *Ibid* at 89.

<sup>223</sup> Bhikhu Parekh, 'Europe, Liberalism and the "Muslim question"' , in Tariq Modood, Anna Triandafyllidou & Richard Zapato-Barrer (eds) *Multiculturalism, Muslims and Citizenship: A European Approach* (2006) at 190.

mainstream society.<sup>224</sup> It is without a doubt that ‘the Muslim question poses new challenges to the liberal nation state’.<sup>225</sup> Kymlicka himself has recently said that the future of multiculturalism lies in its ability to understand and deal with issues to do with Islam and Muslims.<sup>226</sup> Modood also emphasises this in the European context as he contends that

the political integration or incorporation of Muslims – remembering that there are more Muslims in the European Union than the combined populations of Finland, Ireland and Denmark – not only, therefore, has become the most important goal of egalitarian multiculturalism, but is now pivotal in shaping the security, indeed the destiny, of many people across the globe.<sup>227</sup>

This is why the current research is of great importance to liberal democratic states.

### 3.7. Where does Religion fit in?

A limitation of Kymlicka’s work is that whilst on the one hand he acknowledges that most of the backlash against multiculturalism is directed against Muslims, he actually does very little to attempt to deal with this within his work. In fact, one could argue that Kymlicka views issues to do with the accommodation of religious minorities, in particular Muslim communities, as ‘hard cases’. For example, when talking about

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<sup>224</sup> Kymlicka, above n182 at 55.

<sup>225</sup> Vertovec & Wessendorf, above n167 at 26.

<sup>226</sup> ‘Will Kymlicka on Minority Rights’, *Philosophy Bites*, 8 June 2008

<<http://www.philosophybites.libsyn.com/category/Will%20Kymlicka>> accessed 20 November 2010.

<sup>227</sup> Tariq Modood, ‘British Muslims and the Politics of Multiculturalism’ in Tariq Modood, Anna Triandafyllidou & Richard Zapato-Barrer (eds) *Multiculturalism, Muslims and Citizenship: A European Approach* (2006) at 56.

why multicultural policies are successful in Canada, Kymlicka attributes this to an ideal timing of events, which did not deal with these hard cases at the beginning.<sup>228</sup> Modood argues that to 'pick Muslims out as an extreme, rather than a mild case of the contemporary demand to legitimate the politics of difference is to apply double standards'.<sup>229</sup>

If we return to Kymlicka's division of minority groups into indigenous populations, national minorities and migrant groups, the question needs to be asked, where do Muslim minority groups fit in? Whilst Kymlicka acknowledges that not all ethnocultural groups fit neatly into his categories, his analysis is still very much dominated by such a division, and does not make a serious attempt at inquiring where Muslim minority groups might fit in.<sup>230</sup> Whilst it is true that they can be seen as migrant groups, it can also be argued that this is not such a great fit, as Muslim minorities can also include quite established communities which are made up of citizens born in the state. In Australia, a majority of the Muslim community is Australian born – is it right to call this community a migrant group? I would argue that what is needed is actually to include religious minorities as a different type of group seeking accommodation and recognition.

Koenig argues that whilst multicultural theorists have emphasised claims for recognition of particular cultural or ethnic identities, they have 'ignored the specifically religious dimensions of such identities'.<sup>231</sup> Modood also makes the criticism that in studies about multiculturalism and citizenship there has been a

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<sup>228</sup> Will Kymlicka, 'The Canadian Model of Diversity in a Comparative Perspective' (Paper presented at the Eighth Standard Life Visiting Lecture, University of Edinburgh, 29 April 2004) at 11.

<sup>229</sup> Modood, above n220 at 90.

<sup>230</sup> Kymlicka, above n111 at 25.

<sup>231</sup> Koenig, above n150 at 220.

theoretical neglect of the role of religion.<sup>232</sup> He goes on to argue that most theorists of multiculturalism have little sympathy for religious groups and favour a presumption in favour of secularism.<sup>233</sup> This is largely because secularism is viewed as being neutral, that is it puts the state in a neutral state in its dealings with various religious groups. The discussion above, which questioned the supposed neutrality of the state, can thus be expanded to the concept of secularism and its supposed neutrality. Fielding questions the use of the term secular to mean neutral or 'religion free', as rather it has its own entrenched position.<sup>234</sup> This does not mean that secularism should be abandoned, but it does mean that we need to question that such a stance is neutral or objective. Writing in the European context, Parekh questions this neutrality, as he argues that the views of human nature and history that inform much of the European political thought and practice, and many of its current laws and practices come from Christian influences.<sup>235</sup> He argues that:

The fact that their historical roots are often forgotten and that religion survives as culture does not mean that they do not have a religious basis or even religious overtones. Muslims and for that matter devout Christians do not introduce an alien element in an otherwise secular society. Rather they speak loudly in the same language that the rest of society speaks in a quiet whisper.<sup>236</sup>

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<sup>232</sup> Modood, above n203 at 185.

<sup>233</sup> Ibid at 187.

<sup>234</sup> Fielding, above n194 at 43.

<sup>235</sup> Parekh, above n223 at 189.

<sup>236</sup> Ibid.

Indeed Modood goes further to argue that ‘in a society where some of the disadvantaged and marginalised minorities are religious minorities, a public policy of multiculturalism will require the public recognition of religious minorities’.<sup>237</sup>

However before public policies and debates can take into account the particular needs of religious minorities, there needs to be an understanding of the importance of religion in the life of the individual, just as Kymlicka’s work has been dedicated to showing that culture plays an important role. This would require a rebuttal of the prevailing view that sees religion as being in conflict with liberalism. McLachlin reflects upon this when he says:

What is good, true and just in religion will not always comport with the law’s view of the matter, nor will society at large always properly respect conscientious adherence to alternative authorities, and divergent normative, or ethical commitments. Where this is so, two comprehensive worldviews collide.<sup>238</sup>

This research is an attempt at offering such an understanding, to give an example where a religious minority group can indeed fit into a liberal democratic state.

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<sup>237</sup> Modood, above n203 at 187.

<sup>238</sup> CJC McLachlin, ‘Freedom of Religion and the Rule of Law: A Canadian Perspective’ in Douglas Farrow (ed) *Recognizing Religion in a Secular Society: Essays in Pluralism, Religion and Public Policy* (2004) at 21-22.

### 3.8. The Current Research - Extending Kymlicka's work

It is an argument of this research that whilst Kymlicka's work is useful in presenting a framework for the accommodation of minority groups in liberal democratic states, it needs to be extended when it comes to applying it to religious groups. It will be argued that this will actually further develop the concept of multicultural citizenship as articulated by Kymlicka. One way of doing this is to adopt the suggestion of Modood, who argues that rather than derive a concept of multicultural policies from a concept of culture, it is better to focus on identity.<sup>239</sup> In doing so, Modood argues that multicultural accommodation 'works simultaneously on two levels: creating new forms of belonging to citizenship and country, and helping sustain origins and diaspora'.<sup>240</sup> This results in what Modood terms the formation of hyphenated identities such as British-Muslim which would not compete with national allegiance.<sup>241</sup> In this particular research I will attempt to consider the case study of accommodating the family dispute processes of the Muslim community in Australia as an example of the operation of multicultural accommodation, and indeed one which arises because of the emergence of an Australian-Muslim identity.

It is crucial first to attempt to explain how Kymlicka views this issue. In his work *Multicultural Citizenship*, Kymlicka views it as an example of a group demanding internal restrictions by 'seeking the legal power to restrict the liberty of its own members so as to preserve its traditional religious practices'.<sup>242</sup> He sees it as a demand to:

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<sup>239</sup> Modood, above n203 at 40-42.

<sup>240</sup> Ibid at 49.

<sup>241</sup> Ibid at 48-49.

<sup>242</sup> Kymlicka, above n111 at 42.

establish or maintain a system of group-differentiated rights which protects communal practice, not only from decisions made outside the group, but also from internal dissent, and this often requires exemption from the constitutional or legislative requirements of the larger society.<sup>243</sup>

In other parts of his work he mentions recognition of Muslim Law, but argues that there has been no movement towards giving it any legal recognition. But he uses it as a possible example where individual rights, particularly those of women, would be compromised.<sup>244</sup> In particular he reflects upon the debate that took place in Canada, which ultimately resulted in a law banning faith based arbitration as an example of the safeguards of liberal democracy preventing illiberal forces from abusing rights and powers extended to it by liberal democratic states.<sup>245</sup>

This issue will be discussed in some detail below as this thesis will attempt to challenge this conclusion, but suffice to say at this point that this is a very simplistic analysis of what actually took place, and an analysis that goes against much of what Kymlicka proposes in his theoretical construct of multicultural citizenship. Modood critiques Kymlicka's analysis that Muslims sought to set up a separate legal system, rather he contends that Muslims sought to secure their rights based on human rights, social equality and group autonomy, all characteristics of approaches adopted by other oppressed or marginalised minorities.<sup>246</sup> However Kymlicka is right when he says that 'all Western states are struggling with the issue of how best to deal with the

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<sup>243</sup> Id.

<sup>244</sup> Ibid.

<sup>245</sup> Kymlicka, above n158 at 161.

<sup>246</sup> Modood, above n220 at 88.



challenge of protecting vulnerable members of immigrant communities', and there is no simple answer to this question.<sup>247</sup>

To be fair to Kymlicka, he does not claim to base such an analysis on any empirical data, and acknowledges that such a discussion needs to move from theoretical argument to practical analysis, which would involve empirical research on a case by case basis to evaluate the impact of such policies on the freedom of individuals within minority groups.<sup>248</sup> That is precisely what the current research offers - an empirical analysis that supports the idea that accommodating such community processes can fit into the concept of multicultural citizenship. This is critical, as Kymlicka argues that much of the debate about multiculturalism 'has generated more heat than light', largely because it is not informed by what is actually happening in reality.<sup>249</sup>

#### **4. Is Multiculturalism Bad for Women?**

Exploring the accommodation and recognition of Islamic Family Law or Muslim community processes of family dispute resolution brings to the surface the most significant criticism of multicultural citizenship, that such policies adversely affect women. Indeed as later chapters will discuss, this argument has dominated the public debates that have taken place concerning this issue in Canada and the UK. One could go further to argue that it was the lobbying on this issue that was most influential in the decision taken by the Ontario government to enact a law effectively banning faith based arbitration. The specific details and analysis of these arguments will be

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<sup>247</sup> Kymlicka, above n158 at164.

<sup>248</sup> Ibid at 140.

<sup>249</sup> Kymlicka, above n182 at 15-16.

considered in some depth in chapter 4 but the discussion here will focus on the general criticism that multicultural policies are bad for women.

This concern is closely connected to the general concern that multicultural policies can operate to oppress individual members of minority groups. As mentioned above, Kymlicka acknowledges that Western states are trying to deal with the challenge of protecting those who are vulnerable in immigrant communities and that quite simply there is no simple answer to this question.<sup>250</sup> It is argued that without limits being placed on multiculturalism, there is a great threat to individual rights as this could provide a justification for allowing each group to impose its own traditions on its members, even when these conflict with human rights and constitutional principles.<sup>251</sup> In particular, it is asserted that it is women who will be most affected. They are seen to be the most vulnerable community members and they risk being oppressed and denied basic rights by theocratic and patriarchal cultures.<sup>252</sup>

Kymlicka recognises this criticism and goes to great lengths to argue that liberals can only endorse minority rights to the extent that they are consistent with respect for freedom or autonomy of individuals.<sup>253</sup> Furthermore, he asserts that states are unlikely to accommodate or recognise minority rights 'if they fear they will lead to islands of tyranny within a broader democratic state'.<sup>254</sup> In response to the possibility that the practices of some cultural groups do not accord with liberal democratic values, Kymlicka suggests that as a general rule such cultures should not be dissolved, but liberated, whilst at the same time acknowledging that liberality of a culture is a

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<sup>250</sup> Kymlicka, above n158 at 164.

<sup>251</sup> Kymlicka, above n111 at 41.

<sup>252</sup> Ibid at 36.

<sup>253</sup> Ibid at 75.

<sup>254</sup> Kymlicka, above n158 at 92.

matter of degree, as ‘all cultures have illiberal strands ... it is misleading to talk of “liberal” and “illiberal” cultures, as if the world was divided into completely liberal and illiberal societies’.<sup>255</sup> This is a very pertinent point in the context of the current research, as the literature and commentary about accommodation of Islamic family law in liberal democratic states is full of stereotypes and conceptions of Islam and Islamic law as being somewhat barbaric, uncivilised and incompatible with modern society.

However, others are not as optimistic as Kymlicka and believe that, whilst such minority groups may for a time articulate their demands and claims in the language of human rights, once such rights are granted, these values will not be upheld. Kymlicka believes that because multicultural policies are implemented in liberal democratic states, they are subject to many rights protecting mechanisms that would make it legally impossible for minorities to ‘establish illiberal rule’.<sup>256</sup> This protection comes from a combination of three factors: civic education to develop a strong human rights culture; identifying and publicising actual or potential abuses ‘to bring issues into the court of public opinion, and to expose and marginalise illiberal tendencies’<sup>257</sup>; and legal safeguards to prevent or remedy such abuses.<sup>258</sup> What is more interesting is that, according to Kymlicka, the evidence suggests that such minority groups have no desire to establish illiberal rule.<sup>259</sup> This will be explored in more detail throughout this thesis as the evidence from the present research suggests the same thing, that the community leaders in making their demands go to great lengths to show that they want to fit into the existing legal framework. This supports Kymlicka’s argument that

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<sup>255</sup> Kymlicka, above n111 at 94.

<sup>256</sup> Kymlicka, above n158 at 93-94.

<sup>257</sup> Ibid at 161.

<sup>258</sup> Ibid.

<sup>259</sup> Ibid at 94.

to get the benefit of recognition, minority groups ‘must accept the principles of human rights and civil liberties and the procedures of liberal democratic constitutionalism, with their guarantees of gender equality, religious freedom, racial non-discrimination and due process’.<sup>260</sup>

One of the most vocal critics of liberal multiculturalism is the late Moller Okin who posed the question ‘Is multiculturalism bad for women?’<sup>261</sup> She argues that there is a conflict between ‘feminism’ and ‘multiculturalism’, and it is this contention that has been one of the most pervasive and powerful arguments against the recognition of minority rights.<sup>262</sup> By ‘feminism’ Okin refers to:

the belief that women should not be disadvantaged by their sex, that they should be recognised as having human dignity equal to that of men, and that they should have the opportunity to live as fulfilling and as freely chosen lives as men can.<sup>263</sup>

Her conclusions are based on several observations about gender and culture, the most significant of which is that the central focus of most cultures rests in the personal, sexual and reproductive sphere of life, the sphere most relevant to women.<sup>264</sup> This leads her to conclude that one of the principal aims of most cultures is the control of women by men.<sup>265</sup> These are her most significant conclusions and observations, but Okin fails to support them with any substantial evidence, other than a few supporting examples derived from anecdotal evidence in newspaper articles. This leads al-Hibri

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<sup>260</sup> Kymlicka, above n184 at 26.

<sup>261</sup> Susan Moller Okin, above n27.

<sup>262</sup> Ibid at10.

<sup>263</sup> Ibid.

<sup>264</sup> Ibid at 13.

<sup>265</sup> Ibid.

to argue that 'Okin commits simple but significant factual errors in assessing other belief systems'.<sup>266</sup>

Whilst Okin acknowledges that Western liberal cultures still have many forms of gender inequality and sexual violence, she describes the situation for women in other cultures as being much worse.<sup>267</sup> She is most critical of religious cultures and 'those that look to the past – to ancient texts or revered traditions- for guidelines or rules about how to live in the contemporary world'.<sup>268</sup> One of the greatest weaknesses of Okin's argument is that she does not explain why this is inherently such a bad thing for women, and without sufficient support, such statements are little more than generalisations that fail to appreciate the lives of countless numbers of women who form part of such cultures or traditions.<sup>269</sup> These generalisations are in abundance in her writing. Another example is her suggestion that women in what she terms patriarchal cultures:

might be better off if the culture into which they were born were either to become extinct...or, preferable, to be encouraged to alter itself so as to reinforce the equality of women – at least to the degree to which this value is upheld in the majority culture<sup>270</sup>

As Nussbaum quite rightly points out, according to Okin:

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<sup>266</sup> Azizah, Al-Hibri, 'Is Western Patriarchal Feminism good for third world/minority women?', in Joshua Cohen, Mathew Howard and Martha Nussbaum (eds), *Is Multiculturalism Bad for Women?* (1999) at 42.

<sup>267</sup> Okin, above n27 at 17.

<sup>268</sup> Ibid at 21.

<sup>269</sup> Al-Hibri, above n266 at 43.

<sup>270</sup> Okin, above n27 at 22-23.

Religion is not seen as offering human beings anything of value. It is little more than a bag of superstitions, frequently organised around the aim of maintaining control over women.<sup>271</sup>

Nussbaum and Al-Hibri, writing from their perspective as women of faith, question how women like themselves would react to Okin's accusations about religion and its impact on their lives.<sup>272</sup> Indeed the interviews conducted as part of this research project with Muslim women in Australia also demonstrate a similar reaction to the argument that their faith inherently discriminates against them as women. This will be dealt with in more detail in later chapters as the thesis explores the impact of the community dispute resolution processes on Muslim women in Australia.

Okin's response to the criticisms of women like Nussbaum and al-Hibri is to accuse them of actually silencing the voices of many millions of women around the world by 'denying or even downplaying the dominant patriarchal strands that have so long prevailed within' their religious traditions.<sup>273</sup> Okin, quite forcefully asks them, 'Am I the silencer of such voices, in taking into account that hundreds of millions of women are rendered voiceless or virtually so by the male dominated religions with which they live?'<sup>274</sup> This claim by Okin that she represents hundreds of millions of women is based by her own admission on a couple of conversations that she had at an international conference.<sup>275</sup> Hardly a strong basis, I would argue, to hold oneself out as the voice of so many women.

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<sup>271</sup> Martha Nussbaum, 'A plea for Difficulty' in Joshua Cohen, Mathew Howard and Martha Nussbaum (eds), *Is Multiculturalism Bad for Women?* (1999) at 105.

<sup>272</sup> *Ibid* at 106; Al-Hibri, above n266 at 43.

<sup>273</sup> Okin, above n27 at 123.

<sup>274</sup> *Ibid*.

<sup>275</sup> *Ibid* at 122.

This exclusion of the views and voices of women from these religions or cultures is a constant theme in Okin's analysis. This is best seen in her simple dismissal of the views of women who are empowered by their culture or religion, as she says:

My view is that, however certain such women are of the rightness of their role within such a context, surely they would be seriously deluded in viewing themselves as having 'equal dignity' with men.<sup>276</sup>

The implication is that certain women are unable to make an informed choice and are incapable of knowing and realising their rights and dignity and also that women really do not have a choice to exit the community since 'exit may entail social death'.<sup>277</sup>

This is a very important issue, particularly in regards to any issue to do with Muslim women and the accommodation of Islamic family law, and will be dealt with in more detail in later chapters.

To be fair to Okin, she does in later writings make a greater effort to be more sensitive as she acknowledges that cultural and religious freedoms are of crucial importance to members of such groups and that 'some people, whether they make up a whole single nation or a minority within a nation state, need certain rights and protections in order to preserve their language, beliefs, and customs.'<sup>278</sup>

Despite the limitations of her argument, Okin's discussion does raise a very important point, which is the need to be conscious of the position of women and the rights of

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<sup>276</sup> Id at 126.

<sup>277</sup> Andreas Follesdal, 'Between Petros and a Hard Place? Human Rights to Religious Liberty or to Gender Equality in Europe' in K Borresen & S Cabibbo (eds) *Gender Equality in Europe* (2006) at 70.

<sup>278</sup> Susan Moller Okin, 'When Cultural Values Clash with Universal Rights: Is Multiculturalism bad for Women?', *Markkula Ethics Center Lecture Series*, 29 October 2001, available at <http://www.scu.edu/ethics/publications/submitted/okin/multiculturalism.html>, accessed on 20/9/08

women in multicultural states, and ultimately to ensure that such rights are not compromised in the name of recognition of minority rights.<sup>279</sup> A challenge for multicultural states is to find a way to translate women's rights into cultural and religious language and to acknowledge the great role played by insiders in such cultures or religions who 'play a crucial part' in the continuing struggle for women's equality.<sup>280</sup> Okin concludes by saying that in a debate about these issues, value should be given to the many different and varied views that are expressed by women in these cultures, - something that she unfortunately and demonstrably fails to do herself.

However, such a conclusion is not controversial, and many people who see liberal multiculturalism as a basis for the recognition and accommodation of the practices and traditions of minority groups in a liberal democratic state would agree with Okin's conclusion. Indeed Kymlicka, addresses this issue himself when he considers the possibility that recognition of certain group rights could result in the oppression of certain individuals, in particular women. But as was discussed above he comes to the conclusion that it is not such a grave danger as Okin makes it out to be, because there are numerous safeguards in liberal democratic states to ensure that this does not happen. Okin's response to this is that 'there is considerable likelihood of conflict between feminism and group rights for minority cultures, and that this conflict persists even when the latter are claimed on liberal grounds, and are limited to some extent by being so grounded'.<sup>281</sup> In particular Okin thinks that Kymlicka underestimates the danger of individuals being oppressed by the recognition of group

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<sup>279</sup> Okin, above n27 at 131.

<sup>280</sup> Susan Moller Okin, 'Recognising Women's Rights as Human Rights' (1998) 97 *American Philosophical Association Newsletter on Philosophy and Law* 99 at 101.

<sup>281</sup> Susan Moller Okin, 'Feminism and Multiculturalism: Some Tensions' (1998) 108 *Ethics* 661 at 664.



rights because he doesn't look specifically at the private sphere (domestic and family life), which Okin argues is where culture-based gender construction and inequality occurs.<sup>282</sup>

This critique of liberal multiculturalism is also made by Ayelet Shachar who discusses in detail the issue of the accommodation of minority groups in the area of family law. She argues that such accommodation is important because it serves to preserve the identity of a minority group, thereby placing it at the centre of a group's cultural uniqueness.<sup>283</sup> Furthermore, she identifies family law both as an area in which the state is most likely to grant a minority group control over its own affairs, and as a realm in which women have been systematically subordinated.<sup>285</sup> The result is that multicultural policies can potentially expose women 'to state-sanctioned violations of their basic rights'.<sup>286</sup> This she calls the paradox of multicultural vulnerability, that whilst women as group members may benefit from the transfer of legal powers from the state to their identity group, as individuals they bear disproportionate costs for their group's multicultural accommodation.<sup>287</sup>

However, in contrast to Okin's sweeping generalisations and dismissal of accommodationist policies, Shachar argues for a reshaped multicultural model; a model that not only takes into account these effects on women, but also one that has

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<sup>282</sup> Id at 665.

<sup>283</sup> Ayelet Shachar, 'Group Identity and Women's Rights in Family Law : The perils of multicultural accommodation' (1998) 6 *The Journal of Political Philosophy* 285 at 292; Ayelet Shachar, 'The Paradox of Multicultural Vulnerability: Individual Rights, Identity Rights and The State', in Christian Joppke and Steven Lucas (eds) *Multicultural Questions* (1999) at 95.

<sup>285</sup> Ibid.

<sup>286</sup> Ibid.

<sup>287</sup> Ayelet Shachar, 'Reshaping the Multicultural Model: Group Accommodation and Individual Rights' (1998), 8 *Windsor Review of Legal and Social Issues* 83 at.96 ; Shachar, above n284 at 95.

‘an intersectionist understanding of the position of identity group members’.<sup>288</sup> This places an emphasis on understanding the multiplicity of group members’ affiliations. In regards to women, this means appreciating the significant role that religion or culture plays in their life as well as the fact that they are citizens of a secular state.<sup>289</sup> Such an approach attempts to give a real voice to the women concerned as it respects the importance of their sense of belonging to their religious and cultural group. It also serves to promote dialogue and cooperation between the state and the minority group and encourages both sides to reflect upon their values and to be responsive to the needs of their members. It also relieves the pressure upon the individual to define themselves primarily in terms of their cultural identity.<sup>290</sup> In this way it seeks to transform both intergroup relations and intragroup relations.

Shachar differentiates between what she calls public accommodation (demands for inclusion into the public sphere) and privatised diversity (demands for opting out of or seceding from public laws and norms).<sup>291</sup> Whilst many view the call for recognition or accommodation of Islamic family law as a form of privatised diversity, the empirical data from this research project detailed in later chapters will clearly demonstrate that this is erroneous and that it more closely fits within public accommodation. Finally, Shachar offers a way forward by articulating an argument for the development of a model of joint governance that recognises the potential dangers that multicultural accommodation can pose for women whilst respecting the importance that religion plays in their lives. To simply argue that these policies are bad for women and not engage in ways in which the challenges can be addressed

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<sup>288</sup> Shachar, above n283 at.296.

<sup>289</sup> Shachar, above n287 at 86.

<sup>290</sup> Baumeister, above n144 at.409.

<sup>291</sup> Ayelet Shachar, ‘Privatising Diversity: A Cautionary Tale from Religious Arbitration in Family Law’ (2008) 9 *Theoretical Inquiries in Law* 573 at 580-581.

leaves those women most in need of protection in an extremely vulnerable position.<sup>292</sup> Shachar's approach will be discussed in more detail in later chapters when I consider the implications of accommodation of the community processes for Muslim women in Australia.

Despite their different perspectives and views, Okin, Kymlicka and Shachar conclude with the need for debate and dialogue to ensure that all relevant views can be heard, particularly those of the women affected by such policies. It is this 'insider's voice' that needs to be heard. As Okin asserts, the challenge facing women human rights activists is their ability to translate such rights into cultural or religious language, with a great role to be played by insiders in such cultures or religions who 'play a crucial part' in the continuing struggle for women's equality.<sup>293</sup> According to Parekh this could be achieved through intercultural dialogue, an open-minded dialogue between the majority and the minority which must search for common ground and aim at mutual adaptation. Intercultural dialogue must encourage reflection and debate not only between communities, but also within the various communities themselves.<sup>294</sup> Indeed it is my argument that the greatest challenge facing Muslim women in Australia is having a space for their voices to be heard and the diversity of their experiences to be appreciated.

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<sup>292</sup> Id at 604.

<sup>293</sup> Okin, above n280 at 4.

<sup>294</sup> Parekh, above n 223.

## 5. Conclusion

This chapter has introduced the theoretical framework used throughout this thesis to consider the issue of the recognition or accommodation of *Shari'ah* or Islamic family law in liberal democratic states such as Australia. Despite the political rhetoric that there is one law that applies to all which accords with a view that law is centric, it is argued that it is more accurate to understand law to be plural, thus recognising the multiple normative orders that exist in society. The discussion then considered the concept of multicultural citizenship as articulated by Will Kymlicka as a basis for supporting official multicultural policies in liberal democratic states. It was argued that Kymlicka's concept is a useful one to explore the issue of the recognition or accommodation of the differing norms, laws and practices of the various minority groups found within a state. However it was argued that Kymlicka's concept, with an overemphasis on culture, does not adequately deal with religious groups, but that this could be overcome by accepting Modood's suggestion that multicultural policies should be based on different identities rather than cultures. This is crucial if the concept of multicultural citizenship is to remain relevant in today's world, with the focus of multicultural policies being on Muslim communities. Finally the chapter considered the critique that policies of multicultural accommodation can be disadvantageous to women. It was accepted that this critique offers a challenge to those who advocate for greater recognition or accommodation of the practices of minority groups to ensure that this recognition does not come at the expense of women's rights.

## **Chapter 4**

### **An International Context**

#### **1. Introduction**

The discussion in the previous chapter set out a theoretical framework for understanding the issue that is at the heart of this research project – the application and accommodation of Islamic family law in Australia. However, before this can be explored in great detail it is important to appreciate that this issue has been raised in quite a significant way in other liberal democratic states. In particular this chapter will consider the recent public debates that have taken place in the UK and Canada about the recognition or accommodation of *Shari'ah* or Islamic law by the mainstream legal system. This chapter will demonstrate that those debates were based more on assumptions and stereotypes that generated fear in the general public than on an accurate understanding of the issues facing Muslims in those countries. Examining these international debates will provide an important context for the discussion to follow in chapter 5 that looks at the call for recognition in the Australian context. Whilst to date there has not been the same level of public debate and interest

in this issue in Australia, there is no doubt that an understanding of what happened in Canada and the UK can be a valuable learning tool to ensure that any public debate of this nature in Australia is a much more informed and nuanced one. Further, this chapter will also serve as an important basis for clarifying the call for greater recognition or accommodation of Islamic legal principles in liberal democratic states. In particular, it is argued that despite the assumptions made, there is no demand by Muslim groups for recognition of *Shari'ah*, rather it is a call for recognition of dispute resolution processes.

## 2. The Debate in the United Kingdom

The most recent public debate about this issue occurred in the UK in 2008, when the Archbishop of Canterbury Rowan Williams caused a public uproar when in a public lecture titled 'Civil and Religious Law in England: a Religious Perspective'<sup>295</sup> he considered the question 'what level of public or legal recognition, if any, might be allowed to the legal provisions of a religious group?'<sup>296</sup> In discussing this question the Archbishop suggested that there could be greater room for the application of *Shari'ah* or Islamic law in the UK, most particularly in the area of family law and financial transactions, although he acknowledged the 'anxieties' of discussing *Shari'ah* in the UK context, as he referred to the work of Prof Tariq Ramadan, who points out that:

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<sup>295</sup> Rowan Williams, 'Archbishop's Lecture – Civil and Religious Law in England: a Religious Perspective', (Foundation Lecture presented at the Royal Courts of Justice, London, 7 February 2008). <<http://www.archbishopofcanterbury.org/1575>> accessed 1 January 2010.

<sup>296</sup> Ibid.

the idea of *Shari'ah* calls up all the darkest images of Islam...It has reached the extent that many Muslim intellectuals do not dare even to refer to the concept for fear of frightening people or arousing suspicion of all their work by the mere mention of the word .<sup>297</sup>

But he also acknowledged that there were valid concerns that need to be dealt with, particularly in regards to the possible disadvantage that this may pose for vulnerable members of society. He referred at length to Ayelat Shachar, whose work was discussed in chapter 3, particularly her call for a transformative model that aims to respond to the needs of religious groups yet ensures that the rights of individuals are protected. He concluded by calling for a more nuanced debate about the role of Islamic law in Britain and one which needs 'a fair amount of "deconstruction" of crude oppositions and mythologies'.<sup>298</sup>

After this lecture, calls were made for his resignation as head of the Anglican Church. His words led to many dramatic news headlines that at best misreported what the Archbishop actually said, and at worst did much to create animosity against Islam and Muslims in the UK. Modood says that:

Many people (willfully or otherwise) misunderstood Rowan William's position and thought (sincerely or otherwise) that he was sanctioning the stoning of adulterers, hand-chopping for theft and beheadings for apostasy. Even some of those who recognize that he was not doing so still argue that....granting anything to Muslims in this area would encourage extremists and unreasonable demands and propel the entire society down a slippery slope to the Talibanisation of British law.<sup>299</sup>

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<sup>297</sup> Ib.

<sup>298</sup> Idid.

<sup>299</sup> Tariq Modood, 'Multicultural Citizenship and the anti-Sharia storm' *Open Democracy* (14<sup>th</sup> February 2008) at 3.

It would seem that much of the commentary about the speech was made by those who did not take the time to read or fully comprehend the actual lecture delivered by the Archbishop. The next day the Office of the Archbishop issued a statement<sup>300</sup> in response to what they termed a strong reaction by the media to the speech. In this statement they clarified that ‘The Archbishop made no proposals for *Shari’ah* in either the lecture or the interview, and certainly did not call for its introduction as some kind of parallel jurisdiction to the civil law’. Rather, it clarified that the Archbishop ‘sought carefully to explore the limits of a unitary and secular legal system in the presence of an increasingly plural (including religiously plural) society and to see how such a unitary system might be able to accommodate religious claims’. However, despite these immediate attempts at clarification, the public debate continued, largely based on the initial reactions to the Archbishop’s speech.

One of the most immediate reactions was to link this debate to the issue of multiculturalism and the accommodation of the diverse practices of minority groups. Many questioned the objectives of accommodationist policies, arguing that this reflected the disastrous effects of multiculturalism. David Cameron, then Conservative Leader in the UK, said that the use of *Shari’ah* was the:

logical endpoint of the now discredited doctrine of state multiculturalism, seeing people merely as followers of certain religions, rather than individuals in their own right within a common community.<sup>301</sup>

<sup>300</sup> Office of the Archbishop, ‘‘*Shari’ah* law’ – What did the Archbishop actually say?’ (Press Release, 8 February 2008) <<http://www.archbishopofcanterbury.org/1581>> accessed on 19 October 2010.

<sup>301</sup> ‘Cameron steps into *Shari’ah* law row’, *BBC News* (26 February 2008)

<[http://news.bbc.co.uk/2/hi/uk\\_news/politics/7264740.stm](http://news.bbc.co.uk/2/hi/uk_news/politics/7264740.stm)> accessed 20 September 2008.



Thus, the issue was portrayed as one which would fragment society and in particular put in jeopardy the rights of women who, it was claimed, would be coerced into accepting the outcome of barbaric and uncivilized laws. Modood argues that such sentiments led many to believe that an exclusion of religion in the public sphere is most desirable.<sup>302</sup>

This was illustrated not only by the news headlines, but also by the launch of the ‘One Law for All’ campaign against *Shari’ah* law in Britain in December 2008, ten months after the Archbishop’s speech.<sup>303</sup> According to their website, this campaign:

calls on the UK government to recognize that *Shari’ah* law is arbitrary and discriminatory and for an end to *Shari’ah* courts and all religious tribunals on the basis that they work against and not for equality and human rights. The campaign also calls for the Arbitration Act 1996 to be amended so that all religious tribunals are banned from operating within and outside of the legal system.<sup>304</sup>

The arguments against such tribunals include a concern for women’s rights as ‘religious authorities...are by definition misogynistic’ and a fear that human rights and the rule of law will be undermined in British society by the operation of such tribunals, even at an unofficial and informal level.<sup>305</sup>

However there were those who supported what the Archbishop said, such as Bunting, the Associate Editor of *The Guardian* newspaper, who wrote that:

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<sup>302</sup> Modood, above n299 at 1.

<sup>303</sup> <<http://www.onelawforall.org.uk>> accessed 20 October 2010.

<sup>304</sup> Ibid.

<sup>305</sup> Ibid.

Contrary to the torrent of ineptitude and naivety, there was a rationale behind the archbishop's remarks. *Shari'ah* has become the totemic issue for both Muslims and non-Muslims... Williams has squarely put the issue in the public domain to be debated.<sup>306</sup>

Also Prof TJ Winters said that:

Dr Williams, far from recommending some kind of parallel law for Muslims, was pointing out that informal religious tribunals which already exist on a limited number of civil – never criminal – matters, in a way which is entirely legal under arbitration laws, should be more systematically brought under the regulation of the legal system. He was not commending greater separateness, or an expansion of Muslim courts – quite the opposite.<sup>307</sup>

What was rarely acknowledged during this war of words is that this is not a new issue. At various times since the 1970s, different Muslim organisations and leaders in the UK have asked for some form of recognition or accommodation of Islamic family law.<sup>308</sup> Whilst this request has been rejected, it indicates that for decades now the Muslim community has 'developed a strategy whereby methods of Muslim dispute resolution would operate unofficially'.<sup>309</sup> Indeed, this has been acknowledged by UK

<sup>306</sup> Madeline Bunting, *The Guardian* (9<sup>th</sup> February 2008).

<sup>307</sup> Timothy Winters, *BBC Thought for the day* (11 February 2008)

<<http://www.bbc.co.uk/religion/programmes/thought/documents/t20080211.shtml>> accessed 2 February 2011.

<sup>308</sup> Pascale Fournier, 'The Reception of Muslim Family Law in Western Liberal States' (2004 written for the Canadian Council of Muslim Women *Shari'ah/Muslim Law Project* at.23.

<sup>309</sup> *Ibid* at 25.

academics and jurists such as Pearl, Menski, Poulter and more recently Yilmaz.<sup>310</sup> As

Bell argues:

For many people *Shari'ah* courts are seen as brutal institutions where zealots in hard-line Muslim States pass down draconian punishments. But there are already *Shari'ah* courts operating throughout Britain in ways that have very little to do with the stereotype.<sup>311</sup>

So how do Muslims apply Islamic family law in the UK context? Despite a lack of empirical research in this area, it is well documented that there are several *Shari'ah* Councils or tribunals that have been providing family dispute resolution processes since 1982. Hussain says that each council is usually associated with a mosque, but represents a diversity of religious opinion and attempts to cater to the needs of most Muslims.<sup>312</sup> These councils are usually comprised of several scholars or *'imāms* sitting together to decide a case. They each have a particular procedure to be followed which usually involves the person making an application to the council to complete a form setting out the details of their particular case. Councils try to mediate between the parties, but if that is unsuccessful, they will proceed to deal with matters of divorce and/or property settlement. Such councils deal with over 500 cases annually and the majority of applications are made by women. Generally speaking,

<sup>310</sup> Pearl & Menski, above n1; David Pearl, 'Muslim Marriages in English Law' (1972) 30 *Cambridge Law Journal* 120; David Pearl, 'Ethnic Diversity in English Law' in Stephen Cretney (ed) *Family Law; Essays for the New Millennium* (2000); David Pearl, 'Cross-Cultural Interaction Between Islamic Law and Other Legal Systems – Islamic Family Law and Anglo-American Public Policy' (1985-86) 34 *Cleveland State Review* 113; Sebastian Poulter, *Ethnicity, Law and Human Rights – The English Experience* (1998); Ihsan Yilmaz, *Muslim Laws, Politics and Society in Modern Nation States: Dynamic Legal Pluralisms in England, Turkey and Pakistan* (2005).

<sup>311</sup> Dan Bell, 'The View from inside a *Shari'ah* court', *BBC News* (11 February 2008)

<[http://news.bbc.co.uk/2/hi/uk\\_news/7238890.stm](http://news.bbc.co.uk/2/hi/uk_news/7238890.stm)> accessed 11 March 2010.

<sup>312</sup> Jamila Hussain, 'Intersections between the law, religion and human rights: ADR – the UK Model' (Paper presented at Australian Human Rights Commission Roundtable Discussion Series – Intersections between the Law, Religion and Human Rights (Alternative Dispute Resolution and Faith Communities, Sydney, 20-21 February 2009).

these councils do not have any authority other than moral authority, as they are only able to make recommendations and then it is up to the individual parties themselves as to whether they comply.<sup>313</sup>

Despite the media stories that stirred up fear that *Shari'ah* was to be recognised by British law, these councils were not and are not recognised as part of the British legal system. There were no proposals for any legislative amendment or accommodation. The only council or tribunal that has any authority according to UK law is the more recently developed Muslim Arbitration Tribunal (MAT)<sup>314</sup> which operates under the existing Arbitration Act. The MAT was established in 2007 and it was seen by many 'as an important and significant step towards providing Muslims with a real opportunity to self-determine disputes in accordance with Islamic Sacred Law'.<sup>315</sup> It operates within the legal framework of England and Wales, thus ensuring that its decisions can be enforced pursuant to English law.<sup>316</sup> It also claims that its decisions are made in accordance with Islamic law.<sup>317</sup> In this way it is expressing its respect and support for both English law, which it believes is binding on each citizen, and religious law which is significant to Muslims, as its statement of values says:

We believe in the co-existence of both English law and personal religious laws. We believe that the law of the land in which we live is binding upon each citizen, and we are not attempting to impose *Shari'ah* upon anyone. *Shari'ah* does however have its place in this society where it is our personal and religious law.<sup>318</sup>

<sup>313</sup> Ahmad Thomson, 'Islamic Law for Family Lawyers' 22 January 2007 *Family Law Week* at 4 < <http://www.familylawweek.co.uk/site.aspx?i=ed2215> > accessed 20 October 2010.

<sup>314</sup> <http://www.matribunal.com/> accessed 3 October 2010.

<sup>315</sup> *Ibid.*

<sup>316</sup> *Ibid.*

<sup>317</sup> *Ibid.*

<sup>318</sup> *Ibid.*

Its website also contains extensive procedural rules indicating that there are two people conducting the arbitration, an Islamic Scholar that understands the UK context and a practising lawyer. Despite the media reports to the contrary, the MAT is an attempt to harmonise the application of both English family law and Islamic family law without any radical change to the existing legal framework. In fact, such reports prompted the UK Ministry of Justice to issue a statement on 21 September 2008 stating that Islamic Courts are operating legally as arbitrators under existing law which is applicable to all. The Ministry further stated that ‘*Shari’ah* law is not part of the law of England and Wales and the Government has no intention of making any change that would conflict with British laws and values.’<sup>319</sup>

Other more recent developments in the UK include the development of an Islamic Marriage contract which has the endorsement of various *Shari’ah* councils and organisations across the country. This will be considered in more detail in later chapters, particularly in its potential to protect the rights of women, but it is worth noting that it is ‘designed to inform and when necessary enable the parties to secure their rights under the mutually agreed contract’.<sup>320</sup> It consists of a Certificate of Marriage explaining the rights and responsibilities of the parties to the marriage and records the terms agreed upon by the parties as well as providing guidelines for implementation.<sup>321</sup> It encourages Muslims to register their marriage under British law, thus paving the way for British courts to enforce the rights of the parties in

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<sup>319</sup>Quoted in Matthew Hickey, ‘Islamic *Shari’ah* Courts in Britain are now legally binding’ *Mail Online* (15 September 2008) <<http://www.dailymail.co.uk/news/article-1055764/Islamic-shari'ah-courts-Britain-legally-binding.html>> accessed 11 December 2010.

<sup>320</sup>The Muslim Institute, *Muslim Marriage Contract* (August 2008) at 1 <<http://www.muslimparliament.org.uk/Documentation/Muslim%20Marriage%20Contract.pdf>> accessed 3 January 2011.

<sup>321</sup>*Ibid.*

accordance with Islamic law. Dr Siddiqui, one of the authors of the contract, is quoted as saying that ‘This contract is revolutionary and will lead the way in addressing problems that exist under *Shari‘ah* law. Although it is only the tip of the iceberg, it is a revolutionary step; nothing like this has happened in 100 years’.<sup>322</sup>

### 3. The Debate in Canada

A similar public debate erupted a few years earlier in Ontario, Canada. In that instance, in late 2003 a Muslim organisation known as the Islamic Institute of Civil Justice (IICJ) in Ontario sought to offer arbitration in accordance with Islamic legal principles and Canadian law. They called this the Muslim Personal/Family Law campaign and it was promoted by the President of that organization, Syed Mumtaz Ali as a way to offer both marriage and dispute resolution services that would allow Canadian Muslims to live ‘Islam to the best extent possible in the Canadian democratic context’.<sup>323</sup> They proposed to implement Qur’anic requirements to guide each party to try to settle their disputes themselves, thus deciding the case by mutual consent, and then the parties would be helped to finalise the process appropriately. Alternatively if agreement could not be reached, then the service would offer the use of two arbitrators to make a decision, with such decisions becoming binding and enforceable under Canadian law.<sup>324</sup> The IICJ argued that the use of their service would provide the necessary knowledge, experience and expertise both in Muslim and

<sup>322</sup> Urmee Khan, ‘New *Shari‘ah* law marriage contract gives Muslim women rights’ *The Muslim Parliament of Great Britain* (8 August 2008)

<<http://www.muslimparliament.org.uk/contractlawwomenrights.html>> accessed 2 July 2010.

<sup>323</sup> Rabia Mills, ‘Interview: A Review of the Muslim Personal/Family Law Campaign’ (1995) at 9 <<http://muslim-canada.org/pfl.htm>> accessed 21 February 2010.

<sup>324</sup> The Muslim Marriage Mediation & Arbitration Service, *An Essential Islamic Service in Canada – Muslim Marriage Mediation and Arbitration Service* <<http://muslim-canada.org/brochure.htm>> accessed 3 October 2010.

Ontario law, thus saving money, time and ‘headaches associated with court litigation’.<sup>325</sup>

Whilst Syed Mumtaz Ali had been advocating this service for more than 20 years, it seems that in November 2003 it was picked up by the Canadian media<sup>326</sup>, and then progressed to news media all over the world.<sup>327</sup> The reaction can best be understood by reflecting on the news headlines: ‘Canada Allowing *Shari‘ah* Barbaric Laws’; ‘Canadian Judges will soon be enforcing Islamic law...such as stoning women caught in adultery’<sup>328</sup> and editorials which suggested that mediation of divorces ‘under *shari‘ah* or Islamic law is about the best idea since female foot-binding’.<sup>329</sup> It would seem that the proposal by the IICJ created a sort of moral panic, with many believing that what was being suggested was the enforcement of criminal punishments, in particular that Muslim women in Canada would be stoned to death.<sup>330</sup>

It would also seem quite apparent that what was raised by these proposed local initiatives to provide people with dispute resolution processes was linked to something much bigger. It triggered a generalised fear of Islamic fundamentalism associated with international events. Bakht reports that this onslaught of fear-mongering newspaper articles indicated that the ‘biggest threat in the world today is Islamic fundamentalism and indeed that faith based arbitration would somehow aid

<sup>325</sup> Id.

<sup>326</sup> Judy Van Rhijn, ‘First Steps Taken towards *Shari‘ah* Law in Canada’ *Law Times* (Tuesday 25 November 2003) <<http://vancouver.indymedia.org/news/2003/11/87502.php>> accessed 3 October 2010.

<sup>327</sup> Catherine Morris, ‘Media’s Mediation and Other Matters: Faith-Based Dispute Resolution in Canada’ (Paper presented at Canadian Bar Association, Vancouver, 25 January 2006).

<sup>328</sup> Faisal Kutty, *Shari‘ah courts in Canada, Myth and Reality* (9 March 2004)

<<http://faisalkutty.com/publications/media-monitors-network/Shari‘ah-courts-in-canada-myth-and-reality>> accessed 2 July 2010.

<sup>329</sup> Heather Mallick, ‘Boutique law: It’s the latest thing’ *The Globe and Mail* (15 May 2004).

<sup>330</sup> Natasha Bakht, ‘Were Muslim Barbarians Really Knocking on the Gates of Ontario? The Religious Arbitration Controversy – Another Perspective’ (2006) 67 *Ottawa Law Review* 67 at 69.

the cause of fundamentalists the world over.<sup>331</sup> This is an example of the analysis given about multiculturalism in the previous chapter, where it was argued that where policies of accommodation are associated with Muslims, there is a backlash against multiculturalism.

However the most interesting aspect of the public reaction was that very little of it was based upon fact, or an accurate understanding of the reality of the situation. As Fidler aptly suggests, the following words of Mark Twain could well apply to the 'phony debate over *Shari'ah* tribunals in Ontario': 'A lie can travel halfway around the world while the truth is putting on its shoes'.<sup>332</sup>

The reality was that neither the IICJ nor indeed any other Muslim group in Ontario was asking for changes to be made to the law. This was because, in a similar way to the case in the UK, people in Ontario had an existing right to choose arbitration as a means of resolving their disputes, including family law matters.<sup>333</sup> Indeed the Ontario Arbitration Act 1991 allowed for arbitration in private matters, which could include faith based arbitration. For many years Jewish and Christian groups had set up arbitration boards that ruled in accordance with their religious principles.<sup>334</sup> Aslam argues that 'far from being a radical innovation, the IICJ proposal sought only to formalise tribunals that were already permissible under the Arbitration Act'.<sup>335</sup>

<sup>331</sup> Id at 70.

<sup>332</sup> Richard Fidler, 'Ontario's 'Shari'ah Law' Controversy: How Muslims were Hung out to Dry', *MRZINE* (27 May 2006) <<http://mrzine.monthlyreview.org/fidler270506.html>> accessed 2 March 2010.

<sup>333</sup> Marion Boyd, 'Arbitration in family law: Difficult choices', (Winter 2006) *Inroads* at 1 <[http://findarticles.com/p/articles/mi\\_qa4014/is\\_200601/ai\\_n15971898/print](http://findarticles.com/p/articles/mi_qa4014/is_200601/ai_n15971898/print)> accessed 3 April 2010.

<sup>334</sup> Anna C Korteweg, 'The *Shari'ah* Debate in Ontario: Gender, Islam and Representations of Muslim Women's Agency' (2008) 22 *Gender and Society* 434 at 436.

<sup>335</sup> Jehan Aslam, 'Judicial Oversight of Islamic Family Law Arbitration in Ontario: Ensuring Meaningful Consent and Promoting Multicultural Citizenship' (2006) 38 *International Law and Politics* 841 at 843.



However the public debate in Canada, which strongly emphasised the disastrous effects of faith based arbitration on women, was represented as a dichotomy, ‘either protect women’s rights or promote religious extremism’.<sup>336</sup> In response, the Ontario Government commissioned a study by former Attorney General Marion Boyd to consider the feasibility of continuing to allow religious based arbitration under the law. This report entitled *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion*<sup>337</sup> was known as the Boyd Report. The consultations and report were comprehensive and representative of the differing views about having faith based arbitration available as a family dispute resolution process in Ontario. After canvassing the divergent views the report concluded that:

The Review did not find any evidence to suggest that women are being systematically discriminated against as a result of arbitration of family law issues. Therefore the Review supports the continued use of arbitration to resolve family law matters. However, that use should be subject to the safeguards recommended below:

1. Arbitration should continue to be an alternative dispute resolution option that is available in family and inheritance law cases, subject to the further recommendations of this Review.
2. The Arbitration Act should continue to allow disputes to be arbitrated using religious law, if the safeguards currently prescribed and recommended by this Review are observed.<sup>338</sup>

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<sup>336</sup> Shachar, above n 291 at.585.

<sup>337</sup> Marion Boyd, *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion* (2004).

<sup>338</sup> *Ibid* at 133.

The report went on to recommend many important safeguards that were aimed at addressing the concerns expressed in the consultations about the use of arbitration in family law matters. Some of these included legislative changes to ensure greater judicial oversight of arbitral agreements; regulatory requirements such as stating an obligation for screening for violence; agreements to be written as well as obligating arbitrators to keep written records. The report also made recommendations about the need for independent legal advice and public education campaigns as well as some regulations about the skills and training of mediators and arbitrators.<sup>339</sup> Boyd indicated that she understood the challenge of balancing the need to protect the interests of women with the right of people to use faith based dispute resolution processes as she clearly states:

This issue presents the basic problem of balancing the rights of minority groups against the rights of individuals as they may be exercised within a minority. In this sense it speaks to the basic tension inherent in multiculturalism.<sup>340</sup>

In response Boyd referred to the work of Ayelet Shachar to recognise the intersectionality of women's lives:

Part of this negotiation in a multicultural and democratic society is an understanding of individuals as being at the intersection of various identities. One identity would be an individual's membership in the cultural or religious community while another would be that same individual's citizenship within

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<sup>339</sup> Id at 133-142.

<sup>340</sup> Ibid at 89.

the state. But there are numerous other identities that need to be taken into account.<sup>341</sup>

Ultimately she found that with greater safeguards in place the balance could be struck between protecting individual rights and allowing faith based dispute resolution processes to continue in Ontario. However the Ontario Government rejected the findings of the report and amended the law to deny recognition to faith based arbitration of family law disputes under the Act. At the time of announcing the decision of the government to amend the law, then Attorney General Michael Bryant said that:

We have heard loud and clear from those who are seeking greater protections for women. We must constantly move forward to eradicate discrimination, protect the vulnerable and promote equality.....We will ensure that the law of the land in Ontario is not compromised, that there will be no binding family arbitration in Ontario that uses a set of rules or laws that discriminate against women.<sup>342</sup>

This comment reflects a decision that was probably made more for political reasons than policy reasons, as Boyd had devoted a considerable amount of time and attention to considering the impact of these processes on women and had found no evidence that women were being systematically discriminated against. Furthermore, there was no suggestion that faith based arbitration would be conducted in a manner contrary to

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<sup>341</sup> Id at 91-92.

<sup>342</sup> Michael Bryant, Ontario Attorney General, Press Release, 8 September 2005 <<http://www.attorneygeneral.jus.gov.on.ca/english/news/2005/20050908-arb1991.asp>> accessed 2 March 2009.

the law of Ontario. However the decision of the government demonstrated how significant the gender concerns were in the public debate about faith based arbitration.

In fact a coalition of groups and individuals united to lobby the government to reject faith based arbitration because of its perceived impact on women. This was a collaborative effort involving the Canadian Council for Muslim Women, National Association of Women and the Law and the Centre for Human Rights and Democratic Development (Rights and Democracy). This coalition of groups convened workshops, conferences, initiated letter writing campaigns and invited activists from around the world to publicise what they saw as the negative impact of Islamic law on women's rights.<sup>343</sup> Indeed, this coalition ended up comprising over 100 organisations and individuals.<sup>344</sup> One of the strongest arguments made against faith based arbitration was that Islam more generally and Islamic law in particular disadvantages Muslim women by treating them unequally.<sup>345</sup>

As mentioned in the previous chapter such an argument is a common generalisation and misconception about Islam and Muslim women. Brown argues that this generalisation fails to recognise the diversity found in Islamic law and its application to Muslim women.<sup>346</sup> Aslam goes further to argue that there is no 'body of contemporary case law upon which to rely for the argument that a wholesale application of Islamic law would discriminate against women'<sup>347</sup>. In fact it is a widely

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<sup>343</sup> Audrey Macklin, 'Post-Neoliberal Multiculturalism: The case of Faith-Based Arbitration', (Paper presented at the Annual Meeting of the Canadian Political Science Association, York University, Toronto, June 1-3 2006) at 8.

<sup>344</sup> Natasha Bakht, above n330 at 75.

<sup>345</sup> Donald Brown, 'A Destruction of Muslim Identity: Ontario's Decision to stop shari'a based Arbitration' (2007) 32 *North Carolina Journal of International and Commercial Regulation* 495 at 532.

<sup>346</sup> *Ibid.*

<sup>347</sup> Aslam, above n335 at 849.

held belief by many Muslim women in the West that Islam is steeped in a rich tradition that safeguards and promotes women's rights.<sup>348</sup> This is not to say that the community processes that were the subject of debate could not be critiqued in terms of how women experienced these processes, but that this could not simply be attributed to Islamic principles. Rather, as will be explored in later chapters, many men and women interviewed for this research project spoke of the need for such informal community processes to better accommodate the needs of Muslim women. In fact, for many this was an overriding concern of theirs, but this did not mean that they saw no room for such processes to exist.

Another significant objection to the proposal was around the issue of consent – that women could not freely choose to enter into such processes because of the pressure placed upon them.<sup>349</sup> It was argued that Muslim women, particularly newly arrived migrant women, were vulnerable and unaware of their rights under Canadian law. Khan argues that Muslim women experience pressure to conform or risk finding themselves ostracised by their families and communities, this being especially worse for 'women who have concentrated on preserving Muslim culture....and who therefore have few skills with which to survive in the white world.'<sup>350</sup> These comments suggest that women who adhere to an Islamic way of life are ignorant of, uneducated in and, more importantly, not a part of the wider community. The international Centre for Human Rights and Democratic Development, in its report

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<sup>348</sup> Al-Hibri, above n266.

<sup>349</sup> Brown, above n345 at 532.

<sup>350</sup> Shahnaz Khan, 'Canadian Muslim Women and Shari'a Law: A Feminist response to "Oh! Canada!"' (1993) 6 *Canadian Journal of Women and the Law* 52 at 60.

argued that ultimately ‘making religious tribunals readily available and their decisions enforceable under Ontario law will only legitimise women’s lack of real choice’.<sup>351</sup>

Clearly, the view is that Muslim women are vulnerable and incapable of making free decisions for themselves. Whilst these arguments are clearly well intentioned, and raise some very serious issues about domestic violence and the exploitation of women that should not be ignored or trivialised in a debate about faith based arbitration, these are social issues that go beyond the application of Islamic law.<sup>352</sup> These issues affect all women regardless of religion, culture or ethnicity. As Kutty argues, in the public debate, ‘gender inequality was recognised when it was situated within the Muslim community’ but not in the wider Canadian society.<sup>353</sup>

Aslam suggests that such arguments are paternalistic, and open to the same criticisms that were made of the supporters of faith based arbitration – that they serve to limit the choices available to Muslim women.<sup>354</sup> Bakht recognises this as she argues that ‘it cannot be assumed that these women are necessarily duped or oppressed as this would be engaging in the very infantilising of Muslim women that one accuses patriarchal cultures of’.<sup>355</sup>

It is important to note that very little, if any at all, of the commentary made about Muslim women was based on any empirical research, to find out whether in fact

<sup>351</sup> International Centre for Human Rights and Democratic Development, ‘Behind Closed Doors- How Faith Based Arbitration Shuts Out Women’s Rights in Canada and Abroad’ (2005) *Rights and Democracy* at 4 < <http://www.dd-rd.ca/english/commdoc/publications/women/arbifaith.htm> > accessed 5 March 2010.

<sup>352</sup> Jehan Aslam, above n335 at 853.

<sup>353</sup> Korteweg, above n334 at 449.

<sup>354</sup> Aslam, above n335 at 850.

<sup>355</sup> Natasha Bakht, ‘Family Arbitration Using *Shari’ah* Law: Examining Ontario’s Arbitration Act and its Impact on Women’ (2004) 1 *Muslim World Journal of Human Rights*, at 22.

Muslim women were as vulnerable as they were thought to be. As MacFarlane reflected about the debate:

My response as a non-Muslim and as someone who knew absolutely nothing about Islam or Islamic law at that point, but as a dispute resolution researcher, was how astonishingly confirmed everybody was in their opinions, in the absence of any empirical data about what these procedures involved and who was using them. This lack of knowledge extended beyond non-Muslims commenting on the debate to some of the commentary by Muslims – they could reference no public record, no available data, no information on actually what was happening in mosques when Islamic divorce processes are conducted. Aside from those with direct personal experience of divorce in a Canadian mosque – and we did not hear from them, which was also interesting – there appeared to me to be no available information on which to base any kind of an opinion.<sup>356</sup>

Recently MacFarlane has been engaged in a research project on this topic in Canada and North America. Her preliminary findings correspond to the findings of this research project, that the process itself is important to Muslims, even if it may not give them a better financial outcome than the formal court process.<sup>357</sup> MacFarlane also notes the need for greater clarity in the public debate:

I actually think that was a misunderstanding of what the Muslim community was asking and certainly a misunderstanding of the reasons ordinary Muslim

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<sup>356</sup> Julie Macfarlane, 'Faith Based Dispute Resolution – Transcription' <<http://www.islamicdivorce.org/art2.htm>> accessed 3 July 2010.

<sup>357</sup> Ibid.

women would choose to use these processes. Nobody yet has told me that they want to do this in order to overthrow the state.<sup>358</sup>

These findings demonstrate that despite the fear that faith based arbitration was a step towards fragmenting society, it was actually the exact opposite. This will be discussed further below, as well as in later chapters, when considering the empirical findings of this research. Suffice to say that the public debate that took place in Canada and the UK, whether in the news media or in academic writings, was based more on generalisations and inaccuracy and the fear that they generated, than on any empirical research or understanding of what was actually happening at a community level.

#### **4. A Need for Clarification**

What is obvious from the discussion above is that the debates were sensationalised, drawing upon generalisations and assumptions, rather than facts. This obscured the reality of the situation. Faith based arbitration was neither radical nor new; it was available under the existing legislative framework and had been used for many years by Jewish and Christian groups both in Ontario and the UK. Before considering the findings of the present research in the remaining chapters and looking at the issue of recognition of Islamic Law or *Shari'ah* in Australia, it is imperative that many aspects of the overseas debates for 'recognition' are understood. It would seem that much of the opposition and fear came from a misunderstanding of what is meant by 'recognition' or 'accommodation'.

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<sup>358</sup> Id.



## 4.1. A Denial of Legal Pluralism

In each of the public debates there was a strong emphasis on the assumption that there was only one set of laws applicable and these were the official state laws. This was evidenced by the views expressed by the politicians. For example in the UK Nick Clegg, then Liberal Democrat Leader said:

We have to accept that whatever your views, whatever your faith, whatever the great cultural diversity - which I celebrate in this country we have - there's got to be a certain set of values that we all subscribe to, otherwise the whole thing falls apart.<sup>359</sup>

As was mentioned above, the Attorney General of Ontario made similar comments as he announced that the government would be amending the law to ensure that there would be no recognition of faith based arbitration in Ontario. These views clearly demonstrate that many saw law as being monolithic and centralised and embodied only in the official state law. This view did not appreciate that in the resolution of family law disputes, various normative orders were being used to resolve these disputes. Clearly these operated in the unofficial realm and outside the official legal system, but nonetheless for many people they played a greater role in the resolution of their disputes than the official law. As Davies argues, as legal subjects we do not act merely on the basis of legal prescriptions as they are identified and interpreted in a formal system, but on the basis of the intersecting demands of our own ethical beliefs,

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<sup>359</sup> BBC News, 'Reaction in Quotes: *Shari'ah* Law row', *BBC News UK* (8 February 2008) <[http://news.bbc.co.uk/2/hi/uk\\_news/7234422.stm](http://news.bbc.co.uk/2/hi/uk_news/7234422.stm)> accessed on 20 September 2008.

our location in a social field, prevailing discourses about right and wrong and any number of more practical considerations.<sup>360</sup>

In the UK context the discussion above demonstrated that, for quite some time there have been community processes in place that have facilitated the resolution of family disputes based on Islamic legal principles as Islamic *Shari'ah* Councils have operated across the country. More recently with the establishment of a Muslim Arbitration Tribunal, these processes have become more harmonised with existing state law.

Similarly in the Canadian context, the Boyd Report itself documented how various faith communities had set up processes for the resolution of family disputes.<sup>361</sup> In particular, within the Muslim community there were examples of these processes already in existence. The report stated that it had heard from:

many groups that similar sorts of services are available through other mosques and Islamic Community Centres throughout Ontario; these services may be more or less formally structured, and may be organized as mediation or conciliation rather than binding arbitration.<sup>362</sup>

The report gave a detailed account of one faith based dispute resolution service known as Masjid El Noor which had officially been in existence since 1982 and informally prior to that had:

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<sup>360</sup> Davies, above n26.

<sup>361</sup> Boyd, above n337 at 55-68.

<sup>362</sup> Ibid at 60.

offered a continuum of counselling, mediation and arbitration services to its community....Often called upon by the family courts to mediate and sometimes arbitrate, it has won the respect and confidence of the court in its ability to resolve disputes within the Muslim context, according to letters provided to the Review.<sup>363</sup>

Thus, despite the public commentary that emphasised that there was only scope for the application of official law, the reality was that people were guided by 'laws' coming from many different sources to resolve their family law affairs, and quite often this did not involve the state or the official legal system, unless people deliberately chose to.

## 4.2. Official Recognition of Shari'ah not Requested

The debates both in the UK and Canada suggested that that there was an assumption that Muslims were asking for official recognition of *Shari'ah* or Islamic Law, and furthermore that this was an archaic and barbaric set of laws. Feldman argues that 'the outrage about according a degree of official status to *Shari'ah* in a Western country should come as no surprise. No legal system has ever had worse press.'<sup>364</sup> However, in reality there was never any suggestion that Muslims were seeking such recognition. As Archbishop Rowan Williams said 'to recognise *Shari'ah* is to recognise a method of jurisprudence governed by revealed texts rather than a single

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<sup>363</sup> Id.

<sup>364</sup> Noah Feldman, 'Why *Shari'ah*?' *The New York Times* (6 March 2008).

system.’<sup>365</sup> This is also reflected in what one Canadian *’imām* said about *Shari’ah* that it ‘is a loaded word; it includes all of the civil, criminal and other institutions associated with the Islamic legal system...No one in his right mind would propose implementing this system of laws in Canada.’<sup>366</sup>

In fact, there were several submissions made to the Boyd Report by peak Muslim organisations in Canada that objected to the use of the term *Shari’ah* in this context.

The report states that:

Most submissions to the Review were adamant that the term *Shari’ah* should not be used to describe the proposed use of the Arbitration Act to deal with matters of family law for Muslims. The submission from the Council on American-Islamic Relations Canada (CAIR-CAN) represents these views clearly:

The term *Shari’ah* refers to a religious code for living covering all aspects of a Muslim’s life from prayers, to financial dealings, to family relations, to caring for the poor. It is a comprehensive term that encompasses the private and the public, the individual and the community.

It is inappropriate and misleading to use the word *Shari’ah* to describe an arbitration tribunal that will use Islamic legal principles to resolve a very specific and limited set of civil disputes which may be the subject of arbitration under Ontario’s Arbitration Act. Moreover, such a tribunal is not a fully fledged Islamic court, as may be inferred by the use of the word

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<sup>365</sup> Rowan Williams, above n295 at 2.

<sup>366</sup> CTV News, ‘Islamic Group against Ontario use of *Shari’ah* law’, *CTV News*, 22 August 2004.

*Shari'ah*, and its limited jurisdiction stems from the Act. The tribunal will, more appropriately, be a form of Muslim dispute resolution, consistent with Canadian law and the Charter within the flexibility of Islamic normative principles.<sup>367</sup>

Similarly Feldman clarifies that:

Today's advocates of *Shari'ah* as the source of law are not actually recommending the adoption of a comprehensive legal code derived or dictated by *Shari'ah* – because nothing so comprehensive has ever existed in Islamic history.<sup>368</sup>

In actual fact, the issue was not about *Shari'ah* or Islamic law at all. Rather, as stated above, it was about whether Muslims were entitled to avail themselves of procedures available under Canadian or English family law. MacFarlane describes this 'as another form of private ordering, in other words, the private reaching of an agreement and an effort to resolve conflicts outside the courts between consenting adults'. Private agreements cannot be banned because ultimately the state cannot stop people from making their own private arrangements.<sup>369</sup> Indeed this increasingly deters people from using the formal justice system and encourages people to make private arrangements through the use of family dispute resolution.

It is also interesting that in the debates that took place in Canada and the UK, many assumed that there was a call for the recognition of Islamic law in all its forms,

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<sup>367</sup> Boyd, above n337 at 44-45.

<sup>368</sup> Feldman, above n364.

<sup>369</sup> MacFarlane, above n356.

including the well known criminal punishments. However, as al-Faruque argues ‘in spite of there being more than forty-five Muslim countries in the world, Islamic law is not practised anywhere in totality, with the exception of...Iran’.<sup>370</sup> So, if Islamic law is not practised in countries where Muslims are a majority, why would it be sought to be recognised in countries where Muslims are a minority and the state is secular? However the aspect of Islamic law that is applied in every Muslim country, and in actual fact was the only area that Muslims in Canada and the UK were applying, was the area of family law. Therefore as al-Faruque explains ‘the importance of Islamic family law in the life of Muslims can hardly be over-emphasised.’<sup>371</sup> It is argued that if this was clarified during the public discussions in Canada and the UK, then a lot of fear and animosity may have been avoided. However, undoubtedly there would have been many who would have argued that Islamic family law is oppressive to women and has no place in modern society. This will be considered in more detail below.

### 4.3. Difficulties in Applying Islamic Law in a Secular State

Another argument made against faith based arbitration is the *ad hoc* nature of interpreting and applying Islamic Law. There are a number of elements to this argument, the first being that Islamic law is so diverse that the question of which law is to be applied needs to be asked. Furthermore, with such a plurality of Muslim legal views it is difficult to evaluate how multiple versions of Muslim family law would apply at the practical level.<sup>372</sup> It is suggested that the variations and diversity found in

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<sup>370</sup> Muhammad Al-Faruque, ‘Sources on Islamic Family Law: An introductory essay’ (1997) 22 *Canadian Law Libraries* 50 at 50.

<sup>371</sup> *Ibid.*

<sup>372</sup> Fournier, above n308 at 24.

Islamic law indicate that the ‘very concept of Muslim Personal Law is problematic and that it is shaped by those groups who have the power to define it’.<sup>373</sup>

The second element of this argument is that Islamic law is a complex legal framework that ‘does not translate appropriately or fairly when utilized in a patchwork fashion...yet, by virtue of living in Canada, *Shari‘ah* can only be applied in a limited way.’<sup>374</sup> This perception was compounded by the problem that there is no formal certification process to identify someone as being qualified to interpret Islamic law. As Kutty argues ‘as it stands today, anyone can get away with making rulings so long as they have the appearance of piety and a group of followers’.<sup>375</sup> This reinforced the view that to recognise faith based arbitration would be to give power to religious elites within minority groups. This, it was argued, would have a devastating effect on women, as it is male religious leaders who interpret the principles, thereby strengthening the male-dominated control over the family and curtailing women’s sexuality.<sup>376</sup> Again, one can see how prevalent the gender concerns became in the public discourse.

This raises the question of how suited is the application of a religiously based law in a secular society. Many see religion as a divisive force in society that is at odds with the neutral liberal state.<sup>377</sup> This understanding that the separation of state and church is a basic feature of a liberal democratic state led many to argue that ‘we should not allow religious groups to apply their own laws and then have the state enforce

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<sup>373</sup> Khan, above n350 at 57.

<sup>374</sup> Bakht, above n355 at 15.

<sup>375</sup> Kutty, above n328.

<sup>376</sup> International Centre for Human Rights and Democratic Development, above n351 at 5.

<sup>377</sup> Aslam, above n335 at 859.

them'.<sup>378</sup> This takes us back to the point raised in the previous chapter about the assumed neutrality of the secular state, and the fact that the religious origins of mainstream law are often overlooked as it is assumed that there is no legitimate role for religious values and principles in such a society. Is there something inherently difficult about incorporating or accommodating the norms of religious groups simply because they are based in religion? Modood argues that 'we should not ideologise *Shari'ah* and secular law into rival, exclusive and inflexible systems. They have much in common both at the level of principles as well as the capacity to live together'.<sup>379</sup> He offers a way forward on this point as he suggests that:

There is a distinction between the public recognition and respect for identities and beliefs and the moral evaluation of the same; the former is possible without the latter. When we argue for recognition of a difference we are not necessarily morally approving or disapproving of that difference.<sup>380</sup>

However, recent world events have left many in the West with the view that Islamic values pose an inherent danger to society. For example there are concerns that allowing faith based arbitration would 'provide legal and political ammunition for religious extremists around the world'.<sup>381</sup> Tarek Fatah, who strongly opposed the IICJ proposal, described it as 'like putting a toehold or a bridge hood of Islamic fundamentalism in Canada' and that 'they are trying to get under the radar and bring

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<sup>378</sup> Linda Silver Dranoff, 'Setting a dangerous precedent- Comment on the Boyd Report to the Ontario Government' (2005) *Matrimonial Affairs*  
<[http://www.jural23.com/pcwo/documents/Justice/zdranoff\\_reM\\_BoydonShari'ah\\_05.pdf](http://www.jural23.com/pcwo/documents/Justice/zdranoff_reM_BoydonShari'ah_05.pdf)> accessed 11 January 2011.

<sup>379</sup> Modood, above n299 at 4.

<sup>380</sup> Modood, above n203 at 67.

<sup>381</sup> International Centre for Human Rights and Democratic Development, above n351 at 7.



political Islam by stealth. That is their objective; this is not about anything other than trying to establish authority over a community'.<sup>382</sup>

This fear that faith based arbitration was a first step in some kind of grand plan of Islamic Fundamentalists was a common one indeed, and one that saw the use of some very colourful language, for example:

If we know anything about the attitudes of Islamic immigrants to the West, this will evolve over the ensuing years, under the banner of 'religious freedom'....into a full scale parallel legal system for Muslims within Canada. And how long after that until, like an aggressive virus, it begins to eat into the body of its host?<sup>383</sup>

This view remained widespread despite the reassurances by many, including Marion Boyd in her report, that Canadian Muslims were committed to following Canadian law.<sup>384</sup> Writing about the UK context Modood argues that these views are not arguments:

but scaremongering on a large scale. To avoid discussing and conceding what is reasonable because someone else might later demand something unreasonable is irrational. And to associate a whole group, in this case Muslims, with their extremist elements is a kind of political demonisation that may appropriately be called anti-Muslim racism.<sup>385</sup>

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<sup>382</sup> ABC Radio, 'Religious Law in Canada', *The Religion Report*, 21 September 2005.

<sup>383</sup> Val MacQueen, 'Canada's *Shari'ah* Option' *Front Page Magazine* (10 May 2004)

<[www.frontpagemag.com](http://www.frontpagemag.com)> accessed 3 March 2010.

<sup>384</sup> Boyd, above n337.

<sup>385</sup> Modood, above n299 at 3.

Macklin argues that it is misleading to see faith based arbitration as a call for the establishment of a parallel legal system ‘because the one law for all in Ontario permits consenting parties to opt out of that law in favour of norms and processes of their choosing.’<sup>386</sup> Indeed it would be odd if most Canadians could choose to opt out of formal family law processes, but ‘religious Canadians should be prevented from similarly taking ownership over their decisions’.<sup>387</sup> In essence it highlights the perception that religion is somehow a bad thing, in particular for women.

Another concern with faith based arbitration was the perception that it was an attack on Canadian society and its values. As Siddiqui describes, the language used indicated that ‘*Shari’ah* is un-Canadian, antithetical to the liberal human rights tradition, an attack on our values, an attempt to supplant our law with foreign law’.<sup>388</sup> Such comments contributed to the fear and panic that surrounded the debate, again being based more on generalisations than any factual analysis. Korteweg argues that faith based tribunals ‘were equated with the worst examples of justice enacted under the guise of Islam’.<sup>389</sup> For example, a member of the Quebec Provincial Parliament was quoted as saying:

We’ve seen the *Shari’ah* at work in Iran...we’ve seen it at work in Afghanistan, with the odious Taliban regime, we’ve seen it in Sudan where the hands of hundreds of innocent people were cut off. We’ve seen it in

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<sup>386</sup> Macklin, above n343 at 9.

<sup>387</sup> Bakht, above n330 at 79.

<sup>388</sup> Macfarlane, above n356.

<sup>388</sup> Shahina Siddiqui & Omar Siddiqui, ‘Imagining the Real: Legal Pluralism, *Shari’ah*, and a Just Society’ *Focus Justice – The Magazine of the McGill Legal Information Clinic* (2006).

<sup>389</sup> Korteweg, above n334.

Nigeria with attempts of stoning...the list is very long. Is that what we want to import to Canada?<sup>390</sup>

Thus Islamic based arbitration was seen as a foreign importation, rather than part of the alternative dispute resolution framework that already existed in Canada. It could also be argued that in reality if the Muslim community wanted to stand apart from the mainstream legal framework, they would continue to develop their own dispute resolution processes and not seek to harmonise the process with the existing legal framework. Thus the arguments demonising faith based arbitration failed to understand the reality that Canadian Muslims were seeking to harmonise their processes with the existing legal framework.

Furthermore many Muslim groups argued that it was inappropriate to use the word *Shari'ah* to describe these tribunals. Rather they said it was more appropriate to see them as a form of 'Muslim dispute resolution consistent with Canadian law and the Charter within the flexibility of Islamic normative principles'.<sup>391</sup> Similarly in the UK, the Muslim Arbitration Tribunals go to great lengths to explain that they operate a dispute resolution process that complies with English law.<sup>392</sup> Also many academics, particularly in the UK context, have indicated that the community processes and the 'law' that is applied is consciously applied in the shadow of the mainstream law. This will be discussed in chapter 5 in an Australian context, as the research indicates that an awareness of the operation of Australian law is an influential factor in the conduct of such community dispute resolution processes.

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<sup>390</sup> Id at 442.

<sup>391</sup> Brown, above n345 at 506.

<sup>392</sup> Muslim Arbitration Tribunal, <<http://www.matribunal.com/>> accessed 3 October 2010.

#### 4.4. Multicultural Accommodation

Another important aspect of the debates was the balance between accommodationist policies associated with multiculturalism and the rights of individuals. As Boyd noted ‘I concluded as a result of the review that the key issue at stake in our multicultural democracy is how to protect individual choice and yet promote the full inclusion of communities within Ontario under our laws’.<sup>393</sup> This raises the central question that was discussed in the previous chapter, of how a liberal democratic state should deal with the diverse practices of minority groups. Kymlicka’s notion of liberal multiculturalism establishes a basis for the accommodation of this diversity and this was discussed in some detail in the previous chapter. Many of the supporters of the proposals in Canada and the UK viewed the issue of faith based arbitration as a citizenship issue. As Aslam argues, ‘to ignore the role that religion can play in the lives of citizens can bar them from fully participating in civic matters – thus threatening the idea of citizenship in multicultural societies’.<sup>394</sup>

Furthermore, policies of accommodation, rather than being divisive in society, can actually have an integrationist effect as people’s sense of national loyalty increases because they can be good Muslims and good citizens at the same time. Boyd, in her report refers to the important role that allowing faith based arbitration to continue in Ontario would play in bringing the community together:

Nonetheless, incorporating cultural minority groups into mainstream political processes remains crucial for multicultural, liberal democratic societies. By availing itself of provincial legislation that has been in place for over a

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<sup>393</sup> Boyd, above n333 at 3.

<sup>394</sup> Aslam, above n335 at 861.

decade, and that has been used by others, the Muslim community is drawing on the dominant legal culture to express itself. By using mainstream legal instruments minority communities openly engage in institutional dialogue. And by engaging in such dialogue, a community is also inviting the state into its affairs, particularly since the Arbitration Act, even in its present form, specifically sets out grounds for state intervention in the form of judicial oversight. Use of the Arbitration Act by minority communities can therefore be understood as a desire to engage with the broader community.

In multicultural societies such as our own, this type of engagement ultimately aims at creating a “genuine sense of shared identity, [and] social integration.” Of course, for this dialogue to be optimal, a number of elements must be present. For instance, resources must be allocated and affirmative steps taken in order to allow communities to engage fruitfully with one another in a public conversation about what it means to be living together in peace and mutual respect.<sup>395</sup>

Modood also argues that exploring ways of accommodating Islamic principles and laws within UK law is ‘relevant to the task of multiculturalising citizenship’.<sup>396</sup> In other words it is about incorporating the identities of Muslims into their identity as state citizens, and this can be done by ‘bringing them deeper into British institutions and practice’.<sup>397</sup> Modood recognises that there are deep insecurities and fears about Islam in the wider community, but he argues that ‘the ethic of dialogical citizenship offers Muslims a basis both to stand up for equal status in a dignified way and to seek

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<sup>395</sup> Boyd, above n337 at 93.

<sup>396</sup> Modood, above n299 at 3.

<sup>397</sup> Ibid at 5.

to address these fears sensitively and in the spirit of mutual concern and solidarity'.<sup>398</sup> Whilst this is not always easy, it is vital to the inclusion of Muslim minority groups within the broader community. This is well reflected by the great lengths that Muslims went to during these public debates to express their desire to follow the national law and, as later chapters will show, this is true of the sentiment expressed by Muslims in Australia.

#### 4.5. Gender Concerns.

The debates discussed above, in UK and Canada, demonstrate that the gender concerns with faith based dispute resolution processes are paramount and need to be dealt with before any proposal for recognition or accommodation can be publicly accepted. Similarly, as the preceding chapter indicated, the most common argument against multicultural policies is the concern that they will have a detrimental impact on women. Many scholars have attempted to deal with this issue, most notably Ayelat Shachar who talks about the 'paradox' of multicultural policies being that, while they might be beneficial to the preservation of a minority culture, they might also have a detrimental impact on group members who belong to traditionally subordinated classes, such as women within the minority group.<sup>399</sup>

In particular Shachar sees the area of family law accommodation as one in which this paradox can be most evident. This is because it is an area in which minority groups 'urge the state to accommodate their differences by awarding them autonomy' as these groups view control over marriage and divorce as crucial to their future

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<sup>398</sup> Id.

<sup>399</sup> Shachar, above n287 at 85.

survival.<sup>400</sup> Shachar concludes that family law is an area in which the multicultural state is tempted to grant identity groups the maximum degree of control over their own affairs.<sup>401</sup> This according to Shachar has the potential to disadvantage women as family law is also a realm in which women have been systematically disadvantaged.<sup>402</sup> Thus it can mean a transfer of power to the elites of a group, who are usually male members, who are considered ‘the formal guardians of its essential traditions’.<sup>403</sup> However, whilst recognising this potential, Shachar also recognises that minority groups are not homogenous entities and that ‘essential traditions are constantly being redefined’, particularly as they interact with outside forces.<sup>404</sup> Indeed this point will be further developed in later chapters, and it will be demonstrated that the way in which Islamic family law is being applied in Australia occurs very much in the context of the mainstream legal system.

In commenting on the Canadian proposal, Shachar argues that the response of the Ontario Government to ban faith based arbitration fails to recognise the intersectionality of women’s lives, meaning that at the same time women are both citizens of the state and members of a religious group. She goes on to argue that banning such arbitration fails to appreciate the experience and voices of ‘devout women within religious communities’ who try to fulfil their obligations to both secular and religious authority.<sup>405</sup> Shachar recognises that these women want to abide by the laws of the state as well as the religious norms of their faith as, for them, a civil

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<sup>400</sup> Id at 97.

<sup>401</sup> Shachar, above n283 at 95.

<sup>402</sup> Ibid.

<sup>403</sup> Shachar, above n287 at 99.

<sup>404</sup> Ibid at 100, 104.

<sup>405</sup> Shachar, above n291 at 593.

divorce 'is merely part of the story; it does not and cannot dissolve the religious aspect of their relationship'.<sup>406</sup>

Shachar devotes considerable attention to developing a model of 'transformative accommodation' as an appropriate response to this issue, as it recognises that the lives of Muslim women are already affected by 'the interplay between overlapping systems of identification, authority and belief'.<sup>407</sup> Clearly the public debates that took place generally did not recognise the importance of faith for Muslim women. This makes it even more critical that whilst gender concerns took centre stage as a key argument against faith based arbitration, there was very little actual research about the views and experiences of Muslim women who used these community processes. In the Canadian debate it was acknowledged by the Coalition against Faith Based Arbitration in their evaluation that they did not include the voice of women most affected:

It would have been helpful to have more detailed data about actual cases of religious arbitration, but women who had been through this process were very reluctant to speak about their experiences.<sup>408</sup>

Rather it would seem that what was prevalent was what Khan describes as an Orientalist perspective of Muslim women:

...a classic case of the abstract (feminist theory) defining the particular and the local (the reality of the lives of Muslim women), the latter having no

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<sup>406</sup> Id at 576.

<sup>407</sup> Ibid at 578.

<sup>408</sup> National Association of Women and the Law, No Religious Arbitration Coalition: What have we Learned? (Research/Working Paper, 17 February 2007)

<<http://www.nawl.ca/en/newlibrarypage/researchpapersmenu/119-no-religious-arbitration-coalition-what-have-we-learned>> accessed 3 January 2011.



input in its own definition. In other words, the orient cannot define itself; it needs others to define it.<sup>409</sup>

This led to the debates being based on assumptions and generalisations about Muslim women, leaving the impression that Muslim women are incapable of knowing what is good for them, particularly if they adhered closely to Islamic principles. This research aims to address this concern by documenting the views of women who have used such community processes in Australia, thus avoiding a public debate where

in the war of images, secular family laws were automatically presented as unqualified protectors of equality as well as the deterrents to destitution or dependency...by contrast, religious principles were uncritically defined as inherently reinforcing inequality and as the source of disempowerment for women.<sup>410</sup>

Rather what is needed is an understanding of the issues, including the very real concerns about disadvantage to women, devising a response that addresses these concerns, whilst appreciating the importance of religion in the lives of many women.

Finally, one of the most significant arguments against faith based arbitration was that alternative forms of dispute resolution (ADR) which are outside of the formal court system are inherently bad for women, regardless of whether they are faith based or not. It was argued that such private ordering of disputes reproduces social inequities, yet is concealed from any scrutiny.<sup>411</sup> This is particularly the case in family law

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<sup>409</sup> Khan, above n322.

<sup>410</sup> Shachar, above n291 at 584.

<sup>411</sup> Aslam, above n335 at 854.

disputes, with many arguing that private bargaining yields inferior results for many women.<sup>412</sup> Whilst many accepted that this could be a danger of arbitration, they also suggested, as Marion Boyd did, that this could be addressed with effective oversight and regulation.<sup>413</sup>

However for the opponents of faith based arbitration there could be no adequate regulation of ADR, as they argued that such safeguards were neither practical nor adequate. In contrast, the advocates of faith based arbitration saw that it was a great opportunity to improve the existing processes. Aslam argued that the focus of the debate should not be on whether these tribunals should be allowed to exist but rather on what types of procedures should be implemented to protect women who use them.<sup>415</sup> This is because whether such community processes are recognised or not, Muslim women are still going to access and use these services.<sup>416</sup> Hence it is suggested that a better response would be to work on establishing a recognised and accountable system which facilitates Islamic practice and safeguards against the current practice that is often *ad hoc* and unmonitored.<sup>417</sup>

Khan argued that in the Canadian context ‘we have missed a golden opportunity to shine light on abuses masquerading as faith, and to ensure that rulings don’t contradict the charter of rights and freedoms.’<sup>418</sup> The abuses that Khan is referring to are the *ad hoc* nature of the existing community processes which are conducted without regulation or oversight. This led many to argue that banning faith based

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<sup>412</sup> Id at 853.

<sup>413</sup> Boyd, above n337.

<sup>415</sup> Aslam, above n335 at 854.

<sup>416</sup> Ibid.

<sup>417</sup> This will be developed further in later chapters of the thesis.

<sup>418</sup> Sheema Khan, ‘The *Shari‘ah* Debate Deserves a Proper Hearing’ *Globe & Mail* (15 September 2005).

arbitration was the wrong response to the gender concerns that were rightfully identified during the debate. As Bakht argues, feminists were right to draw out these concerns, but ‘where feminist mobilization went astray was in their lobbying efforts to prohibit all religious arbitration’.<sup>419</sup> This was largely because it was accepted that such a ban was not going to stop these tribunals from operating in an informal way.

Similarly Shachar argues that it is not about debating whether or not to allow the tribunals, because the lives of women are already affected by the ‘interplay between overlapping systems of identification, authority and belief’.<sup>420</sup> Furthermore, Shachar suggests that whilst the decision to ban faith based arbitration was politically astute, it

does not necessarily provide protection for those individuals most vulnerable to their community’s formal and informal pressures to turn to “unofficial” dispute resolution forums in resolving marital issues. The decision may instead push these non-state tribunals underground where no state regulation, coordination or legal recourse is made available to those who may need it most.<sup>421</sup>

## 5. Conclusion

The call for recognition of *Shari'ah* or Islamic law has been a common issue for Muslim communities in western liberal democratic states, most recently in Canada and the UK. As the above discussion demonstrates, when this issue has been proposed it has led to highly emotive debates which have been based more on generalisations

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<sup>419</sup> Bakht, above n330 at 7.

<sup>420</sup> Shachar, above n291 at 578.

<sup>421</sup> Ibid at 579.

and assumptions than on actual understanding or research. Debates of this nature have created more fear and animosity, rather than providing a platform for honest and critical debate, as evidenced by the sensationalised news reporting outlined above. This chapter has sought to clarify the issues underlying these debates, by arguing that the real issue is not a call for recognition of a separate legal system, but rather it has been an attempt at formalising processes that are already available under existing national laws and harmonising them with Islamic legal principles. This involves recognition of process rather than 'law', an attempt to fit into the existing alternative dispute resolution framework available to all citizens, rather than a radical change to the existing law. Indeed, it is a very pertinent example of multicultural accommodation as discussed in the preceding chapter. However, without a doubt, the most important issue is the concern that such accommodation is detrimental to women. Whilst this chapter has demonstrated that the assumptions about Muslim Women central to these public debates were not based on any actual empirical research, it is important to appreciate that these concerns about women should not be trivialised or ignored. Rather these need to be addressed in a sensitive and nuanced manner, as suggested by Ayelet Shachar. Finally, as many have indicated, this debate is far from over. In fact it has only just begun.

## **Chapter 5**

### **Accommodation of Islamic Family Law in Australia**

#### **1. Introduction**

This chapter describes how the dynamics described in earlier chapters have played out in Australia by focusing on the Australian Muslim community and its call for recognition of Islamic family law. The chapter begins by looking at the development of multiculturalism both as descriptor of Australia's demographic make-up and as official government policy. In particular it will be shown how, in recent years, Australia's multicultural policy has become closely concerned with the Muslim community. The discussion will then consider the issue of how the official legal system in Australia has dealt with issues of accommodation of the particular needs and concerns of minority groups in the area of Family Law. In the absence of any specific piece of legislation or case law that has dealt with the issue of legal accommodation of cultural or religious diversity, this issue will be considered by examining two key law reform and policy documents. These are the 1992 Australian

Law Reform Commission report on *Multiculturalism and the Law*<sup>422</sup> and the 2001 Family Law Council Report on *Cultural Community Divorce and the Family Law Act*

1975.<sup>423</sup> It will be argued that generally in the area of family law Australia's response has largely been one of non-accommodation. In particular, whenever the issue of accommodation of Islamic family law has been raised in an Australian context, the reaction has been one of opposition from most sectors of society, including government and media commentators. The final part of this chapter will examine the quite negative public reaction to the suggestion of any official accommodation of Islamic family law or faith based dispute resolution processes in Australia. However, it will be argued that, as with similar international debates, this response was based more on myth and misconception than an appreciation of the reality of the situation for Australian Muslims.

## **2. Multiculturalism in Australia**

Australia, like many liberal democracies around the world, is a culturally and religiously diverse society. In the most recent Census in 2006 Australians reported more than 270 different ancestries. The main ones are set out in table 4 below:

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<sup>422</sup> Australian Law Reform Commission, *Multiculturalism and the Law*, Report No 57 (1992).

<sup>423</sup> Family Law Council, *Cultural Community Divorce and the Family Law Act 1975: A Proposal to Clarify the Law – Report to the Attorney General* (2001).

Table 4

<b>POPULATION, By self-reported ancestry</b>				
<b>Ancestry</b>	<b>2001</b>		<b>2006</b>	
	'000	%	'000	%
Australian	6 739.6	35.9	7 371.8	37.1
Other Australian ancestries(a)	106.4	0.6	129.9	0.7
New Zealander	123.3	0.7	160.7	0.8
Maori	73.0	0.4	92.9	0.5
Other Pacific Islander	91.7	0.5	117.7	0.6
European				
English	6 358.9	33.9	6 283.6	31.6
Irish	1 919.7	10.2	1 803.7	9.1
Scottish	540.0	2.9	1 501.2	7.6
Italian	800.3	4.3	852.4	4.3
German	742.2	4.0	811.5	4.1
Greek	375.7	2.0	365.2	1.8
Dutch	268.8	1.4	310.1	1.6
Maltese	136.8	0.7	153.8	0.8
Other European	1 196.2	6.4	1 297.9	6.5
Middle Eastern				
Lebanese	162.2	0.9	181.8	0.9
Turkish	54.6	0.3	59.4	0.3
Other Middle Eastern	147.0	0.8	189.7	1.0
Asian				
Chinese	556.6	3.0	669.9	3.4
Indian	156.6	0.8	234.7	1.2
Vietnamese	156.6	0.8	173.7	0.9
Filipino	129.8	0.7	160.4	0.8
Other Asian	339.5	1.8	455.3	2.3
Other ancestry(b)	243.9	1.3	386.4	1.9
<b>Total population(c)</b>	<b>18 769.2</b>	<b>100.0</b>	<b>19 855.3</b>	<b>100.0</b>

(a) Includes Aboriginal, Torres Strait Islander and Australians of South Sea Islander descent.

(b) Includes 'mixed' ancestry.

(c) Components may not add to totals because people may report more than one ancestry.

Source: ABS data available on request, Census of Population and Housing.

There were over 400 different languages identified as being spoken in the community and table 5 below sets out the key languages spoken in Australia. It was also found that in 2006 3.1 million people (16% of the population) spoke a language other than English at home, an increase of 10% since 2001.<sup>424</sup>

Table 5

<b>14.36 PERSONS WHO SPEAK A LANGUAGE OTHER THAN ENGLISH AT HOME, By language spoken - 2006</b>					
	<b>Males</b>	<b>Females</b>	<b>Persons</b>	<b>Proportion born in Australia(a)</b>	<b>Persons as a proportion of population</b>
	'000	'000	'000	%	%
Italian	154.0	162.9	316.9	42.1	1.6
Greek	124.3	128.0	252.2	52.8	1.3
Arabic	125.0	118.7	243.7	42.9	1.2
Cantonese	115.7	128.8	244.6	21.4	1.2
Mandarin	103.3	117.3	220.6	12.6	1.1
Vietnamese	94.3	100.5	194.9	30.3	1.0
Spanish	46.6	51.4	98.0	24.4	0.5
Tagalog (Filipino)	36.3	56.1	92.3	15.0	0.5
German	34.7	40.9	75.6	19.9	0.4
Hindi	36.4	33.6	70.0	13.7	0.4
Macedonian	34.0	33.8	67.8	40.1	0.3
Croatian	31.3	32.3	63.6	34.1	0.3
Australian Indigenous languages	27.1	28.6	55.7	96.4	0.3
Turkish	27.1	26.8	53.9	42.3	0.3
Polish	23.8	29.6	53.4	21.1	0.3
Serbian	26.2	26.4	52.5	24.4	0.3
Maltese	17.8	18.7	36.5	26.5	0.2
Netherlandic	16.2	19.9	36.2	14.4	0.2
All other languages(b)	424.8	448.2	873.1	18.5	4.4
<b>Total</b>	<b>1 499.0</b>	<b>1 602.5</b>	<b>3 101.5</b>	<b>28.8</b>	<b>15.6</b>
(a) Persons whose birthplace was not stated, inadequately described, n.e.c. or at sea					
(b) Excludes languages that were not stated, inadequately described, and non-verbal					
Source: ABS data available on request, 2006 Census of Population and Housing.					

<sup>424</sup> Australian Bureau of Statistics, *Year Book of Australia* (2008).



Whilst Christianity remains the dominant religion in Aust, the non-Christian religions continue to grow at a much faster rate as can be seen from table 6 below. Buddhism, Islam and Hinduism are Australia's three most common non-Christian religious affiliations.<sup>425</sup>

Table 6

## 14.39 RELIGIOUS AFFILIATION

	2001		2006		Change
	'000	%	'000	%	%
Christianity					
Anglican	3 881.2	20.7	3 718.2	18.7	-4.2
Baptist	309.2	1.6	316.7	1.6	2.4
Catholic	5 001.6	26.6	5 126.9	25.8	2.5
Churches of Christ	61.3	0.3	54.8	0.3	-10.6
Jehovah's Witness	81.1	0.4	80.9	0.4	-0.2
Lutheran	250.4	1.3	251.1	1.3	0.3
Orthodox	529.4	2.8	576.9	2.9	9.0
Pentecostal	194.6	1.0	219.7	1.1	12.9
Presbyterian and Reformed	637.5	3.4	596.7	3.0	-6.4
Salvation Army	71.4	0.4	64.2	0.3	-10.1
Uniting Church	1 248.7	6.7	1 135.4	5.7	-9.1
Other Christian	497.9	2.7	544.3	2.7	9.3
Buddhism	357.8	1.9	418.8	2.1	17.0
Hinduism	95.5	0.5	148.1	0.8	55.1
Islam	281.6	1.5	340.4	1.7	20.9
Judaism	84.0	0.4	88.8	0.5	5.8
Other religions	92.4	0.5	109.0	0.6	18.0
No religion	2 906.0	15.5	3 706.6	18.7	27.5
Not stated/inadequately	2 187.7	11.7	2 357.8	11.9	7.8
<b>Total</b>	<b>18 769.2</b>	<b>100.0</b>	<b>19 855.3</b>	<b>100.0</b>	<b>5.8</b>
Source: ABS data available on request, Census of Population and Housing.					

<sup>425</sup> Australian Bureau of Statistics, *2006 Census Summary - Media Fact Sheet*, (27 June 2007) at 1.

It is this diversity that has led to the description of Australia as a multicultural society. The term multiculturalism is used in many different ways, and it is important to clarify, when the term is used in an Australian context, what it is actually referring to. In a recent position paper on multiculturalism by the Australian Human Rights Commission, the then acting race discrimination commissioner notes that the term multiculturalism can be used as a description of the demographic make-up of modern societies; or as a set of norms or principles that uphold the right of the individual to retain, express and enjoy their culture; or as government policy as a response to diversity.<sup>426</sup> Clearly, the demographic composition of the Australian population attests to the fact that Australia can be described as a multicultural society. When we turn to the usage of the term multiculturalism in government policy, we realise that it can also have many different meanings in this context. Indeed since its inception in the 1970s the term has been used by various governments in Australia for different purposes. It is one of the objectives of this chapter to outline briefly the development of Australia's multicultural policies, and in particular how Australia has sought to accommodate its diversity from a legal perspective.

As was discussed in chapter 3, there are several ways that a state can deal with the existence of cultural, religious and ethnic diversity within its society. These range from having policies of assimilation whereby no recognition is given to the diverse practices of these diverse groups, with an expectation that they will adopt the values and norms of the majority of the population, to multicultural policies which, although they may vary widely, ultimately seek to protect and recognise this diversity. Prior to

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<sup>426</sup> Australian Human Rights Commission, *Multiculturalism – A Position Paper by the Acting Race Discrimination Commissioner* (2007) at 4.

federation, the official policies of the various British colonies towards migrants were ‘clearly influenced by theories regarding the inferiority of non-Caucasians’.<sup>427</sup> For example, in 1897 the NSW Legislative Assembly had laws that restricted immigration on the basis of race, based on the assumption ‘that British people and British culture formed the foundation of the Australian identity, and that all migrants should conform to British inherited values, beliefs and ways of life’.<sup>428</sup> Indeed further discriminatory legislation prevented Asians from voting, owning land and working in certain capacities.<sup>429</sup>

Following from this, the newly formed federation adopted the same policies that were in existence in the colonies at the time, without much concern for racial equality. This is reflected in the words of Sir Edmund Barton, the first Australian Prime Minister: ‘I do not think that the doctrine of the equality of man was really ever intended to include racial equality’.<sup>430</sup>

Upon federation, the Commonwealth *Immigration Restriction Act 1901* embodied the White Australia Policy by providing for eligibility criteria such as dictation tests and other indirect means to ensure that the majority of migrants were from Britain. This act remained in force until 1958.<sup>431</sup>

These laws and policies are in stark contrast to the current migration laws and policies towards migrants, but it is important to recognise that Australia has not always been

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<sup>427</sup> Anti-Discrimination Board of NSW, *Race for the Headlines: Racism and Media Discourse* (2003) at 18.

<sup>428</sup> *Ibid.*

<sup>429</sup> *Ibid* at 19.

<sup>430</sup> *Ibid* at 20.

<sup>431</sup> *Ibid.*

welcoming of such diversity within its borders, and that indeed multiculturalism has only been a policy in use in the last 30 years or so. Rather, initially Australia was committed to a policy of strict control of and assimilation of its migrants. These policies are reflected in government policies of the early part of the twentieth century as ‘a means to ensure the full acceptance and integration into Australian society of Indigenous people and migrants from non-British backgrounds’.<sup>432</sup> This led to interventionist policies which saw the forcible removal of Aboriginal children from their families. Assimilation was also ‘the official term used to describe government policy for migrants settling in Australia in the immediate post-war period’.<sup>433</sup> The term was widely used in the 1950s. Stratton describes a 1951 Department of Immigration ruling on

how much coloured ancestry a person could have and still be allowed into Australia. A prospective migrant had to be of 75% ‘European blood’. The assumption was that more than 25% coloured ancestry would make a person too visually different, with the implication that they would be rejected by the Australian population, but also that the person would be too culturally different to assimilate.<sup>434</sup>

After World War II, there was a shift from a focus on race as a basis for restrictive immigration policy to arguments that certain people who looked or behaved differently would cause social unrest and conflict.<sup>435</sup> However at this time there was

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<sup>432</sup> Id.

<sup>433</sup> Brian Galligan & Winsome Roberts, ‘Australian Multiculturalism: Its Rise and Demise’, (Paper presented at the Australasian Political Studies Association Conference, University of Tasmania, Hobart, 29 September – 1 October 2003) at 3.

<sup>434</sup> Jon Stratton, ‘Multiculturalism and the Whitening Machine, or how Australians became white’, in Ghassan Hage & Rowanne Couch (ed), *The Future of Australian Multiculturalism* (1999) at 178.

<sup>435</sup> Anti-Discrimination Board of NSW, above n427 at 23.

an increase in migrant intake because of the need for workers. In 1966, the criteria used to assess admissibility to migrate to Australia were amended with the removal of specific restrictions relating to non-European migrants.<sup>436</sup> Nonetheless, the expectations remained that migrants would abandon their culture and integrate into the majority society.

However as more diverse migrants came into Australia, Australia's demographic composition altered, and as the country became more culturally diverse it needed to consider how it would deal with this diversity.<sup>437</sup> Thus, multiculturalism as government policy emerged as a response to this cultural diversity in the 1970s.<sup>438</sup> It was during this period that Australia abandoned the White Australia Policy, and the federal government supported a policy of multiculturalism, although it would seem that such a policy was more focused on improving the welfare of migrants from Non English Speaking Backgrounds (NESB) than on questions of accommodation of diversity.<sup>439</sup>

The term multiculturalism itself was first used in Australia by Al Grassby, the Minister for Immigration in 1973, in a speech entitled 'A Multi-Cultural Society for the Future'.<sup>440</sup> The first formal definition of the term as official government policy came in 1977 under the newly elected Fraser Liberal government, in a report entitled *Australia as a Multicultural Society* produced by the Australian Ethnic Affairs Council, a government advisory body. In fact, the Fraser government had many initiatives in this policy area, including the establishment of advisory councils such as

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<sup>436</sup> Id at 26.

<sup>437</sup> Ibid.

<sup>438</sup> Galligan & Roberts, above n433 at 5.

<sup>439</sup> Anti-Discrimination Board of NSW, above n427 at 26.

<sup>440</sup> Galligan & Roberts, above n433 at 5.

the Institute of Multicultural Affairs to commission, research and educate the community about multiculturalism.<sup>441</sup> It also commissioned the infamous Galbally Report, which embraced multiculturalism, as it concluded that:

Migrants have the right to maintain their cultural and racial identity.....then the community as a whole will benefit substantially and its democratic nature will be reinforced. The knowledge that people are identified with their cultural background and ethnic group enables them to take their place in their new society with confidence.<sup>442</sup>

These initiatives were a reflection of the then Prime Minister Fraser's view of multiculturalism as he said:

It is not an abstract or alien notion, not a blueprint holding out utopian promises, but a set of guidelines for action which grows directly out of our society's aspirations and experiences. That is why multiculturalism has so quickly entered our political and social vocabulary and become a central reference point.<sup>443</sup>

By the early 1980s Galligan and Roberts argue that multiculturalism was 'much more than the provision of special services to minority ethnic groups and had become a way of looking at Australian society and a prescription for national identity'.<sup>444</sup> In 1983 the Hawke Labor government continued its support for multicultural policies, despite its cut to funding of multicultural programs in 1986. It oversaw the development of a

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<sup>441</sup> Id at 5-6.

<sup>442</sup> Anti-Discrimination Board of NSW, above n427 at 27.

<sup>443</sup> Galligan & Roberts, above n433 at 5-6.

<sup>444</sup> Ibid at 7.

revised *National Agenda for a Multicultural Australia* which was launched in 1989 and ultimately defined government policy till 1996.<sup>445</sup> It stated that, 'As a public policy, multiculturalism encompasses government measures designed to respond to...diversity...it is a policy for managing the consequences of cultural diversity in the interests of the individual and society as a whole'.<sup>446</sup> It outlined three dimensions to multicultural policy: Cultural Identity; Social Justice and Economic Efficiency.<sup>447</sup> Its conclusion was that all Australians should have a commitment to Australia and share responsibility for furthering our national interests.<sup>448</sup>

This national agenda was reviewed under the Keating government in 1995 in the document entitled *Multicultural Australia: The Next Steps Towards and Beyond 2000*. Whilst it still described Australia as a multicultural society, 'the emphasis was now on national identity'.<sup>449</sup> This was reflected in how the then Prime Minister viewed the concept of multiculturalism in Australia, as he stated that:

Australian society is rich in linguistic, racial, religious and cultural diversity. We have consciously devised policies to encourage and preserve this diversity and gain in return benefits to the nation and community. We count the creation of this rich, pluralistic and peaceful society, we think one of the most successful multicultural societies in the world, as one of our great national achievements<sup>450</sup>

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<sup>445</sup> Id at 7-8.

<sup>446</sup> Department of Immigration and Citizenship, *National Agenda for a Multicultural Australia*, A Report to the Australian Parliament (1989) <<http://www.immi.gov.au/media/publications/multicultural/agenda/agenda89/toc.htm>> accessed 4 April 2010.

<sup>447</sup> Ibid.

<sup>448</sup> Ibid.

<sup>449</sup> Galligan & Roberts, above n433 at 8.

<sup>450</sup> Paul Keating, Prime Minister of Australia, 'Opening Address', (Speech at the Global Cultural Diversity Conference, Sydney, 26 April 1995) <<http://www.immi.gov.au/media/publications/multicultural/confer/speech2A.htm>> accessed 3 March 2010.

Keating also argued that multiculturalism has come to mean:

...a policy which guarantees rights and responsibilities. The rights include those of cultural identity, the right to express and share individual cultural heritage, including language and religion. The right to social justice and the right of every Australian to equality of treatment and opportunity, regardless of race, ethnicity, religion, language, gender or places of birth. The responsibilities might be summarised as follows: that the first loyalty of all Australians must be to Australia, to its interests and its future; that all must accept the basic principles of Australian society, including the constitution and the rule of law, parliamentary democracy, freedom of speech and religion, English as the national language, equality of the sexes and the right of every Australian to express his or her views and values. That is the essential balance in the multicultural equation: the promotion of individual and collective cultural rights and expression, on the one hand; and on the other, the promotion of common national interests and values.<sup>451</sup>

The next shift in official government policies on multiculturalism occurred with the election of the Howard Liberal government in 1996. Galligan and Roberts argue that from the outset ‘the Howard government effectively marginalised multiculturalism as an issue’.<sup>452</sup> This is reflected by Howard’s avoidance of using the word multiculturalism, for example his insistence that ‘it not be used in the joint parliamentary resolution rejecting racism that was passed in 1996, and avoided it in

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<sup>451</sup> Galligan & Roberts, above n433.

<sup>452</sup> Ibid at 9.



speeches'.<sup>453</sup> Another example can be found in 1997, when launching a discussion paper '*Multicultural Australia – The Way Forward*' issued by a revamped National Multicultural Affairs Council, Prime Minister Howard clearly struggled with using the word multiculturalism, when he said: 'What this paper does is to open up some of the issues...not to call into question the commitment of Australia to multiculturalism or to diversity'.<sup>454</sup>

It was not just a change in terminology that characterised a shift in government policy, but also its stronger focus on a reassertion of a unitary values system, as evidenced by the 1999 report *Australian Multiculturalism for a New Century: Towards Inclusiveness*<sup>455</sup> where multiculturalism was described in terms of Australian values and citizenship. Furthermore cultural diversity was recognised as a fact rather than an end in itself, meaning that the term multiculturalism was being used more to describe the demographics of the population than as government policy promoting or protecting this diversity. This was further reflected by the *New Agenda for Multicultural Australia* launched by the government in 2000 which Galligan and Roberts argue closely equated multiculturalism with Australian political values and citizenship.<sup>456</sup>

Soon after this, with the events of 9/11 and other terrorist acts around the world, a spotlight was placed on multicultural policies and in particular on how they applied to the Muslim community. In such a context, the government presented its statement on

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<sup>453</sup> Id.

<sup>454</sup> Ibid at 10.

<sup>455</sup> National Multicultural Advisory Council, *Australian Multiculturalism for a New Century: Towards Inclusiveness* (1999).

<sup>456</sup> Galligan & Roberts, above n433 at 11.

multiculturalism in 2003 called *Multicultural Australia – United in Diversity*.<sup>457</sup> This document reiterated the push towards national unity as a foundation for the government's position on multiculturalism, which was described by the then Minister for Immigration and Multicultural and Indigenous Affairs, Phillip Ruddock, in the introduction to the document:

Australia today is a culturally and linguistically diverse society and will remain so. Like our sophisticated migration program, our multicultural policy continues our tradition of successful nation building. It will help to ensure that we meet the challenge of drawing the best from the many histories and cultures of the Australian people, within a framework of a uniting set of Australian values.<sup>458</sup>

This statement stated four principles that the government felt underpinned multicultural policy, which were responsibilities for all, respect for each person, fairness for each person and benefits for all.<sup>459</sup> The policy placed a particular emphasis on the goals of community harmony, access and equity and promoting the benefits of diversity.<sup>460</sup> This focus on Australian values, with little emphasis on the accommodation of diversity, reflected Prime Minister Howard's view of multiculturalism:

Everyone knows that I don't use the word multiculturalism very much and the reason I don't use it very much is that it has been used in a very zealous...mushy fashion by some over the years. To many people

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<sup>457</sup> Commonwealth of Australia, *Multicultural Australia: United in Diversity* (2003).

<sup>458</sup> *Ibid.*

<sup>459</sup> *Ibid.*

<sup>460</sup> Department of Immigration and Citizenship, *Australian Immigration fact Sheet 6: The Evolution of Australia's Multicultural Policy* (2007) <http://www.immi.gov.au/media/fact-sheets/06evolution.htm> accessed 4 April 2010.

multiculturalism simply means that we are tolerant to people of different cultural backgrounds; now if that's all it means, then it's a fine concept. We are tolerant to people of different backgrounds but over the years at its zenith the more zealous multiculturalism basically said that this country should be a federation of cultures. You can't have a nation with a federation of cultures. You can have a nation where a whole variety of cultures constantly influence and mould and change and blend in with the mainstream culture, but not a nation that doesn't have a core culture, and the core culture of this nation is very clear; we are an outshoot of western civilisation. Because we speak the English language our cultural identity is very heavily Anglo-cultural. It doesn't mean that it isn't distinctively Australian, but you have to recognise that there is a core set of values in this country.<sup>461</sup>

With such a perspective about multiculturalism, in early 2007 the then federal government renamed the Department of Immigration and Multicultural Affairs the Department of Immigration and Citizenship, on the basis that it better reflected what was expected of new migrants to Australia. The spotlight on the Muslim community only became brighter and brighter, and is reflected in the words of National Party Senator John Stone, who stated:

Australians must fundamentally rethink the stupidities which, for 20 years now, have dominated our immigration policies and, along with them, our official policies of multiculturalism....All the past brainwashing to the contrary notwithstanding, all cultures are not equal and it is ridiculous (and since September 11, much more dangerous) to keep insisting that they are.

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<sup>461</sup> Radio 3AW, 'John Howard interview with Neil Mitchell' (24 February 2006).

The most sensitive aspect of that future debate will be our attitude towards further Muslim immigration.<sup>462</sup>

The issue was much broader than just about migration, but was also about how the Muslim community fit into the wider Australian society. There was a perception that Muslims were a threat to Australian society. The government repeatedly made comments that it was only a small minority of the community, and that the whole Muslim community should not be blamed. Yet the debate, sparked by an emphasis placed by the government on a return to Australian values, only served to create an impression that somehow Muslims do not share these values. This was evident when a government MP Bronwyn Bishop argued that Muslim girls should not be allowed to adhere to an Islamic dress code. She argued that it was a symbol of defiance against Australian values and that:

It is being used by the sort of people who want to overturn our values, as an iconic emblem of defiance and a point of difference. If you saw interviews with certain young Muslim girls recently, they said they in fact wore that as a point of difference.<sup>463</sup>

She repeatedly said that the dress of Muslim women was against the freedom and equality of women, despite the fact that many Muslim women had said that they felt free and equal. Instead she argued that this goes:

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<sup>462</sup> John Stone, 'We only want those prepared to be like us' *The Australian* (26 November 2001).

<sup>463</sup> ABC Radio, 'Bronwyn Bishop responds to the Aussie Mossie', *The National Interest, Radio National*, 28 August 2005 <<http://www.abc.net.au/rn/talks/natint/stories/s1447773.htm>> accessed 4 October 2009.

back to that definition of freedom, you see. Some people can feel free, Nazis in Nazi Germany felt free and comfortable, but that's not the sort of standard that I can accept as being free. Neither can I accept someone who wants to be a little bit of a slave, or a little bit subservient. The fact of the matter is that in this country, freedom is defined by our law, and that's the standard, not somebody else's definition of what they think freedom might be, which allows you to be tolerant of the sorts of horrendous behaviour that occurred in Nazi Germany for instance.<sup>464</sup>

The discussion came back to what multiculturalism meant in an Australian context as Ms Bishop said that 'the fact of the matter is that we are a very tolerant country, we're very tolerant to each other, we've got a great multicultural mix but there are certain things that are not allowed in the mix'.<sup>465</sup> It was becoming increasingly clear that the practices of Muslims were not perceived to be an acceptable part of the multicultural mix.

At this time, the government recognised that the issue of Muslim Australians needed to be addressed, so they developed the *National Action Plan to Build on Social Cohesion, Harmony and Security*.<sup>466</sup> This plan aimed to foster connections and understanding between Muslim and non-Muslim Australians.<sup>467</sup> It stated that its purpose was to:

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<sup>464</sup> Id.

<sup>465</sup> Ibid.

<sup>466</sup> Department of Immigration and Citizenship, *Living in Australia – A National Action Plan to Build on Social Cohesion, Harmony and Security*, (2005-06) <<http://www.immi.gov.au/living-in-australia/a-diverse-australia/national-action-plan/nap.htm>> accessed 3 March 2010.

<sup>467</sup> Ibid.

Reinforce social cohesion, harmony and support the national security imperative in Australia by addressing extremism, the promotion of violence and intolerance, in response to the increased threat of global religious and political terrorism. It is an initiative of the Australian governments to address issues of concern to the Australian community and to support Australian Muslims to participate effectively in the broader community.<sup>468</sup>

The plan sought to do this by focusing on the four key areas of education, employment, integration and security.

The Rudd Labor government came into government in late 2007. Whilst it oversaw some change in migration laws and policies, particularly in its treatment of asylum seekers, there was not a great emphasis on multiculturalism or a clear indication of change of policy in this area. It endorsed the National Action Plan and indeed launched a *National Action Plan Kit*.<sup>469</sup> Laurie Ferguson, the Parliamentary Secretary for Multicultural Affairs and Settlement Services, stated that:

There is no doubt that Australia's Muslim communities have been under increased pressure in recent years. This has been closely related to the actions of a small minority who use terror under the guise of Islam. At times like these, we need to remember that Muslim Australians, like every other religious group in our society, are law-abiding, peace-loving citizens, who want to pay their taxes, live their lives, and contribute to Australia's society

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<sup>468</sup> Id.

<sup>469</sup> Department of Immigration and Citizenship, *Living in Australia – A National Action Plan to Build on Social Cohesion, Harmony and Security Kit*, (2007-2008).

and economy. The community should not be held accountable for the actions of a few whose acts distort their faith.<sup>470</sup>

There remained a strong policy focus on issues to do with the Muslim community as part of a broader policy framework of multiculturalism. This was evident by the many specific government funded programs addressing the Muslim community, such as the *Australian Multicultural Foundation Leadership Australia* program which aims to:

develop a group of confident and well connected young Australian Muslims who will be able to present the views of young Australian Muslims to the wider community. In addition, the program provides a unique resource for other young Muslims to seek mentorship and leadership within the community.<sup>471</sup>

One of the most well funded projects under this plan was the establishment of the *National Centre for Excellence in Islamic Studies* which is a joint initiative of the University of Melbourne, University of Western Sydney and Griffith University.<sup>472</sup>

With the new Gillard government only in office for a few months it is hard to assess its stance on the issue of multiculturalism, although it would seem that Gillard, like Howard, has a problem with the word multiculturalism, choosing to remove the word from the title of the Parliamentary Secretary associated with that portfolio. The new title is Parliamentary Secretary for Immigration and Citizenship. However, since July

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<sup>470</sup> Id.

<sup>471</sup> Australian Multicultural Foundation, *Leadership Australia – A New Generation Resource Guide* at 2 < [http://amf.net.au/library/file/Leadership\\_Australia\\_RESOURCE\\_GUIDE](http://amf.net.au/library/file/Leadership_Australia_RESOURCE_GUIDE) accessed 3 January 2011.

<sup>472</sup> Abdullah Saeed, *Director's Welcome* < <http://www.nceis.unimelb.edu.au/> accessed 6 January 2011.

2010, the government has ceased its funding of the *National Action Plan* and now is funding programs through its *Diversity and Social Cohesion Program*.<sup>473</sup> The key objectives of this program are:

- the importance of all Australians respecting one another regardless of cultural, racial or religious differences
- the fair treatment of all Australians, encouraging people to recognise that our interactions should be accepting of, and responsive to, each other's backgrounds, circumstances, needs and preferences
- opportunities for people to participate equitably in Australian society and to understand the rights and responsibilities that we share as part of that society
- a sense of belonging for everyone by helping communities work towards a spirit of inclusiveness and a shared identity as Australians
- the benefits of living in a culturally diverse society
- to build the resilience of specific communities who are under significant pressure because of their culture or religion.<sup>474</sup>

These objectives are achieved by funding community programs directed at the above objectives. It will be interesting to see whether the funding of these programs will remain concentrated on Muslim communities as was previously the case.

The focus on the Muslim community raises the question of how religion fits into the debate about multiculturalism in Australia. Many would argue that there is no issue about religion, as Australia is a secular state and thus there is no place for religion in

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<sup>473</sup> See Department of Immigration and Citizenship website <<http://www.immi.gov.au/living-in-australia/a-diverse-australia/national-action-plan/>> accessed 3 January 2011.

<sup>474</sup> Department of Immigration and Citizenship, *The Diversity and Social Cohesion Program* <<http://www.harmony.gov.au/aboutus.htm>> accessed 21 December 2010.



the public sphere. However, as the discussion in earlier chapters has shown, the state being secular does not mean that it treats all religions neutrally, as evidenced by the fact that public holidays are only commemorated on days that reflect the festivities of the majority. Cahill, Bouma, Dellal and Leahy argue in their report *Religion, Cultural Diversity and Safeguarding Australia* that this issue has been neglected despite its importance because of the ‘controversial nature of religion itself....from academic reluctance to research faith communities...or because of a feeling that a privatised faith had largely become an irrelevance in a secular world’.<sup>475</sup> They also argue that, since the 1970s, there has been an emergence of a multi-faith Australia, that ‘Australia is now, paradoxically, a secular and a multi-faith society with a far greater range of religious offerings’.<sup>476</sup>

Similarly Aly and Green argue that:

Religious identity is generally deemed to have no place in the liberal democratic model, particularly where that religion is constructed to be at odds with the principles and values of liberal democracy.....Indeed, it is as if the national commitment to secularism rules as out-of-bounds any identity that is grounded in religion, giving precedence instead to accepting and negotiating cultural and ethnic differences. Religion becomes a taboo topic in these terms.<sup>477</sup>

This reluctance to address issues of religion within a discussion on multiculturalism indicates a failure to appreciate the relevance and importance of religious identities in

<sup>475</sup> Cahill, Bouma, Dellal & Leahy, above n41 at 11.

<sup>476</sup> Ibid at 52.

<sup>477</sup> Anne Aly and Leila Green, ‘Less than Equal: Secularism, Religious Pluralism and Privilege’ (2008) 11 (2) *Multiculturalism Journal* at 6 <<http://journal.media-culture.org.au/index.php/mcjournal/article/view/32>> accessed 6 June 2009.

multicultural states. This is the very argument made by Modood that was discussed in the previous chapter, as he argues that ‘religious identity needs to be an important part of our discussion on multiculturalism and in particular the question of how Muslims can be integrated or incorporated into a multicultural state’.<sup>478</sup>

At a practical level, the fact that, for most of this decade, Australia’s official multicultural policies have been focused on the Muslim community, indicates a need to have a greater awareness of the multi-faith element of multiculturalism in Australia. Returning to the current policy stance of the Australian government on multiculturalism, it is clear that, as the former Race Discrimination Commissioner argued, there is a need for a stronger statement about multiculturalism from the government.

### **3. Legal Accommodation in a Diverse Society**

There is no doubt that Australia is a very culturally and religiously diverse country. This, coupled with official multicultural policy for over 30 years, raises an important question. How has the Australian legal system sought to accommodate or recognise the needs of a multicultural society, particularly as there have been official multicultural policies in existence for over 30 years? In particular, this research focuses on the area of family law, because, as the Australian Law Reform Commission recognised, the family is of great importance in the ‘development of a person’s cultural identity and the transmission of culture, language and social

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<sup>478</sup> Modood, above n227 at 53.

values'.<sup>479</sup> As a result, they found that the 'impact of law and policy on the family is of special significance in a multicultural society'<sup>480</sup>, and therefore if laws fail to take into account the diversity of family arrangements, then minority communities and individuals from these communities may be harshly impacted upon.

Generally speaking, despite such policies, successive governments have failed to address how the Australian legal system could accommodate the needs of its culturally and religiously diverse population in the area of family law. The discussion below considers this in the light of the ALRC report *Multiculturalism and the Law*<sup>481</sup> and the Family Law Council's Report *Cultural Community Divorce and the Family Law Act 1975*<sup>482</sup>. Both of these being reports made recommendations for change in response to the accommodation of the needs of religious and cultural groups which were not acted upon by successive governments.

This rather muted response by government to the recommendations of these reports is made even more interesting by the fact that the first of these reports, the Australian Law Reform Commission Report, *Multiculturalism and the Law*, was done in reference to a fulfilment of one of the then government's objectives for its multicultural policy, which was 'to promote equality before the law by systematically examining the implicit cultural assumptions of the law and the legal system to identify the manner in which they may unintentionally act to disadvantage certain groups of Australians'.<sup>483</sup> This objective was part of an overall policy which Parkinson describes as one which allows linguistic and cultural diversity within a framework of

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<sup>479</sup> Australian Law Reform Commission, above n422 at 4.6.

<sup>480</sup> Ibid at 4.7.

<sup>481</sup> Ibid.

<sup>482</sup> Family Law Council, above n423.

<sup>483</sup> Department of Immigration and Citizenship, above n446.

commitment to fundamental Australian values.<sup>484</sup> These objectives gain greater importance as the society becomes more diverse and pluralistic. Black argues that in these circumstances it is ‘inevitable that they will wrestle with the extent to which the state should recognise, make concessions to, or even enforce norms and values embedded in different religions, cultures or traditions’.<sup>485</sup> The next section will consider these reports.

#### **4. Australian Law Reform Commission Report, *Multiculturalism and the Law***<sup>486</sup>

As mentioned above, the ALRC was given a reference on multiculturalism and the law which considered the three areas of family law, criminal law and contract law. The analysis that follows will concentrate on the area of family law. The report acknowledged that ‘while cultural diversity is now an accepted part of Australian society, the consequences of this for the legal system have not been fully considered’.<sup>487</sup> It also recognised the important link between multiculturalism and legal accommodation, as it describes multiculturalism as a social policy requiring ‘systematic examination of Australian law to consider whether it could play a more positive role in achieving the goals of multiculturalism’.<sup>488</sup> Yet it also appreciated that its inquiry included establishing appropriate limits on the right to cultural freedom.<sup>489</sup>

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<sup>484</sup> Patrick Parkinson, ‘Taking Multiculturalism Seriously: Marriage Law and the Rights of Minorities’ (1994) 16 *Sydney Law Review* 473 at 478.

<sup>485</sup> Ann Black, ‘Accommodating *Shari’ah* Law in Australia’s Legal System: Can we? Should we?’ (2008) 33 *Alternative Law Journal* 214 at 214.

<sup>486</sup> Australian Law Reform Commission, above n422.

<sup>487</sup> *Ibid* at 1.16.

<sup>488</sup> *Ibid* at 1.17.

<sup>489</sup> *Ibid* at 1.18.

The Australian Law Reform Commission also found that an obstacle to reform in this area is the lack of relevant data about minority communities, as the report noted that ‘the development of policies, programs and legislation which take account of and support a wide range of family arrangements is impossible unless there is adequate information on the way different families and communities operate’.<sup>490</sup> Indeed, one of the main objectives of this thesis is to provide this much needed insight into what is happening within the Muslim community in Australia.

Another key area of the ALRC report is the Commission’s recommendation in the area of dispute resolution, as they found that:

Community-based dispute resolution services may well be more accessible to migrants and people of non-English speaking background than institutional services...Consideration should be given to developing ethno-specific dispute resolution services which have an understanding of cultural practices. These could either be separate from or within existing services. As with dispute resolution mechanisms generally, care would have to be taken to ensure that gender-based power imbalances are addressed in the development of these dispute resolution mechanisms.<sup>491</sup>

Clearly this is very important in the context of resolving family law disputes amongst Muslims, yet neither the community nor any other sector has further developed this idea in the context of how it can best apply to Muslims. Again, it is another objective of this research project to consider this in some detail. The report also considers

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<sup>490</sup> Id at 4.15.

<sup>491</sup> Ibid at 4.48.

many proposals that affect marriage and divorce, and these will be considered in later chapters, particularly how they affect the affairs of the Muslim community.

The ALRC report, whilst important in raising awareness of a multitude of issues that affect diverse communities in the area of family law, has also been itself subject to criticism. Professor Parkinson argues that whilst the approach taken by the ALRC was sound, such an approach is not acted upon in most of its recommendations.<sup>492</sup>

He goes on to say that:

There was not a single recommendation which can be seen as leading to a greater degree of cultural pluralism in Australian marriage law, nor anything which indicated a greater tolerance for values which lie outside of those held in mainstream Australian culture. On the contrary, the Report recommended changes which reduced the level of acceptance of minority cultural practice.<sup>493</sup>

Furthermore, he goes on to argue that the report reinforces the hegemony of western values and reasserts the monocultural character of the law.<sup>494</sup> For example, in regards to the issue of recognition of polygamous marriages, the Report recommended that such marriages should not be recognised on the basis of gender equality, yet they recognised the anomaly of the situation that the law could recognise a *de facto* relationship existing alongside a marriage.<sup>495</sup> The other criticism of this recommendation is that it is not consistent with the approach taken by the ALRC that the law should recognise and support the relationships people choose for themselves.

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<sup>492</sup> Parkinson, above n484 at 484.

<sup>493</sup> Ibid.

<sup>494</sup> Ibid.

<sup>495</sup> Australian Law Reform Commission, above n422 at 5.8.

Professor Parkinson also makes an interesting objection, that the ‘gender equality’ argument (that such a practice is oppressive towards women) is rightly ‘open to the criticisms of cultural imperialism and of being paternalistic in its approach’,<sup>496</sup> in its implication that women who want to freely enter into such a relationship are incapable of knowing what is good for them. These are complex issues, but suffice to say that the ALRC did not feel that they could offer a recommendation altering the *status quo* on this point.

In contrast, when considering the issue of recognition of customary divorces, and in particular the question of whether the civil law should be used to compel a party to grant a religious divorce, the ALRC recommendations were more responsive to the concerns of the community. This issue mainly affects the Muslim and Jewish communities, whereby the situation exists where it is in a husband’s power not to grant a religious divorce to the wife, even if they are divorced under Australian law. In response to this, it was recommended that the Court should have the power to postpone making a decree absolute until any impediments to the other party’s remarriage have been removed. Professor Parkinson argues that this was the only recommendation where the Commission responded to the concerns of the ethnic communities.<sup>497</sup> This recommendation was not implemented, on the basis that the Family Law Act does not regulate religious law and that it is an Australian legal tradition that civil and religious laws are, and should, remain separate.<sup>498</sup> This is interesting, particularly in light of the discussion in earlier chapters that questions this separation in the area of family law.

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<sup>496</sup> Parkinson, above n484 at 500.

<sup>497</sup> Ibid at 487.

<sup>498</sup> Commonwealth Attorney General’s Department, *Justice Statement* (1995)

<<http://www.austlii.edu.au/austlii/articles/scm/jcontents.html>> accessed 20 October 2010.

## **5. Family Law Council Report – *Cultural Community Divorce and the Family Law Act 1975***<sup>499</sup>

Almost a decade later, the issue of using civil law to intersect with religious practice in finalising divorce was seen to be of such significance that the Family Law Council prepared a report for the Attorney-General on this very issue. This report was completed after some targeted consultation with the Muslim and Jewish communities. The Council made two important recommendations, firstly that the Family Law Act be amended to give courts discretionary powers to assist in matters involving cultural community divorce and secondly the enhancement of service provision in matters involving cultural community divorce.<sup>500</sup>

However, like the recommendations from the ALRC report, these recommendations were neither accepted nor implemented by the Australian Government. It would seem that successive Australian governments have failed to address how the Australian legal system could accommodate the concerns of the culturally and religiously diverse population that lives within its boundaries, with an assumption that the only relevant law is the official law. In this way governments have clearly failed to appreciate the reality of legal pluralism that actually exists in the family law area.

It is important to note that in late 2010 the Family Law Council received new terms of reference to look at the needs of Indigenous and Culturally and Linguistically

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<sup>499</sup> Family Law Council, above n423.

<sup>500</sup> Ibid at 37.



Diverse clients in the family law system.<sup>501</sup> It will be interesting to see what recommendations will arise from this investigation, particularly as past experience indicates a great reluctance to make any changes in this area of law. As Professor Parkinson contends, the ALRC's report 'failed to take multiculturalism sufficiently seriously'<sup>502</sup>, and this could be extended further to say that successive Australian governments have failed in the same manner. Professor Parkinson concludes by asking several relevant questions:

1. Whether the legal system can or should embrace a wider concept of cultural diversity?
2. Is there willingness in the Australian political community to make the compromises in the law necessary for multicultural policies to be translated into legal reforms?<sup>503</sup>

Clearly these questions go to the heart of the concept of multicultural citizenship as outlined in the previous chapter and in part this research attempts to answer these questions in relation to the family law issues facing the Muslim Community in Australia and the question of recognition of Islamic family law.

Finally, the Family Law Council in its report made some interesting observations about the Muslim community, such as its conclusion that the establishment of a *Shari'ah* Court in Australia would alleviate many of the divorce difficulties experienced in the Muslim community, and furthermore that cross-cultural mediation

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<sup>501</sup> Commonwealth Attorney General's Department, *Family Law Council – Terms of Reference* (8 November 2010).

<sup>502</sup> Parkinson, above n484 at 505.

<sup>503</sup> Ibid.

is best suited to resolving such difficulties.<sup>504</sup> Whilst this was not a recommendation for formal recognition of Islamic family law, it implies that Islamic family law has an important role to play in the lives of Australian Muslims. This recommendation did not cause a hysterical public reaction, possibly because it occurred almost a decade before the spotlight was placed upon the Muslim community. The recommendation concerning cross-cultural mediation has also not been acted upon, yet, as this thesis will demonstrate, it is a key initiative in responding to the current needs of the Australian Muslim community.

## **6. Recognition or Accommodation of Islamic Family Law in Australia**

The previous chapter demonstrated that the issue of recognition or accommodation of Islamic family law has been a controversial and significant issue in many countries around the world. In particular, the discussion showed that in Canada and the UK there have been public debates over initiatives to harmonise the Muslim community dispute resolution processes with the official legal framework for family dispute resolution. In both cases, the debate focused on the limits of multiculturalism.

This chapter will now consider the issue as it has arisen in Australia. In particular, has there been a suggestion for the recognition of *Shari'ah* or Islamic law in Australia? What has this meant in the Australian context? Whilst there has never been a formal proposal for the accommodation of Islamic family law in Australia, it has come up as an issue on several occasions, and both media and politicians have commented on the desirability and practicality of such a suggestion. More

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<sup>504</sup> Family Law Council, above n423 at 17-19.

importantly, in Australia there has been recent interest by the government in understanding this topic, as the Australian Human Rights Commission under a *National Action Plan* funded a project called *Intersections between Law and Religion*, which has devoted some considerable time to exploring this issue.<sup>505</sup>

It is important to appreciate that the issue of the accommodation of Islamic family law is not a novel concern for the Muslim community. Rather it has been an issue the community has grappled with for many years, and this was indicated by many of the community and religious leaders interviewed as part of this research. For example, some said:

*This is not a new issue, we have been faced with issues to do with marriage and divorce since the beginning of the establishment of our community structure....very quickly our 'imāms were faced with people facing marital issues and were in a position to attempt to resolve these issues according to Islamic principles and laws.*<sup>506</sup>

*Sorting out how we deal with issues of marriage and divorce has always been a priority for the community.*<sup>507</sup>

However, despite the prominence and importance of this issue for the Muslim community, they have not to date put together a detailed proposal which seeks some form of recognition or accommodation of Islamic family law or of the community

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<sup>505</sup> Australian Human Rights Commission, *Intersections between the Law, Religion and Human Rights: A National Roundtable Dialogue*  
<[http://www.humanrights.gov.au/racial\\_discrimination/partnerships/projects/law\\_religion\\_hr.html](http://www.humanrights.gov.au/racial_discrimination/partnerships/projects/law_religion_hr.html)>  
accessed 2 January 2011.

<sup>506</sup> Community Leader, interviewed 5 June 2006, 23 July 2008.

<sup>507</sup> Religious Leader, interviewed 7 May 2006, 17 August 2008.

processes already in existence. Rather what has occurred is that community leaders have attempted to demonstrate, through meetings with government leaders, that they would like some form of recognition or accommodation of the dispute resolution processes in which they are engaged. This is in contrast to the situation in Canada and the UK as discussed in the previous chapter, where the debate about *Shari'ah* or Islamic law centred on the application of Islamic law in the arbitration process. A possible explanation for this may be that Australia has a different Dispute Resolution framework operating in the family law area with a greater emphasis on mediation than arbitration. Also, the Muslim community processes in Australia (which will be discussed in more detail in later chapters) are less formal and more *ad hoc* than their international counterparts.

However, as mentioned above, there have been calls made for some form of recognition or accommodation of Islamic law in Australia, but as Ghobadzaeh argues, the debate in Australia has been less specific, as it 'includes a broad arena of calls for developing an Islamic court on the one hand, and using *Shari'ah* as an informal mediator body on the other'.<sup>508</sup> For example there have been some within the community who have made a general call for Islamic law to be applied in Australia, such as the call made by Kurt Kennedy, the founder and leader of the Best Party of Allah in Australia in 2005.<sup>509</sup> As mentioned previously, there have also been reports of community leaders who have requested the establishment of a separate Islamic court to deal with Islamic divorce, such as that reported in April 2005.<sup>510</sup> However,

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<sup>508</sup> Naser Ghobadzaeh, 'Multiculturalism and Muslim Women: *Shari'ah* Debate in Australia and Canada' (Paper presented at the Annual Conference Canadian Political Association, 29 May 2009) at 12.

<sup>509</sup> *Ibid* at 14.

<sup>510</sup> Trudy Harris, 'Call for Islamic Divorce Court' *News.com.au* (4 April 2005)

<<http://www.news.com.au/story/print/0,10119,12746354,00.html>> accessed 21 September 2008.

the then Minister for Citizenship and Multicultural Affairs and the Attorney General were quick to reject the idea, stating that the law in this country is secular as there is a clear separation between religion and the law. Furthermore that Australia's laws apply equally to all citizens, regardless of their religion<sup>511</sup> and that 'it would not be appropriate for the government to establish a separate religious court'.<sup>512</sup>

At about the same time, there were reports of Muslim leaders in Perth setting up a special court or tribunal under *Shari'ah* law to deal with divorce matters.<sup>513</sup> Abdul Jalil Ahmad of the Islamic Council of Western Australia suggested that this would comprise a board of ten Islamic leaders and that the whilst the court would be a 'court of arbitration', it would not take the place of the Australian legal system, as he said that Muslims would not act contrary to law.<sup>514</sup> He also said that 'in areas where we are legally allowed to implement our Islamic teaching we do, otherwise we cannot do because it is illegal' and thus it would be limited to areas of marriage and divorce.<sup>515</sup> This proposal is quite ambiguous about whether what was suggested would remain in the unofficial realm, or whether the proposed court of arbitration would share characteristics with the UK *Shari'ah* tribunals. Nonetheless several community leaders came out in support of such an idea, for example Keysar Trad, speaking on behalf of Australia's Lebanese Muslim community, said, 'we're looking for a solution to make life easier for Australian citizens'.<sup>516</sup>

<sup>511</sup> Women living under Muslim laws, 'Australia: Muslim Leader's Divorce Proposal' (26 April 2005) <[http://www.wluml.org/english/newsfulltxt.shtml?cmd\[157\]=x-157-224686](http://www.wluml.org/english/newsfulltxt.shtml?cmd[157]=x-157-224686)> accessed 21 March 2006.

<sup>512</sup> Ibid.

<sup>513</sup> David Weber, 'The World Today – Muslim Leaders call for *Shari'ah* Divorce Court' *ABC Online* (7 April 2005) <<http://www.abc.net.au/worldtoday/content/2005/s1340348.htm>> accessed 20 July 2006.

<sup>514</sup> Ibid.

<sup>515</sup> Women living under Muslim laws, 'Australia: Muslim leaders call for *Shari'ah* divorce court' (16 April 2005) [http://www.wluml.org/english/newsfulltxt.shtml?cmd\[157\]=x-157-187720](http://www.wluml.org/english/newsfulltxt.shtml?cmd[157]=x-157-187720) accessed 21 March 2006.

<sup>516</sup> Ibid.

Similarly Jamila Hussain, lawyer, academic and spokeswoman for the Muslim Women's National Network said that a religious tribunal or court would address the problem suffered by a large number of Muslim women in Australia in securing a religious divorce when their husbands refuse to co-operate.<sup>517</sup>

Later in 2005, then Treasurer of Australia, Peter Costello went to great lengths to dismiss any idea of the accommodation of Islamic law in Australia, as he said:

We will never be an Islamic State. We will never observe *Shari'ah* Law....if you want to live in an Islamic republic there are Islamic republics, you might be happier in those countries than you will in Australia.<sup>518</sup>

He also emphasised that there is no room for legal pluralism in Australia:

There is only one law in Australia. It is the law that is made by parliament and it is enforced by the courts. And every person who lives in Australia has to understand this. This is the law they come under.<sup>519</sup>

Clearly, this relates to how one is to understand official policies of multiculturalism and at the time Costello remarked that certain things such as 'parliamentary democracy, the rule of law, equality of people, civil state are not negotiable, yet diversity is welcomed in fashion and food'.<sup>520</sup> This sentiment was reflected in many of the writings in the opinion pages of Australia's newspapers, such as that of Piers Akerman when he wrote:

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<sup>517</sup> Trudy Harris, above n510.

<sup>518</sup> Nine Network, *A Current Affair*, 11 November 2005.

<sup>519</sup> *Ibid.*

<sup>520</sup> *Ibid.*

The very notion of multiculturalism giving all cultures equal standing is fundamentally flawed. There is absolutely no way that the misogynistic cultural values of *Shari'ah* law can be equated with the values of equality embedded in Australian law.<sup>521</sup>

The issue was again raised in early 2006 when once again the then treasurer Peter Costello, in a keynote speech at the Sydney Institute entitled *Worth Promoting, Worth Defending: Australian Citizenship, What it Means and How to Nurture it* spoke out against what he termed 'confused, mushy, misguided multiculturalism' which did not require new citizens to give up culture, language, religion or opinions.<sup>522</sup> In particular he made direct reference to a comment made by a Melbourne 'imām that Muslims live by Australian law and Islamic law and stated that:

Our state is a secular state.... There is not a separate stream of law derived from religious sources that competes with or supplants Australian law in governing our civil society. The source of our law is the democratically elected legislature... There are countries that apply religious or *Shari'ah* law – Saudi Arabia and Iran come to mind. If a person wants to live in under *Shari'ah* law these are countries where they might feel at ease. But not Australia.<sup>523</sup>

Thus, the message was delivered loud and clear that not only is there no room for the application of Islamic law in Australia but also that the suggestion itself was a rejection of Australian values, as 'we expect all those who call themselves Australians

<sup>521</sup> Piers Akerman, 'No Equality in Misogynistic *Shari'ah* law; Culture Cringe' *Geelong Advertiser*, (19 December 19 2005).

<sup>522</sup> Peter Costello, 'Worth Promoting, Worth Defending: Australian Citizenship, What it Means and How to Nurture it' (Address to the Sydney Institute, 23 February 2006) <<http://www.treasurer.gov.au/DisplayDocs.aspx?pageID=&doc=speeches/2006/004.htm&min=phc>> accessed 3 June 2007.

<sup>523</sup> Ibid.

to subscribe to...Loyalty, democracy, tolerance, the rule of law – values worth promoting, values worth defending. The values of Australia and its citizens'.<sup>524</sup>

Black argues that it is illogical to argue that Muslims should go back to a Muslim country, because they are a permanent part of the Australian landscape whose:

identity is now tied to Australia, and defining what it is to be an Australian Muslim or a Muslim Australian is not only a personal journey for each individual and their ethnic or faith communities, but is one for the country as a whole.<sup>525</sup>

Furthermore, as was argued in the previous chapter, to say that there is only one law applicable to all is not entirely accurate, as the reality is that *Shari'ah* or Islamic family law is already being applied in Australia. However, as Black argues 'this does not mean every Muslim Australian is defying or avoiding Australian laws and bypassing the Australian legal system, but means choices are negotiated within the parameters of both laws'.<sup>526</sup> This is supported by many comments made by the interviewees in this research, one of whom said:

*When it comes to matters of marriage and divorce, we exist between two worlds, on the one hand we are part of the Australian legal landscape and are obligated to comply with Australian laws, but on the other hand these matters are closely aligned with our religious beliefs and the sanctity and sacredness of our family unit means that as a first resort we turn to Shari'ah*

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<sup>524</sup> Id.

<sup>525</sup> Ann Black, above n485 at 214.

<sup>526</sup> Ibid.



*to guide us...you can say that we sort of tiptoe along a fine line where we hope that we can abide by both sets of laws.*<sup>527</sup>

This important point will be further developed in the next few chapters when the discussion turns to how Australian Muslims are actually negotiating between the two sets of legal principles. In fact this is not unique to Australian Muslims, but as discussed in previous chapters is a common characteristic of Muslim minorities in many parts of the world.

It is interesting that Costello's comments were made in response to a mere suggestion that Islamic law is important to the lives of Australian Muslims, and that there was no actual proposal suggested by any member of the Muslim community to change the *status quo*. Costello, like others, made a link with *Shari'ah* or Islamic law and a threat to Australian society, but was not willing to actually consider how Islamic law was important to Australian Muslims, nor how they might be applying it in their daily lives. De Brennan wrote at the time, criticising Costello and arguing that:

As the Canadian experience demonstrates, it is only a matter of time before *Shari'ah* law is proposed as a legitimate means of resolving disputes – including family law disputes – as they arise between Islamic Australians. The presence of Koori courts and sentencing circles for indigenous Australians and the fact that much of the law in this land is predicated on the Judeo-Christian legal tradition remind us that there is nothing novel about the interplay and tension between religion, culture and law<sup>528</sup>

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<sup>527</sup> Community Leader, Interviewed 6 July 2008.

<sup>528</sup> Sebastian De Brennan, '*Shari'ah* law and Australia' *ONLINE opinion* (22 March 2006) <<http://www.onlineopinion.com.au/view.asp?article=4282>> accessed 7 January 2009.

Others portrayed Costello's comments as mere ignorance about Islam and *Shari'ah*, as Muslim Lawyer Irfan Yusuf wrote at the time:

For Costello, *Shari'ah* seems little more than a synonym for disloyalty, violence, amputation and stoning. Therefore Muslims compromise their Australianness by subscribing to a religion which has its own sacred legal tradition. Both Howard and Costello have legal training. Both should understand there is more to any legal tradition than merely criminal punishment. Both are showing a surprising degree of ignorance about what *Shari'ah* actually is.....*Shari'ah* itself says that its criminal sanctions and public law have no jurisdiction in Australia.<sup>529</sup>

Yusuf goes on to say that *Shari'ah* embodies many broad ethical principles and asks Costello 'where any of these *Shari'ah* principles conflict with Australian law, Australian values or Australian citizenship. Surely these principles would form the basis of any civilised society, Islamic or otherwise'.<sup>530</sup>

Kara-Ali, a member of the then newly constituted Muslim Reference Group advising the Howard federal government on the Muslim community, criticised the call for Muslims to abandon Islamic values, and said that rather it is important that these values are maintained, as:

Islamic values are not the hysterical, stereotyped image of...Osama bin Laden, running around wild calling for the cause of *Shari'ah*. They are not a

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<sup>529</sup> Irfan Yusuf, 'Costello's Views of *Shari'ah* Code don't Coincide with the Reality' *Canberra Times* (1 March 2006) at 15.

<sup>530</sup> *Ibid.*

manifestation of *Shari'ah*. What is a manifestation of *Shari'ah* is me living my life, what has made me particular, or others like me success stories, is *Shari'ah* law. Because the moment you take away from a Muslim his sense of identity is the moment you are calling for a crisis in identities. And a crisis of identities is exactly what extremists tap into to further recruit into their extremist cause.<sup>531</sup>

Others saw Costello's comments as 'a calculated beat-up about *Shari'ah* law...an attempt to scapegoat Muslims for electoral and other political purposes'.<sup>532</sup> Regardless of the intention of Costello in making such comments, Ghobadzaeh argues that the effect of what he said 'blocked any possibility of expanding the debate. Those seeking the implementation of *Shari'ah* law were looked upon as agitators and asked to leave the country'.<sup>533</sup> He goes on to say that such 'statements made on different occasions left no doubt that it was not a matter for consideration. It was a waste of time to talk about something so clearly against Australian core values'.<sup>534</sup>

The next time the issue was raised in Australia was when it became a controversial issue in the UK in early 2008. As was discussed in some detail in the previous chapter, this occurred when the Archbishop of Canterbury suggested that there was a role for Islamic law in resolving disputes between Muslims, particularly in the area of family law. In Australia, both sides of politics were quick to dismiss this as a suitable suggestion for the Australian context. It was reported that the then federal leader of the opposition, Brendan Nelson, said that under no circumstances would he

<sup>531</sup> ABC Radio, 'Mustapha Kara-Ali in Conversation', *Religion Report*, 19 April 2006.

<sup>532</sup> Bob Gould, 'Peter Costello, Muslims and *Shari'ah* law' *Ozleft* (6 March 2006)

<<http://www.gouldsbooks.com.au/ozleft/shari'ah.html>> accessed 7 September 2007.

<sup>533</sup> Ghobadzaeh, above n508 at 15.

<sup>534</sup> *Ibid.*

support Australia recognising *Shari'ah* law.<sup>535</sup> Again it was seen as being a rejection of Australian law or Australian values, as Nelson said that:

the idea that in some way you would change your basic values, culture and law to accommodate some people who feel that they don't want to see themselves as Australians first, above all else – under no circumstances would I support that'.<sup>536</sup>

Similarly at this time, Howard, in his first speech after losing government, attacked the idea of introducing Islamic law in western societies, as he linked it to Islamic terrorism.<sup>537</sup> The reaction from the newly elected Rudd Labor government was almost identical to the response from the previous Howard government, as the Attorney General Robert McClelland said 'The Rudd Government is not considering and will not consider the introduction of any part of *Shari'ah* law into the Australian legal system'.<sup>538</sup> The reaction from the Muslim community was diverse and varied, with many expressing their views in the opinion pages of the nation's papers. Soliman, a former president of the Islamic Council of Victoria wrote that 'Australia is nowhere near ready for *Shari'ah* courts any time soon...there have been no calls for a parallel or alternative court system for Muslims in Australia'.<sup>539</sup> However he went on to distinguish between a *Shari'ah* court and the already established community processes developed to resolve marital disputes which:

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<sup>535</sup> ABC, '*Shari'ah* Law Not an Option: Nelson' *ABC News* (8 February 2008) <<http://www.abc.net.au/news/stories/2008/02/08/2157815.htm>> accessed 20 March 2010.

<sup>536</sup> *Id.*

<sup>537</sup> ABC, 'Australian former PM warns against *shari'ah* law' *ABC Online* (6 March 2008) <<http://www.abc.net.au/ra/programguide/stories/200803/s2182633.htm>> accessed 20 March 2010.

<sup>538</sup> Barney Zwartz, 'Australia's Muslims Cool on Change' *The Age* (9 February 2008) <<http://www.theage.com.au/news/world/australias-muslims-cool-on-change/2008/02/08/1202234168549.html>> accessed 20 March 2010.

<sup>539</sup> Yasser Soliman, 'Embarrassing to Muslims' *Herald Sun* (10 February 2008) <<http://www.news.com.au/heraldsun/story/0,21985,23186972-5000117,00.html>> accessed 20 March 2010.

do not contradict state or federal laws and do not apply to criminal matters, which are dealt with in mainstream judicial system. When Muslim groups deal with minor, non-criminal disputes in such a way, it may help to alleviate the burden on the legal system.<sup>540</sup>

In this way, Soliman attempted to demystify the debate by distinguishing between *Shari'ah* and what was actually taking place at a community level which he argued did not conflict with the Australian legal system. Similarly, Akbarzadeh argued that:

The overwhelming majority of Islamic organisations view Australian law as their protector and appeal to it for redress. Australian Muslims, whether cultural or devout, value the fair-go spirit of Australia. This spirit resonates with their cultural and religious beliefs. It would help us all if we paused to look at values that bind us together'.<sup>541</sup>

Some of the community leaders interviewed for this research project felt that, whilst it was an important topic to be discussed in Australia, they could not publicly comment:

*It is hard to publicly talk about Shari'ah, because it evokes a lot of emotion and controversy in the minds of the wider Australian community, and we did not want to risk being further portrayed as a group that rejects Australian law or values, even though we knew that that was not the issue at all.*<sup>542</sup>

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<sup>540</sup> Id.

<sup>541</sup> Shahram Akbarzadeh, 'Muslim Majority wants Secular Law' *The Australian* (19 April 2008) <<http://www.theaustralian.news.com.au/story/0,25197,23539447-7583,00.html>> accessed 20 April 2008.

<sup>542</sup> Religious Leader, Interviewed 7 July 2008.

*When we had raised the issue with the previous government it really ended up backfiring against us, and who knows how the current government would react to this issue.<sup>543</sup>*

*The debate was a bit misleading, because it was portrayed as setting up a parallel court system, but I ask you, who in the community asked for that? But nobody was interested in listening to what it was really about, it is much easier for them to talk about shari`ah as if they were experts in the field...it is funny, it would be like me putting myself out as an expert on Australian law.<sup>544</sup>*

Another interesting feature of the debates is the lack of clarification as to what was meant by recognition or accommodation of Islamic law in the Australian context. This is true both amongst the wider Australian community, especially media commentators and politicians who, as can be seen from the discussion above, seemed to assume that Muslims were seeking to enforce Islamic criminal law in Australia, as well as amongst the Muslim community itself, with some members talking about *Shari`ah* courts and others talking about existing community processes. This is supported by the current research, whereby several of the community leaders, when asked about how they felt about the recognition of Islamic law, interpreted it to mean different things. For example, one said:

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<sup>543</sup> Religious Leader 18 February 2008.

<sup>544</sup> Community Leader, Interviewed 10 March 2003, 11 July 2008.

*Yes, recognition is very important, because we need validity and enforceability of the decisions we make in resolving marital disputes...a Shari'ah court would be a good idea.*<sup>545</sup>

When then asked, what this actually means, what is a recognised *Shari'ah* court, they responded with:

*Well, that is an issue that would need some study...maybe it is not really a court at all, but some form of accommodation or recognition by the Australian system.*<sup>546</sup>

Such a response left open the impression that this interviewee could be satisfied if, for example, the Australian Family Court was able to apply or consider Islamic law in its decisions concerning Muslim families. Yet many others interviewed were quite adamant that this would not be a suitable arrangement, as one remarked:

*There is no way that you could have Family Court judges applying Shari'ah...there would be too many problems with that.*<sup>547</sup>

However most community leaders emphasised the importance of the existing community processes:

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<sup>545</sup> Community Leader, Interviewed 13 July 2008.

<sup>546</sup> Ibid.

<sup>547</sup> Religious Leader, Interviewed 11 December 2003, 2 June 2006, 17 September 2008.

*We already have dispute resolution processes....they are far from ideal, but they certainly can be made better if we knew of ways to have them recognised by the Australian legal system.*<sup>548</sup>

It is obvious that there is some confusion in the minds of people about this issue, and indeed it is no wonder that the public debate seemed to be dominated by more misconception than fact, resulting in the portrayal of a Muslim community that does not share in a commitment to Australian values or Australian law. It is the argument of this thesis that this is a fundamentally flawed picture of reality, and as the next few chapters will seek to demonstrate, there are strong grounds to argue to the contrary, that this very issue of seeking accommodation is a sign that the Australian Muslim community is eager to integrate its community processes within the broader official legal system.

This issue of accommodating Islamic family law or *Shari'ah* in Australia is an interesting and complex one, and the discussion above has only just introduced the key points which will be further developed in the rest of the thesis. However, what is interesting is that, as Ghobadzaeh argues 'it becomes clear that appeals to introduce *Shari'ah* law in Australia were not well organised around a legal, cultural or political context. As a result, a single, unified and boundary-bounded argument could not be developed'.<sup>549</sup>

It would seem that the Muslim community itself is unsure of what they mean by greater accommodation or recognition of Islamic law in Australia, but where there

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<sup>548</sup> Religious Leader, interviewed 7 May 2006, 17 August 2008.

<sup>549</sup> Ghobadzaeh, above n508 at 14.



does seem to be agreement is the need to find better ways to help Muslims navigate their way between Islamic and Australian law, as both are deemed relevant in the way that they resolve their family law disputes. This can only be achieved by having an accurate understanding of the current community processes in place and how these processes intersect with the Australian legal framework. This understanding coupled with an appreciation of the pluralist nature of law in a multicultural setting is crucial to this debate.

On the one hand such an understanding would help to address the confusion and misunderstanding that the non-Muslim community has about *Shari'ah* and the needs of the Muslim community, and on the other hand it would allow the Muslim community itself the space to evaluate and honestly address the limitations of the current community processes without fear of a hysterical public backlash. Thus, one of the main objectives of this research is to contribute to this understanding, which is critical to any debate or dialogue about the Muslim community in a multicultural state.

## **7. Conclusion**

There is no doubt that Australia is a multicultural state in terms of its demography, with a population that has links to all corners of the globe in terms of culture, religion, ethnicity and language. However, as this chapter has demonstrated, the term multiculturalism can refer to a variety of things, although in this discussion it was used to refer to government policies promoting or protecting diversity. In particular,

this chapter provided a brief outline of the policies of successive governments towards accommodating the needs of its various cultural and religious communities, with a focus on the expressed attitudes of politicians towards the Muslim community.

More importantly, this chapter considered the related question of how the Australian legal system has responded to the needs of a culturally and religiously plural society in the area of family law. Generally speaking it has done very little to accommodate the needs of a diverse society, despite there being official government policies of multiculturalism for over 30 years. Returning to the question posed by Professor Parkinson earlier in this chapter, which asked whether there was a willingness in the Australian political community to make the compromises in the law necessary for multicultural policies to be translated into legal reforms, the answer would seem to be a resounding no in the area of family law. This is well borne out in the remainder of the chapter which explored the political responses to the issue of greater accommodation or recognition of Islamic family law in Australia. Whilst Australia has not had the same level of public debate about this issue as the UK and Canada, there is no doubt that when the issue has been raised in the public domain it has been faced with the same public response, namely, a denial of legal pluralism, a criticism that multicultural policies that will fragment society and a belief that any accommodation will be detrimental to women. Like the international debates, the response has not been one that has been based on any empirical evidence or research about the Australian Muslim community, because to date there has not been any such research.

## **Chapter 6**

### **Islamic Family Law in Australia**

#### **1. Introduction**

This thesis will now address the important need for empirical data about what is happening at a community level, that is, how Muslims in Australia resolve their family law disputes and what processes they engage in to do this. Earlier chapters have provided an insight into the make-up of the Muslim community in Australia, its leadership structure and organisation. This chapter will consider the importance of and application of Islamic family law in Australia, by drawing on the empirical data gathered through the interviews conducted during this research. I will argue that despite the widely held assumption that all Australians rely on the 'official' law to govern their family law affairs, the reality is that, for Australian Muslims, principles of Islamic family law are of critical importance to the way they deal with these matters. Whilst the present study is a qualitative one and not a quantitative one, and as acknowledged in chapter 1 that one needs to be careful not to generalise the experience of the interviewees to be the experience of the entire Muslim community, the research does give an insight into how some Australian Muslims, particularly those from the more established migrant communities are utilising Islamic principles

to matters of marriage and divorce. I will then turn to discuss the processes by which such issues are resolved.

As the previous chapters have indicated, it is these processes that Muslim communities in the UK and Canada have recently sought to have officially accommodated or recognised. I will also argue that, whilst it is important to understand the basic principles of Islamic law that are being applied, and indeed this will be covered in the next few chapters, it is equally important to understand the processes themselves. This is because, when we talk about recognition or accommodation of Islamic law, we are not referring to accommodation of the content of Islamic legal principles as much as we are talking about finding a suitable form of family dispute resolution process for Australian Muslims.

## **2. Muslims and Family Law Issues**

The discussion in chapter 4 demonstrated the importance and relevance of Islamic family law to Muslims around the world, in particular in the Muslim communities in the UK and Canada. Despite the general assumption in those states that one law applies to all citizens, the reality is that Islamic law operates in the realm of ‘unofficial law’. This has been well documented in the UK context, in particular by Pearl and Menski, who note that the UK legal system remains ‘purposely blind to social conventions and so called cultural practices which are perceived to operate in the extra legal sphere’.<sup>550</sup> Yet they argue that whilst it may appear that Muslims in Britain are following English law, they are really following a path that is informed by

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<sup>550</sup> Pearl and Menski, above n1 at 56-57.

religious principles. Furthermore they conclude that 'in Britain...we find a form of *Shari'ah* which remains officially unrecognised by the state but is now increasingly in evidence as a dominant legal force within the various Muslim communities'.<sup>551</sup>

This form of *Shari'ah* Pearl and Menski term '*angrezi shari'ah*'. They argue that:

as a matter of fact...Muslims in Britain operate today a form of unofficial legal pluralism. Muslim individuals and whole communities, irrespective of state law or inexplicit reaction to it, have developed their own hybrid legal system in Britain, which they perceive as a form of Muslim law.<sup>552</sup>

More recently, Yilmaz, has discussed this new hybrid unofficial law which has emerged as a result of the interaction between English law and Muslim law and points out that 'this has become the new Muslim law of the English soil'.<sup>553</sup> This shows the dynamic character of Muslims and their unofficial laws. Mirza too discusses the emergence of *Shari'ah* as unofficial law, and as 'a framework of law which has been driven underground and operates outside the realm of official law'.<sup>554</sup> In the UK context, this saw the community developing *Shari'ah* Councils to meet the dispute resolution needs of British Muslims. Poulter details the way that these councils operate:

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<sup>551</sup> Id

<sup>552</sup> Ibid at 75.

<sup>553</sup> Ihsan Yilmaz, 'Muslim ADR and Neo-Itjihad in England', (2003) 2 *Alternatives: Turkish Journal of International Relations* at 3 <<http://www.alternativesjournal.net/volume2/number1/yilmaz.htm>> accessed 5 May 2006.

<sup>554</sup> Qudsia Mirza, 'Islam, Hybridity and the Laws of Marriage', (2000) 14 *The Australian Feminist Law Journal* 1 at 3.

First, vigorous attempts are made to see if reconciliation can be promoted.....Secondly, in certain circumstances Islamic divorces are granted by the council...Thirdly, the council has drafted a form of Muslim marriage contract...so that Muslim couples can expressly agree upon certain matrimonial arrangements, which are in line with Islamic ethical principles, and feel that they are utilising a distinctively Islamic technique as an integral part of the process.<sup>555</sup>

In particular Poulter emphasises that the *Shari'ah* council is:

not tied to any particular school of Islamic doctrine and is prepared to offer the parties the benefits of any school which suits their particular needs. The Council is thus concerned to apply the underlying spirit and general principles of Islamic law, as set out in the *Qur'an* and the *Sunna*, rather than let itself be constrained by narrow interpretations of classical jurisprudence.<sup>556</sup>

These Councils have not become a part of the way Australian Muslims have sought to resolve their family disputes. As mentioned above there have been informal groupings of *'imāms* who work together and some call themselves *Shari'ah* councils. However, unlike the UK context, very little has been written about how Muslims deal with their family law affairs in Australia. Thus the next few chapters will be significant in detailing these processes in the Australian context. First the importance of Islamic family law to Australian Muslims will be considered and then the processes by which Islamic family is being used or applied in Australia.

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<sup>555</sup> Poulter, above n310 at 234-235.

<sup>556</sup> *Ibid.*

The research clearly demonstrates that, as in Canada and the UK, Muslims in Australia are relying on Islamic legal principles to resolve their family law matters. This is the view of 'imāms, community leaders and the community members interviewed for this research. Some of the responses from the interviewees include:

*Generally, I would say that 99% of Muslims in Australia abide by Islamic law when it comes to marriage and divorce.*<sup>557</sup>

*We know that in Australia, we can marry and live under Shari'ah principles. I think that the laws we are applying are allowing us to practise Islam in Australia.*<sup>558</sup>

*I can tell you that there are many people who come to discuss their problem and if it can be solved according to their beliefs they will never go to the court because the court does not satisfy their needs.*<sup>559</sup>

*People accept Islamic law because it comes from God.*<sup>560</sup>

*I think the majority of the community seek to live by it. At the end of the day you have to be divorced by both legal systems, under both sets of laws – it is important that you are married and divorced under Australian family law – the recognition is important.*<sup>561</sup>

<sup>557</sup> Religious Leader, Interviewed 17 April 2006.

<sup>558</sup> Religious Leader, Interviewed 2 June 2006.

<sup>559</sup> Religious Leader, Interviewed 23 January 2003.

<sup>560</sup> Community Leader, Interviewed 5 June 2006, 23 July 2008.

<sup>561</sup> Community Leader, Interviewed 18 August 2007.

*You have families at the moment sitting between two laws, you have an Islamic community that is driven by their specific religious philosophy that is reflected in their everyday behaviour and conduct and then if a family breaks down the problem then lies in which laws are we required to abide by, because you still have to go through the normal procedures of filing for divorce and then discussing and resolving the maintenance issues and custody and property – which are in some cases quite different to Islamic family law. How to deal with this is a real challenge facing the Muslim community.<sup>562</sup>*

### 3. Why are Islamic Legal Principles Important?

The question may be asked why Islamic legal principles rooted in sources that date back over 1400 years ago remain relevant to Australians in today's society. This is a very significant question to address because it can help to dispel misconceptions that have surrounded the debate about recognition of Islamic law in other jurisdictions, by allowing a more accurate appreciation of the motivation of the community in seeking this recognition or accommodation. This question was put to the interviewees, and from the perspective of the *'imāms* it was quite clear that they felt that they were responding to an acute need of the community, who saw that Islamic law was relevant to their lives wherever they may reside. This is similar to the UK context, as Shah-Kazemi wrote, at the time when *Shari'ah* Councils were set up in the UK, that:

According to the *Shari'ah*, every Muslim community, however small its size, must be regulated, as far as possible, by Islamic legal norms, appropriately

<sup>562</sup> Community Leader, Interviewed 10 March 2003, 11 July 2008.



interpreted and applied by the most knowledgeable scholars residing in the community. The phenomenon of Muslim minority communities living in non-Muslim lands has its earliest precedent in the migration to Abyssinia of a group of Muslims at the behest of the Prophet himself. Thus, one finds the *'imām* Abu Hanifa (d 798 C.E) specifying that in non-Muslim lands, Muslims are obliged to appoint a person to act as a guide in respect of religious issues, legal questions and social disputes. The establishment of the MLSC (Islamic *Shari'ah* Council).....is able not only to act as a *Qāḍy* (Judge) would in resolving disputes regarding the dissolution of marriage contracts, but it is also able to perform the advisory role that the *Qāḍy* offers by mediating in intra-familial, intra-community conflicts, as well as give opinions about formal rules governing the validity of such legal procedures as marriages and divorces.<sup>563</sup>

This was reflected in the words of the *'imāms* interviewed for this research, as some said:

*General principles of Islamic law need to be applied. The community should organise itself so that there is one body, or one leader who can deal with such issues which are of concern to the community.*<sup>564</sup>

*It is part of our Islamic way of life that whenever we form a community or a group of believers, that certain matters need to be organised, we need a leader and in family matters we need to work out how to apply Islamic law*

<sup>563</sup> Yilmaz, above n553 at 4.

<sup>564</sup> Religious Leader, Interviewed 3 September 2007.

*amongst ourselves...this does not mean that we do not respect the Australian law, but if we can live by both then why not?*<sup>565</sup>

The interviewees expressed the view that Islamic family law principles were important regardless of the religiosity of the people, as some leaders said:

*It is important even if they are not practising Muslims, i.e. they don't pray or fast. This is something very clear and evident in the Muslim community. So Islamic family law is very important to their life.*<sup>566</sup>

*For those who aren't practising it is a matter of degree – for those who identify as Muslim quite often they will want their relationship be governed by Islamic family law.*<sup>567</sup>

*It is very important to Muslims regardless of their level of religiosity, it is important to those who are Muslims by ID only as we call them, when it comes to family law they come back to Islam....It gives them something to rely on – if I can take it from my religion why should I have to worry.*<sup>568</sup>

This was reinforced by other community member interviewees:

*Although my husband doesn't pray or fast he still has respect for the 'imām and their processes. He would divorce me if the Shaykh asked him to.*<sup>569</sup>

<sup>565</sup> Religious Leader, Interviewed 7 July 2007.

<sup>566</sup> Religious Leader, Interviewed 6 August 2006.

<sup>567</sup> Community Leader, Interviewed 15 March 2003.

<sup>568</sup> Community Leader, Interviewed 5 June 2006, 23 July 2008.

<sup>569</sup> Community Member, Interviewed 18 December 2003.

*I don't really go to the Mosque very often, but when I was having problems with my wife I sought out the Shaykh for advice.<sup>570</sup>*

Many community leaders expressed their view that Islamic family law was very important to Muslims in Australia. In particular many pointed to the fact that religion was a central feature of the lives of many Muslims in Australia:

*In getting married and divorced, the majority of Muslims would want to fulfil the Islamic requirements.<sup>571</sup>*

*Religion plays a critical role in the lives of people, once you have understood that as a foundation then you can better understand the context in which families operate particularly in a land where there is variance between secular law and Islamic family law. Once we understand this we can talk about the relevance of Islamic family law in Australia.<sup>572</sup>*

*It is highly relevant because many Muslims expect that their marital life will be governed by Islamic family law, certainly practising Muslims would have that expectation., There will be a small minority who will not know what Islamic family law is, but practising Muslims will expect family relationships to be governed by Islamic family law.<sup>573</sup>*

*There is no doubt about the relevancy of Islamic family law, because Islam is a way of life and you don't differentiate between Islamic family law and other laws in your life because it all encompasses as one. From my experience the*

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<sup>570</sup> Community Member, Interviewed 3 March 2006.

<sup>571</sup> Community Leader, Interviewed 5 December 2007.

<sup>572</sup> Community Leader, Interviewed 10 March 2003, 11 July 2008.

<sup>573</sup> Community Leader, Interviewed 3 April 2003.

*majority of people have tried to abide by it all the way and they see that it does make their life easier. But when it comes to implementation it is a different story.*<sup>574</sup>

*As Muslims we take marriage as being part and parcel of our religion so we are getting married because Allah (SWT) tells us that it is half of our religion. So what we are doing is for our religion, so when something happens, why do we have to turn to other avenues for help – we turn to our religion – that is for people who are practising.*<sup>575</sup>

*I don't think that many young Muslims think very seriously about Islamic family law unless they have a problem, and they start to say Oh if I can't get help from the 'imām, from my community then who else can I get help from – then they start thinking about Australian law.*<sup>576</sup>

Thus the importance of faith more generally, and Islamic legal principles of marriage and divorce in particular are quite evident in the Australian Muslim community. This is closely connected to the earlier discussion in chapter 1 that explained Islam as a way of life to its adherents. This is similar to what MacFarlane notes about the US context, as she says:

Overwhelmingly the most important constellation of reasons given to me relate to faith and religious obligation. These individuals say that using

<sup>574</sup> Community Leader, Interviewed 5 June 2006, 23 July 2008.

<sup>575</sup> Community Worker, Interviewed 6 June 2003, 7 July 2008.

<sup>576</sup> Community Worker, Interviewed 18 August 2007.

Islamic principles to dissolve their marriage is intrinsic to their duty and obligations as a Muslim.<sup>577</sup>

However, this does not mean that all Muslims rely on Islamic legal principles to resolve all their family law issues. Rather, many of those interviewed commented on how they had observed many people who moved between the two sets of laws, finding the one that would be of most benefit to them:

*From our role in dispute resolution we notice that for a great many people if the Shari'ah is to their benefit then they want to abide by it but if it isn't then they want to go to Australian law.<sup>578</sup>*

*In general, the people like to follow Shari'ah, but when they feel that it doesn't give them what they want then they go to the Australian system...this makes us as 'imāms feel that people are at a distance from Shari'ah in these cases.<sup>579</sup>*

*Are people conveniently choosing when and where to go, are people shopping around for the best deal for them? It is hard to know. What I am trying to say is that in the heat of the moment it is hard to tell people who they are to listen to, they have to decide that for themselves, as far as I am concerned that is their decision at the end of the day.<sup>580</sup>*

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<sup>577</sup> Macfarlane, above n356.

<sup>578</sup> Religious Leader, Interviewed 2 June 2006.

<sup>579</sup> Religious Leader, Interviewed 9 July 2007.

<sup>580</sup> Community Leader, Interviewed 2 September 2006.

This ability to choose which legal system suited them was seen as a good thing by some:

*Muslim Women in the west have an advantage living between two legal systems – if one lets them down they can access the other one. I know that I certainly did.*<sup>581</sup>

Yet others saw that it had disadvantages as well:

*It is not fair, when we were with the Shaykh my husband agreed to give me an amount of money upon finalising the religious divorce, but then went back on his word and said sorry we live in Australia, go to the Family Court.*<sup>582</sup>

In this way, Australian Muslims are, in the words of Black, ‘successful legal navigators’<sup>583</sup>, that is they are quite aware of their need to make their way through two different legal settings. They generally appreciate the importance of each to the resolution of their dispute, even though at times they may find themselves facing difficulties when the two systems intersect. Indeed the next few chapters will explore the issues that arise when this occurs.

One of the common assumptions made is that these are the concerns of a migrant community attached to its cultural and religious heritage. However, the research indicates the exact opposite, that it is younger community members who are born and bred in Australia who seek to apply Islamic legal principles to their day to day life.

<sup>581</sup> Community Member, Interviewed 11 March 2007.

<sup>582</sup> Community Member, Interviewed 16 December 2007.

<sup>583</sup> Ann Black, ‘Window into *Shari’ah* Family Law’ (2010) 15 *Family Relationships Quarterly* 3 at 6.

Pearl and Menski also found in the UK that these principles are not just relevant to a migrant community, but rather ‘it is young people....born and brought up in the west who are reasserting their cultural and religious values’.<sup>584</sup> The responses from the younger interviewees in this research are revealing:

*The Islamic divorce process is very important to me; in fact obtaining an Islamic divorce is more important to me than an Australian divorce.*<sup>585</sup>

*If I don't obtain an Islamic divorce, then it is as if I haven't been divorced at all even if I have an Australian divorce – as an Australian Muslim woman the Islamic divorce is very important.*<sup>586</sup>

*I am not married, but when I do, I intend to do so according to my religion because I think that Islam offers so much to me...But of course I still want to comply with the requirements of Australian law.*<sup>587</sup>

These results confirm the observation of Pearl and Menski that ‘there is on the one hand a genuine desire not to offend the state’s laws, on the other there is a strong allegiance to an entity which is regarded, because of its divine nature, as having a higher status than the state’.<sup>588</sup> The research has indicated that there is not one view or voice in the Australian Muslim community. Rather there is a diversity of views that need to be acknowledged and listened to in any public debate about the integration of the community into the wider Australian community. However, the

<sup>584</sup> Pearl and Menski, above n1 at 54-55.

<sup>585</sup> Community Member, Interviewed 8 July 2007.

<sup>586</sup> Community Member, Interviewed 19 September 2007.

<sup>587</sup> Community Member, Interviewed 2 February 2008.

<sup>588</sup> Pearl & Menski, above n1 at 56-57.

responses from the interviewees emphasise that, regardless of religiosity or age or gender, Islamic principles are relied upon in matters of marriage and divorce.

#### 4. How is Islamic Family Law being applied in Australia?

The chapter will now consider the important question of how these principles are being applied in Australia, in particular what processes exist to apply these legal principles. However in order to appreciate these existing community processes in the Australian context, it is necessary to take a brief look at Islamic dispute resolution principles, which many of the *'imāms* interviewed said informed the existing community processes. For example, several *'imāms* and community leaders spoke at length about the importance of such dispute resolution principles, particularly in the area of family law:

*I want to talk about mediation – and how that has worked for both men and women – our focus from an Islamic perspective is to achieve a win-win situation – focusing on what their needs and demands are – we use verses from the Qur'an and ḥadīth from the Prophet (PBUH) to remind both parties that this is the basis on which you entered into your marriage and you have taken an oath with God and when you separate you are to do so with Raḥmah (mercy).<sup>589</sup>*

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<sup>589</sup> Community Leader, Interviewed 1 June 2003, 7 October 2008.



*From my experience, the court system is a frightening thing – Islamically when such a thing occurs you don't have to go to such a high authority to resolve your disputes.*<sup>590</sup>

*People think that mediation is a new way of resolving family disputes, but we as Muslims have a history rich in such principles of dispute resolution, in fact we are obligated to pursue such processes.*<sup>591</sup>

*Helping couples to reach a peaceful settlement of their dispute is what we try to do, and that is based on our Islamic principles of dispute resolution.*<sup>592</sup>

So what are these principles of dispute resolution that guide the community processes that are to be documented in the discussion below? Bouheraoua argues that: 'Peaceful dispute and conflict settlement is highly encouraged by Islam, and that in Islamic law, peaceful conflict settlement is to be achieved either by means of conciliation (*Sulh*) or arbitration (*Tahkim*) or mediation (*Wasaatah*)'.<sup>593</sup>

Rashid argues that, contrary to the popular belief that Amicable Dispute Resolution (ADR) 'emerged and originated in the West during the last few decades', such processes 'are as old as Islamic law itself, that is, 1400 years old'.<sup>594</sup> ADR processes in Islamic law have a religious sanctity attached to them, making adherence a divine

<sup>590</sup> Community Worker, Interviewed 10 June 2003, 4 July 2008.

<sup>591</sup> Religious Leader, Interviewed 11 October 2006.

<sup>592</sup> Religious Leader, Interviewed 6 August 2006.

<sup>593</sup> Said Bouheraoua, 'Foundation of Mediation in Islamic Law and its Contemporary Application' (Paper presented at the Mediation in the Asia-Pacific: Constraints and Challenges Conference, International Islamic University of Malaysia, Kuala Lumpur, 16-18 June 2008) at 2.

<sup>594</sup> Syed Khalid Rashid, 'Peculiarities and Religious Underlining of ADR in Islamic Law' (Paper presented at the Mediation in the Asia-Pacific: Constraints and Challenges Conference, International Islamic University of Malaysia, Kuala Lumpur, 16-18 June 2008) at 1.

obligation.<sup>595</sup> Conciliation, mediation and arbitration are all means of amicable dispute resolution encouraged by Islam.<sup>596</sup> The amicable settlement of disputes had foundations in the key sources of Islamic law. For example there are many verses in the *Qur'an* which refer to this, such as the following:

If two parties among the believers fall into a quarrel, make ye peace between them.<sup>597</sup>

In most of their secret talks there is no good; but if one exhorts to a deed of charity or justice or conciliation between men, (secrecy is permissible): to him who does this, seeking the pleasure of Allah, We shall soon give a reward of the highest (value).<sup>598</sup>

If you fear a breach between them twain appoint (two) arbiters, one from his family and one from hers. If they wish for peace, Allah will cause their reconciliation. For Allah has full knowledge and is acquainted with all things.<sup>599</sup>

If a wife fears cruelty or desertion on her husband's part, there is no blame on them if they arrange an amicable settlement between themselves; and such settlement is best; even though men's souls are swayed by greed. But if ye do good and practise self-restraint, Allah is well-acquainted with all that ye do.<sup>600</sup>

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<sup>595</sup> Id at 2.

<sup>596</sup> Bouheraoua, above n593 at 3.

<sup>597</sup> The Holy Qur'an, Chapter 49 verse 9.

<sup>598</sup> The Holy Qur'an, Chapter 4 verse 114.

<sup>599</sup> The Holy Qur'an, Chapter 4 verse 35.

<sup>600</sup> The Holy Qur'an, Chapter 4 verse 128.

There is also a strong basis for conciliatory methods of dispute resolution in the narrations of the Prophet, for example it is narrated that the Prophet said:

Conciliation between Muslims is permissible, except for a conciliation that makes lawful unlawful and unlawful lawful.<sup>601</sup>

Furthermore, the second Caliph Umar ibn al-Khattab, a well respected companion of the Prophet is reported to have said:

Return the disputants till the conciliation is achieved. Verily, litigation causes rancour between disputants.<sup>602</sup>

Another example is the famous letter which the second Caliph Umar ibn al-Khattab wrote to Abu Musa Al-Ash'ri after appointing him as a judge, in which he explains:

All types of compromise and conciliation among Muslims are permissible except those which make *ḥarām* (unlawful) anything which is *ḥalāl* (lawful), and a *ḥalāl* as *ḥarām*.<sup>603</sup>

Bouheraoua also argues that the main form of conciliation encouraged by Islamic practice is that of mediation known as *Wasaatah*. *Wasaatah* is the common term used for mediation, and is used in Islamic law.<sup>604</sup> It is a benevolent and non-binding procedure to end a dispute. It is characterised by one or more persons intervening in a

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<sup>601</sup> Sunan Abu Dawud, Book 24 The Office of the Judge (Kitab Al-Aqdiyah) ḥadith no. 3587 available from Compendium of Muslim Texts <http://www.usc.edu/schools/college/crcc/engagement/resources/texts/muslim/hadith/abudawud/024.sat.html> accessed 2 January 2011.

<sup>602</sup> Cited in Bouheraoua, above n593 at 4.

<sup>603</sup> Rashid, above n594 at 4.

<sup>604</sup> Bouheraoua, above n593 at 2.

dispute either of their own initiative or at the request of one of the parties. The independent mediator must then seek to achieve an amicable settlement by proposing solutions to the parties.<sup>605</sup> Bouheraoua notes that any procedure applied in the process of mediation is valid as long as ‘it brings the people closer to beneficence, and furthest away from corruption, and as long as it does not contravene the principles of Islamic teaching’.<sup>606</sup>

Similarly, Lukito argues that ‘in Islamic legal tradition, mediation is recognised as one resolution method for family disputes’.<sup>607</sup> The importance of mediation can be seen from the fact that the *Qur’an* contains a detailed verse about this, which, he argues, ‘cannot be seen as rigid; indeed, it is flexible and susceptible to the development of alternative dispute resolution methods’.<sup>608</sup> This verse, according to Lukito, sets out a procedure to be followed in mediating disputes between a married couple where ‘each party should appoint its own representative...selected from their respective families, to negotiate a solution to the conflict’.<sup>609</sup> Lukito argues that this *Qur’anic* process differs from the common understanding of mediation in three respects. Firstly, the mediators should be taken from relatives of the couple. Secondly, these mediators are pro-active in the sense that they are actively involved in the process. Thirdly, ‘they have more of an insider role in the process of negotiation’.<sup>610</sup> He goes on to say that ‘the Islamic practice of involving the participants’ relatives to mediate a family conflict seems to be justified by the idea that the dispute between husband and wife is in fact inseparable from the social values

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<sup>605</sup> Id.

<sup>606</sup> Ibid at 6.

<sup>607</sup> Ratno Lukito, ‘Religious ADR: Mediation in Islamic Family Law Tradition’ (2006) 44 *Al-Jami’ah* 325 at 332.

<sup>608</sup> Ibid at 344.

<sup>609</sup> Ibid at 333.

<sup>610</sup> Ibid at 333.

of Muslim society'.<sup>611</sup> These are social values of a communal way of living which emphasise the interdependence and relatedness of community members.<sup>612</sup>

Islamic principles of dispute resolution also encompass arbitration, known as *tahkim*, which refers to the appointment of a judge or judges by the disputed parties to adjudicate a certain dispute or issue.<sup>613</sup> Arbitration or *tahkim* differs from mediation or *sulh*, in that it firstly results in a binding, judicial decision, whereas conciliation *sulh* results in a non-binding proposal for settlement; secondly, in conciliation *sulh*, one or both parties renounce some rights; whereas in arbitration no one renounces any of their rights.<sup>614</sup>

As mentioned above, one cannot truly understand the debate about recognition or accommodation of Islamic family law without understanding the processes that are used to apply such principles. This is because it is these processes that have been adapted to the Australian context, as much as the actual application of the legal principles. Abdalla argues that:

The discussion of dispute resolution within the Islamic setting removes the focus of the research from the realm of jurisprudence to the realm of interdisciplinary research, from legality to morality, from the letter of law to its spirit, and from application of law to the pursuit of justice. The focus of such research no longer remains to be legal interpretations and

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<sup>611</sup> Id at 334.

<sup>612</sup> Amr Abdalla, 'Principles of Islamic Interpersonal Conflict Intervention: A Search within Islam and Western Literature' (2002) 15 *Journal of Law and Religion* 151 at 165.

<sup>613</sup> Bouheraoua, above n593 at 2.

<sup>614</sup> Ibid at 3.

precedents....known as *fiqh*....dispute resolution...attempts to operate within the larger Islamic world view, not just within its traditional legal system.<sup>615</sup>

This opens up greater opportunities for change and adaptation, as it makes it easier to offer recommendations to improve the processes. One community leader said:

*We have to be willing to be criticised and analysed and to develop. I am pretty sure that this will occur. We have to be willing to accept this...but when you criticise the community structures you are not there to demolish them you are there to work with them and develop a plan for it.*<sup>616</sup>

Therefore, there is a strong basis in legal principles for resolving disputes, particularly those of a family law nature, outside a formal court setting. This means that there is harmony between Islamic principles of family dispute resolution and a growing emphasis on alternative forms of dispute resolution within the Australian legal framework, particularly in the area of family law as outlined in chapter 1 and as will be considered again in later chapters.

## **5. What do these Dispute Resolution Processes look like?**

It is important now to consider what these processes look like in Australia. This will show how Muslims resolve their family law issues. It would seem that the family has an important role to play in helping couples deal with any problems they may have.

<sup>615</sup> Abdalla, above n612 at 157-158.

<sup>616</sup> Community Leader, Interviewed 4 November 2007.

This was described by both the community leaders and community members interviewed:

*Assuming there is a conflict between two people, they have reached a deadlock, neither party can resolve it, either party can raise the issue with members of their family, the elders of their family would have intervened and tried to reconcile the differences and reach an amicable outcome.*<sup>617</sup>

*When we started to have problems in our marriage, I turned to my uncle who is a well respected man in the community to help resolve our problem. He sat us both down and helped us to work through our concerns.*<sup>618</sup>

*When we were agreeing on terms for our marriage contract we sought the advice of our family, actually our parents were instrumental in negotiating these terms.*<sup>619</sup>

*We tend to respect and give a lot of emphasis to elders, religious leaders and family who play that role of seeing what is going on and providing advice on how to fix it.*<sup>620</sup>

Some interviewees who had no extended family in Australia felt that they didn't know what to do when faced with marital problems:

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<sup>617</sup> Community Leader, Interviewed 18 August 2007.

<sup>618</sup> Community Member, Interviewed 14 April 2007.

<sup>619</sup> Community Member, Interviewed 21 August 2008.

<sup>620</sup> Community Member, Interviewed 14 January 2006.

*It is hard to know where to go. You turn to friends, somebody knows somebody, eventually you get a phone number, and eventually you find somebody to help you.*<sup>621</sup>

*I so desperately wanted my parents around, or my uncles, aunts, actually anybody that I could turn to, but I had only been in the country for 9 months when we had problems and I didn't know who to go to for help.*<sup>622</sup>

If the issues are not resolved by family members, then the couple are likely to seek the advice of community elders or leaders, who can be either religious leaders such as the *'imāms*, and this will be discussed below, or just respected members of the community whose advice is sought by one or both parties:

*We have two parts to the way the community deals with these issues... There are those that are qualified in Islamic law that deal with issues of marriage and divorce. Then there are those that are not necessarily qualified in Islamic law, like the community organisations like the Muslim Women's Association, they deal with such issues at a community level. Of the former there are many individual Shaykhs who do this work, there is no one body, as to the latter there are numerous organisations that deal with social issues.*<sup>623</sup>

*If families haven't been able to resolve the issue, then they will seek the intervention of the community leaders, these leaders have the obligation to sit and listen to both parties put their case as to the source of their problems – sometimes*

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<sup>621</sup> Community Member, interviewed 18 December 2003.

<sup>622</sup> Community Member, interviewed 1 December 2007.

<sup>623</sup> Religious Leader, interviewed 25 January 2003.



*it is nothing more than a communication problem. In other cases it could be more complex issues that require quite long term periods of counselling.*<sup>624</sup>

One such leader interviewed remarked upon the difficulties of such a responsibility:

*I regularly have young couples come to see me, usually they have tried to resolve their issues themselves or with their families, but things have not worked out. Sometimes it takes just a short session to fix things, but mainly it requires several meetings with both before the issues can be resolved. If it looks like there is no chance of reconciliation, then I recommend that they seek the advice of an 'imām.*<sup>625</sup>

*When things go wrong, this is where as a community leader I find that morals can be thrown out the window – it doesn't matter how religious you are, doesn't matter how much you think you are trying to abide by it, certain people take advantage of others because the materialistic world takes over. Sometimes it is good to remind people that their marriage contract was one made in accordance with the moral principles of Islam, and that that should guide their interaction with one another.*<sup>626</sup>

Quite often these community leaders are accessed through one of the many organisations that serve the needs of the Muslim community. The role of these organisations is very important as they are often the first place that people turn to when they need help. Yilmaz argues that such community agencies are well placed to resolve family problems through the process of counselling or mediation and could

<sup>624</sup> Community Leader, Interviewed 10 March 2003, 11 July 2008.

<sup>625</sup> Community Leader, Interviewed 5 June 2006, 23 July 2008.

<sup>626</sup> Community Leader, Interviewed 1 February 2007.

often be the first port of call for those in need.<sup>627</sup> This is reflected in the responses of the interviewees:

*The community has existing structures at a federal and state level, but we don't have a clear format of who does what. But specific communities usually only turn to their specific organisations – and when things go wrong that is where they go to.*<sup>628</sup>

*They come into our office and ask to speak to an 'imām, we try to help them first by speaking to them and if possible reconcile the relationship, get them to understand what their rights and responsibilities are, if we can't resolve it then we refer them to the 'imām.*<sup>629</sup>

One of the key roles played by these organisations is their referral role, that is, even if they themselves can't help the person who comes to them, they can certainly advise them on where to go. This is particularly important as these organisations usually have close links with the religious leaders:

*The community organisations play an important part of the whole process...that is where our staff refer the couple to the appropriate people. Most assessments are done at this level. If mediation needs to take place, then it is planned and set out for the couple with a specific religious leader agreed to by the couple and their family. When the mediation takes place the leader and our staff are there to help sort it out. When the decision to divorce is made then the religious leader handles it from then on because it*

<sup>627</sup> Yilmaz, above n553 at 5.

<sup>628</sup> Community Leader, Interviewed 17 June 2008.

<sup>629</sup> Community Worker, Interviewed 15 March 2003.

*then becomes an Islamic law issue – the community workers will then help if there is a fall-out.*<sup>630</sup>

*The process allows time for people to think about their actions, and we have a case by case approach, we have case plans to work with each couple. I think this reduces the demand on the formal court system. But not all cases can be dealt with in such a way. But overall the amicable mediation process takes more time, effort, counselling and support but the outcome is much better for the whole family unit. Our mediation process reduces the pain and agony, because we do case planning for the children and provide support for the children.*<sup>631</sup>

Whilst there are many community organisations that people turn to for assistance, it is important to appreciate the crucial role that is played by the women's organisations such as the Muslim Women's Association. This particular organisation manages the only Muslim women's refuge in Australia, and has been doing so for over twenty years. Thus, as part of the job of providing emergency accommodation and assistance to women, many of whom are fleeing because of domestic violence or marital discord, they play a pivotal role in supporting many Muslim women through the resolution of family law issues. As one of their staff members remarked:

*We provide much needed support for women going through the process of divorce. We would advocate on her behalf, guide her to a lawyer or to access legal assistance and give her valid religious reasons she can present,*

<sup>630</sup> Community Leader, Interviewed 5 June 2006, 23 July 2008.

<sup>631</sup> Community Worker, Interviewed 10 June 2003, 4 July 2008.

*and also try to reason with the 'imām... We talk to the 'imām, debate with him about the rights and wrongs of the situation.*<sup>632</sup>

The importance of their work can also be seen from the responses of some of their clients who were interviewed:

*We rely entirely on the women from the Support Centre and the Muslim Women's Association for help and advice about what to do and where to go.*<sup>633</sup>

*They (social workers) asked me what I wanted to do, what my demands were, and whether there was any chance of reconciliation – they appeared to genuinely be able to help...I told them I wanted to proceed with the divorce process, both under Islamic law and under Australian law.*<sup>634</sup>

*I had nowhere to go...I contacted the MWA and I was very afraid but when I spoke to them I felt at ease and once I saw them I was even more comfortable, and when I arrived at the centre I felt even better.*<sup>635</sup>

It is important to acknowledge that the women's organisations play a pivotal role in the community, a role that quite often is not recognised. This is reflected in the work of Bouma and Brace-Govan, as they contend that 'Women have played an under-sung role in processes of religious settlement, the negotiation of religious and cultural

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<sup>632</sup> Community Worker, Interviewed 18 August 2007.

<sup>633</sup> Community Member, Interviewed 14 January 2006.

<sup>634</sup> Community Member, Interviewed 11 October 2006.

<sup>635</sup> Community Member, Interviewed 6 March 2006.

diversity and in the emergence of multicultural Australia'.<sup>636</sup> This is quite true of Muslim women's organisations and the role they play in supporting women through these unofficial community processes. This point will be considered below in the context of the need to address the gender concerns raised by these processes.

However the focal point of the community processes under discussion is the religious leaders known as *Shaykhs* or *'imāms*. Most of those interviewed drew attention to the central role of these people, for example one community leader said:

*People rely on the 'imāms to help them sort out any issues that arise in their relationship...so they will go to an 'imām and ask them to resolve their problem. These sorts of things don't really surface unless there are problems in a relationship, so when they start to face a situation of conflict or dispute and they start to consider the possibility of separation or counselling that is when they start to look at what Islamic family law can offer to deal with the particular problem. So at that point they come to the 'imām or our office for help.*<sup>637</sup>

As was mentioned earlier in the discussion, these leaders are usually associated with particular mosques. Indeed it is mosques and organisations associated with mosques that are the venue for most of the community dispute resolution processes. This is because, as Wise and Ali argue, mosques have become more than just places of worship, as 'they have at once become the spiritual centres for symbolising the existence of Islam, collectivising Muslims, and teaching and training Muslims about

<sup>636</sup> Bouma & Brace-Govan, above n70 at 159.

<sup>637</sup> Community Leader, Interviewed 15 March 2003.

their religious values and practices. Mosques also act as the centres of religious, educational, cultural and social activities'.<sup>638</sup>

It is important to remember that these mosques are closely linked to the community organisations that are in charge of their affairs, including appointing the *'imāms* themselves, thus there are close ties between the *'imāms* and the community organisations referred to above.

What then do these religious leaders do when faced with a couple with family law issues? Some of these *'imāms* gave an insight into the processes which they adopt:

*I mediate between the people and I can solve most of the problem. I have a procedure...people will come to me and I will write their story and after that I will send the letter to the other party to invite them to come and present their side of the story.*<sup>639</sup>

*What happens is that they come to people like me, I help them reach an agreement then I advise them to go to some solicitor to make this agreement legal.*<sup>640</sup>

*We have a whole chapter in the Qur'an to instruct us on the importance of giving people a fair hearing...where Allah (SWT) responds to a complaint by a woman who had been telling the Prophet how she had been treated, and the response comes from God and treats the issue in a really profound way and shows about the importance of listening attentively. It is a good story and*

<sup>638</sup> Wise & Ali, above n30 at 19.

<sup>639</sup> Religious Leader, Interviewed 23 January 2003.

<sup>640</sup> Religious Leader, Interviewed 18 February 2008.

*what it says is to me is that if God had responded to this woman who felt she had been dealt with wrongly...it speaks volumes to me that if someone comes to talk to you about a problem, the importance of listening to them in a non-judgemental way and listen to their grievances and pay attention – you have a duty of care to such a person.*<sup>641</sup>

*I feel, believe me, sometimes I couldn't sleep during the night because I wasn't fair to either party. I do my best to compromise between them to the level which I think I have the right to do it and Islam gives us a lot of discretion to make the two people agree.*<sup>642</sup>

*We have to have the mentality to apply the religion to our present time....Muslims need an open mind and eyes too, this is how our scholars became scholars, because they find solutions to problems existing in their time.*<sup>643</sup>

*Once we hear both sides of the story, then we use Islamic legal principles to help the parties come to an agreement. Of course when it comes to matters of divorce, that is determined according to Islamic Law, but then once we have determined whether or not a divorce has taken place we aim to facilitate negotiation between the parties on other matters, such as property or financial issues.*<sup>644</sup>

Despite attempts by the *'imāms* to come together to resolve these matters as a group or council, many in the community appeared frustrated by the *ad hoc* nature of these

<sup>641</sup> Community Leader, Interviewed 10 March 2003, 11 July 2008.

<sup>642</sup> Religious Leader, Interviewed 23 January 2006.

<sup>643</sup> Religious Leader, Interviewed 7 April 2007.

<sup>644</sup> Religious Leader, Interviewed 25 January 2003.

processes, which can differ depending on which 'imām one goes to see. This was expressed by some interviewees:

*What we have at the moment is personality driven, that is not legitimate and perhaps through greater legitimacy it can be purposeful and resourceful than one based on personal allegiances.*<sup>645</sup>

*Attending one of these meetings is a funny thing...If a Shaykh knows this person, this person will become favourite and everyone will have to agree with him, this is not working for God.*<sup>646</sup>

*Firstly there is the process of individual consultation that does occur. But they tell the man and what they tell the woman – there is no guarantee that it will be consistent...But similar to the Australian family court system...it never gets to a court hearing it gets to facilitation and mediation but not a court hearing.*<sup>647</sup>

*I think that it is very ad hoc, there is no systematic way of dealing with those issues...leaders get called on an ad hoc basis to get involved in a dispute, they don't have the skills, they might have the knowledge of the law but not how to deal with it practically.*<sup>648</sup>

These observations raise some concerns of interviewees about the current community dispute resolution processes, in particular related to the way that some of these processes are conducted. It needs to be appreciated that there is no uniformity

<sup>645</sup> Community Member, Interviewed 11 March 2007.

<sup>646</sup> Community Member, Interviewed 6 July 2003.

<sup>647</sup> Community Leader, Interviewed 5 November 2008.

<sup>648</sup> Community Leader, Interviewed 5 December 2007.



amongst the practices of the 'imāms, and clearly some adhere to procedural rules more closely than others. It is often this *ad hoc* nature that frustrates women participants most, and this will be considered below.

Several of the interviewees also questioned whether the 'imāms currently have all the skills required to resolve family law disputes. Whilst many acknowledged their extensive religious knowledge, they also said that this was not enough; there was a need for dispute resolution skills as well:

*It is important to realise that the Islamic leader is not just a community leader that leads an organisation; it is the person who has an intricate knowledge of Islamic family law. If you have a particular disease it is no use going to a carpenter – so the last resort is the religious leader because they determine the outcome according to the Qur'an and Sunna – so you need a knowledgeable person who can intervene.<sup>649</sup>*

*The success of the process seems to be dependent on the individual religious leader and their openness, their dispute resolution skills, their level of experience....So having the Islamic knowledge does not necessarily mean you have those skills – your lack of tact and communication can actually destroy a marriage that could otherwise have been resolved.<sup>650</sup>*

*I wonder if the mosque committees are questioning the qualification of the 'imāms they appoint....because an 'imām in a non-Muslim country is not like*

<sup>649</sup> Community Leader, Interviewed 15 March 2003.

<sup>650</sup> Community Leader, Interviewed 3 April 2003.

*an 'imām in a Muslim country where they just lead a prayer. You need people of the highest calibre to be an 'imām in Australia.*<sup>651</sup>

Many went further to say that there was a need for further training for 'imāms who dealt with these issues:

*Our religious leaders in my opinion must go through specific training here on becoming marriage celebrants, they must perform a course that equips them with knowledge about family law procedures, how the family law operates here, what is required of them in terms of performing marriages and dealing with divorce issues, understanding the rules and regulations of the family law processes so that they can then educate the community through short information sessions, or on radio to tell people that this is what they can anticipate.*<sup>652</sup>

This is interesting given the fact that many 'imāms commented on how they understood that they resolved these issues in the shadow of Australian family law:

*As an 'imām dealing with these issues we try to be aware of Australian law and strike a balance when we reach a decision for couples.*<sup>653</sup>

*When a couple come to me, I remind them that if they can't agree then they can look forward to a long and costly time in the Family Court, where they may end up with less than what they want.*<sup>654</sup>

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<sup>651</sup> Community Leader, Interviewed 4 November 2007.

<sup>652</sup> Community Leader, Interviewed 10 March 2003, 11 July 2008.

<sup>653</sup> Religious Leader, Interviewed 2 June 2006.

<sup>654</sup> Religious Leader, Interviewed 6 August 2006.

Some questioned whether it should be the role of the *'imāms* to have so much of their time devoted to resolving family law issues:

*We need to help the 'imāms improve their method in managing conflict resolution in marriages.....and leave the religious leaders to do the things that they are supposed to be doing – because dealing with these issues takes up so much time – and allows them to have time to initiate and support other exciting initiatives for the community.*<sup>655</sup>

*I think there needs to be some change in how we do things. Our 'imāms are overworked in this area, is there not a better way to do this, by keeping them part of the process but leaving the actual dispute resolution role to qualified professionals?*<sup>656</sup>

Many of those interviewed expressed a desire to see change in this area from within the community, particularly in having the *'imāms* working more closely together and in a more consistent way:

*I think what they need is a plan and to be made more professional – to consider its legitimacy, its recruitment qualifications, length of service.*<sup>657</sup>

*Establishing a Shari'ah council would be an ideal, but there are so many parts that are missing in the community at the moment, that just trying to fix one aspect like the board of 'imāms makes it difficult if the other parts are not fixed as well.*<sup>658</sup>

<sup>655</sup> Community Leader, Interviewed 5 June 2006, 23 July 2008.

<sup>656</sup> Community Leader, Interviewed 11 March 2003, 28 April 2008.

<sup>657</sup> Community Member, Interviewed 11 March 2007.

*The Jewish community has their Beth Din – whilst it is not officially recognised it is there and I think the Muslim community should have something similar, but the religious leaders would have to get together and agree on who would constitute it and what it would be able to do – with the history of disagreement within the community that would be a big ask.<sup>659</sup>*

Several community leaders spoke about the need for a proper evaluation of the existing community processes and structures, and in particular the need to be reflective and self-critical:

*If we identify our weaknesses then we can improve.<sup>660</sup>*

*We need to realise that Shari'ah is flexible ... you can't apply a law from the desert thousands of years ago to a city life now without contextualising it.<sup>661</sup>*

*Criticising the community structures does not mean seeking their destruction; rather it is a means by which to improve.<sup>662</sup>*

## 6. Gender Concerns

An area that many highlighted as needing to be improved is the gender issue. As the previous chapters discussed, it is this issue that appears to generate the most concern, with many arguing that these dispute resolution processes are not in the best interests

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<sup>658</sup> Community Leader, Interviewed 13 July 2008.

<sup>659</sup> Community Leader, Interviewed 6 July 2008.

<sup>660</sup> Religious Leader, Interviewed 11 December 2003, 2 June 2006, 17 September 2008.

<sup>661</sup> Community Leader, Interviewed 3 April 2003.

<sup>662</sup> Community Leader, Interviewed 1 February 2007.

of women, who are pictured as being vulnerable to community pressure which forces them to be part of these processes. While this issue will be discussed in detail in later chapters there is no doubt that the research presented in this chapter recognises that there are aspects of these community processes that need to be addressed to make them better for women, particularly in ensuring that there is due process for the women involved. Some women appeared to be frustrated by feelings of not being heard in a male dominated process:

*In the end result, in the negotiations, for example one of the men I took along, my brother-in-law, was in a different religious group to the men on the panel, as if I understand or care, but I was in the middle and needed my affairs sorted out and the men were fighting about the different sects – can you believe that – why were they there? I didn't even understand or care about what they were fighting about. It was very heated – men's egos.<sup>663</sup>*

*If the woman or her family are well connected with the Shaykh then it may be OK, but otherwise it is very difficult for a woman who is on her own.<sup>664</sup>*

Yet it appears that in more cases than not it is the men who are dragged before the *'imāms*, as it is the women who are more likely to go to the *'imām* first. As one *'imām* said:

*I can swear that each day I have more than ten calls from women asking about their rights – I push and support them all the way – Allah and the Prophet gave you these rights; don't give them up.<sup>665</sup>*

<sup>663</sup> Community Member, Interviewed 11 March 2007.

<sup>664</sup> Community Member, Interviewed 6 July 2003.

Another said:

*We find that it is the women who come to us first and then we proceed to contact the husband to get him to come to a meeting.*<sup>666</sup>

This issue will be considered in more detail in the next few chapters, particularly in looking at why women are more likely to seek the intervention of an 'imām. However it is important to appreciate that the impact of these community processes on women is a crucial consideration in any evaluation of their effectiveness.

The discussion above has demonstrated that there are many aspects to the way that Muslims resolve their family law issues in an Australian context. As one community leader said:

*We know that the community has its own structure and ways of doing things that it gravitates around and adjusts and negotiates because being in Australia means that we have to navigate our way in determining how to apply Islamic family law.*<sup>667</sup>

This structure involves family, community organisations, community and religious leaders, with each one having an important role to play in the whole process. It is argued that without an adequate appreciation of all of these aspects, one cannot have a true understanding of how Muslims deal with their family law issues..

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<sup>665</sup> Religious Leader, Interviewed 6 August 2006.

<sup>666</sup> Religious Leader, Interviewed 23 January 2003.

<sup>667</sup> Community Leader, Interviewed 10 March 2003, 11 July 2008.

## 7. Conclusion

This chapter has begun detailing the way in which Australian Muslims apply Islamic family law, firstly by understanding the importance of alternative forms of dispute resolution from an Islamic perspective and then considering how these processes have been adapted to suit the needs of Muslims in Australia. It is clear that religion and in particular Islamic principles associated with marriage and divorce are important to many Muslims in Australia, and they seek to rely on these principles in a variety of ways, including through family members, respected community leaders or elders, community organisations and ultimately religious leaders. This questions the common assumption that there is only one law applicable in Australia. Rather, it strongly supports the analysis in chapter 3 that in reality there can be multiple normative orders which govern the way we live our life. This is at the essence of a pluralistic understanding of law.

It is significant to note that, in these areas of marriage and divorce, where the issue is determining the status of a relationship, whether a divorce has occurred or not, Islamic legal principles are closely adhered to. Yet when it comes to the related issues of property settlement, then this is more about facilitating an agreement between the parties, with all in the process being very aware that they are operating in the shadow of Australian family law. This process questions the assertions in the public debates that the Muslim community wants to establish a parallel legal structure, quite separate from the mainstream legal system. Rather, this research indicates that one of the greatest concerns of Muslim community leaders is to seek ways to integrate the

existing community dispute resolution processes better into the existing legal framework. As discussed earlier, this is a critical issue currently facing liberal democratic states worldwide with Muslim minority groups.

This chapter has introduced the informal community processes. The next three chapters on marriage and divorce will detail the substance of the issues decided in these processes and the issues that arise as a result. However, as has been emphasised above, despite the assumption that when Muslims talk about accommodation or recognition of Islamic law, their focus tends to be solely on accommodating a body of law, the reality is that understanding the processes used in applying these principles and ultimately resolving the disputes is just as important. It is also critical to appreciate that, as the research indicates, the Muslim community itself is aware of the need to address some of the limitations of the current community processes, particularly in regards to addressing gender concerns. Indeed, as previous chapters have shown, this is crucial if there is to be a greater acceptance of the need to accommodate these processes within the legal framework.



# Chapter 7

## Marriage

### 1. Introduction

Marriage is a central part of Islamic family law and this chapter will seek to demonstrate how the Islamic law of marriage is being applied in Australia. Whilst it is not part of or recognised by the official Australian law, it is still relied upon by many Muslims in Australia. In particular, this chapter will document, based on the empirical findings of this research, the way in which Muslims marry in Australia and how this intersects with Australian law. This thesis argues that Australian Muslims are effectively navigating their way between two sets of legal principles.

The chapter considers the different stages of an Islamic marriage, the role of the *mahr* (dower), the use of a marriage contract and the financial rights of the parties during the marriage. For each of these issues it is necessary to consider the Islamic legal principles and their intersection with Australian law, as this is central to understanding how these principles are being applied in an Australian context.

This chapter argues that, whilst there are some concerns raised by the community about the intersection of Islamic and Australian laws of marriage, in fact, there is

enough flexibility in Australian law to allow Muslims to apply key aspects of Islamic law if they so desire. However the Muslim community seems not to be aware of this potential opportunity for the application of Islamic law. Some scholars writing in the UK and US contexts describe the application of Islamic law in these countries as a new phase in the development of *Shari'ah*, calling it *angrezi shari'ah* (English *Shari'ah*) and *amrikan shari'ah* (American *Shari'ah*). Could this mean that there is also an emerging *australi shari'ah* (Australian *Shari'ah*)? There is no doubt that Muslims in Australia are indeed finding ways to apply Islamic law in a relevant and local context but, as argued in the previous chapter, it is not appropriate to give it labels or names which imply that the *Shari'ah* is developing a particular national identity. Rather *Shari'ah* is being applied as it should be, adapting to the particular needs of the community wherever it may be. Furthermore, this research demonstrates that adopting a pluralistic understanding of family law in Australia more accurately describes how law is being applied, rather than assuming that official law is the only relevant and applicable law.

This leads to the key question regarding what kind of official recognition or accommodation should be given to the laws and practices that people rely upon outside of the formal legal system, given the existence of unofficial legal pluralism in Australia? In particular, what does the call for greater recognition or accommodation of *Shari'ah* or Islamic law in Australia mean? And in what ways can the official legal system address the needs of Australian Muslims?

This chapter will demonstrate that in the area of marriage there is a great deal of scope in Australia's marriage laws to cater to the needs of the Muslim community.

Therefore marriage laws provide an example where there are more commonalities than differences between the religious laws and principles of Muslims and Australian laws of marriage. The analysis of multicultural citizenship as discussed in earlier chapters demonstrates that accommodating the religious principles of minority groups is not necessarily a difficult thing for a state to achieve. A greater awareness of the diverse practices of minority groups and less reliance on common assumptions may assist in developing policies of accommodation which will help the integration of minority groups rather than be a destabilising force in society. However it is clear that there is very little understanding of these opportunities both by the Muslim community and wider Australian community. This has meant that any discussion about the place of Islamic law in Australia has been sensationalised and based more on assumptions than on an understanding of the needs of the Muslim community

## **2. General Principles of Marriage under Islamic Law**

### **2.1. The Significance of Marriage in Islam**

The first part of this chapter will explore the concept of marriage in Islam, considering its significance and more importantly providing an overview of the key elements of a valid marriage according to Islamic law. Marriage plays a very important role in the Muslim family, as it ‘brings together individual Muslims, male and female, and forms the foundation of a successful Islamic society based on mutual rights and duties as well as the perpetuation of humanity’.<sup>668</sup> Ali argues that the ‘central idea in Muslim family law is the institution of *nikāh* or marriage. Almost

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<sup>668</sup> Hedaya Hartford, *Initiating and Upholding an Islamic Marriage* (2007) at 13.

every legal concept revolves around the central focal point of the status of the marriage'.<sup>669</sup>

Literally, the word *nikāh* means 'to collect things'. Technically, the word *nikāh* refers to cohabitation. In *Shari'ah*, *nikāh* refers to a contract, hence *nikāh* is also called '*aqd* (a contract).<sup>670</sup> From a legal point of view Islam views marriage as a contract between two people, and as Ali notes, all major writers on Islamic law agree that marriage 'according to Islam is in the nature of a contract'.<sup>671</sup> However this should not detract from the religious and spiritual significance of the relationship. There are many narrations from the Prophet that indicate the importance of marriage to an Islamic way of life, as it is reported that the Prophet has said:

Marriage is my exemplary way (*sunna*); those who are averse to my example are also averse to me.<sup>672</sup>

He who marries secures one half of his religion, so let him beware of Allah where the other half is concerned.<sup>673</sup>

He who has means should marry.<sup>674</sup>

One who marries for the sake of Allah, or gives in marriage for the sake of Allah, earns the right to Allah's friendship.<sup>675</sup>

<sup>669</sup> Shaheen Ali, *Gender and Human Rights in Islam and International Law* (2000) at 151.

<sup>670</sup> Ibid.

<sup>671</sup> Ibid at 152.

<sup>672</sup> Cited in 'imām Al-Ghazali, *The Proper Conduct of Marriage in Islam, Adab an-Nikah, Book 12 of Ihya' Ulum Ad-din* ( Muhtar Holland trans, 2007 ed) at 8.

<sup>673</sup> Ibid at 9.

<sup>674</sup> Ibid at 8.

<sup>675</sup> Ibid.

We have not seen anything better than marriage for those who are in love.<sup>676</sup>

The *Qur'an* itself also emphasises the importance of marriage, as it is described as a fortification<sup>677</sup>, symbolising the strength of the institution, and its role in protecting the morality of believers.<sup>678</sup> The relationship between a husband and wife is described in the *Qur'an* in the following terms:

They are your garments. And ye are their garments.<sup>679</sup>

This refers to the complementary nature of the relationship, that 'spouses, like garments, serve to protect each other from the outside world, to adorn and beautify each other i.e., to bring out the best in each other, to provide comfort and support to each other'.<sup>680</sup> This verse is surrounded by many references to the nature of the marital relationship, as one being based on love and compassion:

And among His Signs is this, that He created for you mates from among yourselves, that ye may dwell in tranquillity with them, and He has put love and mercy between your (hearts): verily in that are Signs for those who reflect.<sup>681</sup>

<sup>676</sup> Cited in Hartford, above n668 at 9.

<sup>677</sup> Abul A'ala Maudoodi, *The Laws of Marriage and Divorce in Islam* (1993) at 6.

<sup>678</sup> Ibid.

<sup>679</sup> The Holy Qur'an, Chapter 2 verse 187.

<sup>680</sup> Muhammad Abdul Bari, *Marriage and Family Building In Islam* (2007) at 4-5.

<sup>681</sup> The Holy Qur'an, Chapter 30, verse 21.

It is He Who created you from a single person, and made his mate of like nature, in order that he might dwell with her (in love)..<sup>682</sup>

The parties should either hold Together on equitable terms, or separate with kindness.<sup>683</sup>

Most of the religious leaders interviewed for this research, when asked about marriage in Islam, emphasised these *Qur'anic* verses and narrations. They said that they often spoke about the importance of marriage in Friday sermons, lectures, study circles and on various community radio programs:

*It is a union between a man and a wife that is based on several principles, including the satisfaction of desires, procreation, love and mercy and the building of a family unit.*<sup>684</sup>

*I often give my Friday sermon about an aspect of marriage and family life, because it is something that everybody needs to know about.*<sup>685</sup>

*Everyday I deal with issues to do with marriage...I am always answering calls and questions about marriage.*<sup>686</sup>

*There really is no relationship more sacred than that between husband and wife...I try to remind people of the greatness of the bond that brings them together.*<sup>687</sup>

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<sup>682</sup> The Holy Qur'an, Chapter 7 verse 189.

<sup>683</sup> The Holy Qur'an, Chapter 2 verse 229.

<sup>684</sup> Religious Leader, Interviewed 17 April 2006.

<sup>685</sup> Religious Leader, Interviewed 7 July 2008.

<sup>686</sup> Religious Leader, Interviewed 2 June 2006.

## 2.2. Legal Requirements of an Islamic Marriage

Marriage according to Islamic law is quite a simple concept. Essentially, marriage is a contract and as Nasir argues, ‘the marriage contract can only be concluded through the two essentials or pillars of offer and acceptance’.<sup>688</sup> The law does not insist on any particular form in which this contract is entered into or on any specific religious ceremony, although there are different traditional forms prevalent amongst Muslims in different parts of the world.<sup>689</sup> Pearl notes that this simple form of marriage is almost always accompanied by religious ceremonials.<sup>690</sup> These can vary from country to country and culture to culture, and even occur in different languages. The majority of Islamic scholars agree that the contract can be solemnised in languages other than Arabic.<sup>691</sup> Regardless of the language, it begins with a statement from the bride or her guardian that means ‘I marry you’ and an immediate acceptance by the groom of ‘I marry her’ or ‘I accept her in marriage’.<sup>692</sup> The offer and acceptance must occur at the same time, as Nasir notes that ‘if the meeting is over after the offer and before the acceptance, the offer becomes void’.<sup>693</sup>

A central component of the contract is the dowry or *mahr*, which is ‘a compulsory payment which must be made by the bridegroom to the bride (not her relatives) at the time of marriage’.<sup>694</sup> If the amount is not specified at the time of the contract, the marriage is still valid and the dowry is estimated according to the customary standards

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<sup>687</sup> Religious Leader, Interviewed 6 August 2006.

<sup>688</sup> Nasir, Jamil *The Islamic Law of Personal Status* (1986) at 42.

<sup>689</sup> Ibid.

<sup>690</sup> David Pearl, *A Textbook on Muslim Personal Law* (2<sup>nd</sup> ed, 1987) at 41.

<sup>691</sup> Nasir, above n688.

<sup>692</sup> Ahmad ibn Naqib Al-Misri, *Reliance of the Traveller; A Classic Manual of Islamic Sacred Law*, (Nuh Ha Mim Keller trans, 1999 ed) at 517.

<sup>693</sup> Nasir, above n688.

<sup>694</sup> Jamila Hussain, *Islam Its law and Society* (2<sup>nd</sup> ed, 2003) at 82.

of the time and place.<sup>695</sup> The *mahr* will be discussed in detail later in the chapter, but it is important to appreciate that it is one of the most significant aspects of the marriage contract.

The spoken words constitute the actual marriage contract, although, as the discussion below will demonstrate, it is encouraged that the parties put it in writing, and to include many more details about the agreement reached by them. It is also a requirement that there are two witnesses to this contract, with the purpose of ensuring that the marriage is publicised.<sup>696</sup> This publicity is important as some jurists argue that ‘an agreement to keep the marriage secret invalidates the contract’, whilst others maintain that the contract is valid but ‘secrecy is nonreligious and reprehensible’.<sup>697</sup> This needs to be understood in light of the fact that publicity was often the factor which distinguished ‘legitimate unions from illicit ones’, thus the actual marriage ceremony has an important role to play in this regard.<sup>698</sup>

In regards to capacity, it is central to the formation of the marriage contract, that both parties must have capacity, because the contract shall be deemed void if either or both parties are devoid of legal capacity.<sup>699</sup> Whilst there are some differences in opinion amongst the various schools of jurisprudence, the minimum age is that of reaching puberty, with the presumption that this is reached at 15 years of age, although evidence could be brought to say that it has been reached earlier.<sup>700</sup> Whilst this does

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<sup>695</sup> Hammudah Abd al Ati, *The Family Structure in Islam* (1995) at 60.

<sup>696</sup> Nasir, above n688 at 49; Ibn Rushd *The Distinguished Jurist's Primer, Vol II, Bidayat al-Mijtahidwa Nihayat al-Muqtasid* (Imran Ahsan Khan Nyazee trans, 1996 ed) at 19; Al-Misri, above n692 at 518.

<sup>697</sup> Abd al Ati, above n695 at 60.

<sup>698</sup> Ibid at 61.

<sup>699</sup> Nasir, above n688 at 43.

<sup>700</sup> Pearl, above n690 at 42.



raise the issue of child marriage, Hussain notes that most Muslim countries today have legislated to provide a minimum age of marriage.<sup>701</sup> This will be discussed below when considering how Islamic marriage laws are being applied in Australia.

Another requirement related to capacity is that the parties need to be free from any impediments preventing their marriage, which includes the requirement that the parties must not be within the prohibited degrees of affinity and that a Muslim woman may not marry a non-Muslim man.<sup>702</sup> The prohibited degrees of affinity are set out in the *Qur'an* and are that 'a person may not marry his or her ascendants, descendants, siblings, nieces and nephews, aunts and uncles, in-laws, step-parents and step-children and their descendants'.<sup>703</sup> The prohibition is also extended to relatives that arise out of what Islam terms as foster relations, which refers to the relationship that 'is deemed to come into existence between a woman who breast feeds a child and that child'.<sup>704</sup> Generally speaking, Muslim men are allowed to marry Jewish or Christian women, but a Muslim woman is prohibited from marrying a non-Muslim man.<sup>705</sup>

An important aspect of the marriage contract is that both parties have voluntarily entered into it. Whilst the majority of the Islamic schools of jurisprudence require the bride's marriage guardian, who is usually her father or grandfather, to agree to the marriage, there is no doubt that she cannot be coerced or forced to enter into a

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<sup>701</sup> Hussain, above n694 at 79.

<sup>702</sup> *Ibid* at 78.

<sup>703</sup> *Ibid* at 80.

<sup>704</sup> *Ibid* at 80.

<sup>705</sup> *Ibid* at 79.

marriage contract.<sup>706</sup> The consent of both parties is an essential element of marriage, as the *Qur'an* gives women this right:<sup>707</sup>

Do not prevent them from marrying their (former) husbands, if they mutually agree on equitable terms.<sup>708</sup>

This is also supported by the practice of the Prophet, indicated by the following *hadith* or narrations of the Prophet:

If a man gives his daughter in marriage in spite of her disagreement, such a marriage is invalid.<sup>709</sup>

A young woman once came to the Prophet complaining that her father wished to force her to marry her cousin. The Prophet told her that she had the right to reject her father's choice. But she replied, 'I accept my father's choice, but I wished to let the people know that our guardians cannot force us in marriage'.<sup>710</sup>

The matter of choice is necessary for both parties. This stands in contrast to the common understanding that people have that in Islam women can be forced into marriage. Unfortunately, despite the religious legal requirement that consent needs to be given, many Muslims around the world still ignore this requirement and compel girls to marry against their will. Ahsan, writing about the UK context, argues that although Islam emphasises freedom of choice and consent of the couple, 'the parents,

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<sup>706</sup> Abd al-Ati, above n695 at 76.

<sup>707</sup> Ibid.

<sup>708</sup> The Holy Qur'an, Chapter 2, verse 232.

<sup>709</sup> Cited in Abdul-Bari, above n680 at 22.

<sup>710</sup> Ibid.

especially those whose norms and values are embedded in family and village customs and traditions rather than in Islamic law, often pressure children to accept', this being a clear abuse of Islamic norms.<sup>711</sup>

Therefore it is clear from the discussion above that marriage in Islam is a contract between the two parties. This is emphasised by the fact that a marriage is centred around the offer and acceptance of the couple, and unlike other religious traditions its validity does not require any officiating by a priest or clergy. Furthermore, being a civil contract, the parties retain their personal rights as against each other, as well as against others. Marriage in Islam is not a temporary union and is meant for the entire span of life. Dissolution of marriage is, however, permitted if it fails to serve its objectives and has irretrievably broken down. This can be likened to a breach of the contract. The power to dissolve the marriage-tie rests with both parties and specified forms have been laid down for that, which will be considered in detail in chapters 8 and 9. Many of those interviewed saw the nature of marriage as being a contractual arrangement, as one said:

*Marriage is an agreement or a contract between a man and a woman to marry according to Islamic requirements.....the couple is able to negotiate the terms of this arrangement.*<sup>712</sup>

However, there is no doubt that marriage in Islam has considerable religious importance, with many seeing it as a contract made before God. In particular it is argued that despite the autonomy granted to the couples to negotiate the particular

<sup>711</sup> Manazir Ahsan, 'The Muslim Family in Britain' in Michael King (ed) *God's Law versus State Law – the Construction of an Islamic Identity in Western Europe* (1995) at 24.

<sup>712</sup> Community Leader, interviewed 11 March 2003, 28 April 2008.

terms of their marriage contract, many of the rights and obligations of the parties are determined by religious principles which they cannot contract out of. This spiritual dimension of the relationship was also mentioned by several people interviewed for this research:

*Marriage is more than just a relationship between two people; it is a contract they enter into before God. It is not just about enforceability in this life....I know that if my husband was to not act in accordance with the contract then he is answerable to God.*<sup>713</sup>

### **3. How Muslims Get Married in Australia.**

The discussion will now turn to how Muslims in Australia apply Islamic marriage laws, in particular the focus will be to document the processes of marriage for Muslims in an Australian context. It is argued that Australian Muslims attempt to abide by both Australian and Islamic marriage laws, and in this way are playing the role of ‘skilful legal and cultural navigators’<sup>714</sup>, having found ways to harmonise the requirements of both sets of laws into the way that they officially form marriages. In order to adequately understand this process, it is necessary to briefly consider the concept of marriage under Australian law and how Muslims relate to it.

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<sup>713</sup> Community Member, Interviewed 3 February 2008.

<sup>714</sup> Black, above n485.

### 3.1. The Concept of Marriage in Australian Law

It has often been noted that Australia's marriage laws are quite broad and able to accommodate the different marriage customs of the many diverse groups within the country. Most notably, this refers to the recognition of marriages conducted by marriage celebrants who are ministers of religion. In such a case the marriage may be 'solemnised according to any form and ceremony recognised as sufficient for the purpose by the religious body or organisation of which he or she is a minister'.<sup>715</sup> Black argues that in the area of marriage it is not difficult for Muslims to comply with both sets of laws, as the *Marriage Act 1961* (Commonwealth) 'allows for marriages to be performed and registered by recognised marriage celebrants, who for Muslims may be their *'imām*, and without the need for a separate registering event or ceremony'.<sup>716</sup> It is quite common for an *'imām* to be a registered marriage celebrant, meaning that when Muslims want to get married, they arrange it with an *'imām* who can both oversee a religious marriage ceremony as well as ensure that their marriage is registered under Australian law. This certainly makes it more convenient for couples, as several *'imāms* said:

*As a marriage celebrant, I can satisfy the requirements of both Australian law and Islamic law.*<sup>717</sup>

*The couple come to organise their marriage ceremony, and as a registered marriage celebrant it can coincide with a registered marriage under Australian law.*<sup>718</sup>

<sup>715</sup> s.45 Marriage Act 1961 (Cth).

<sup>716</sup> Black, above n485 at 216.

<sup>717</sup> Religious Leader, Interviewed 17 April 2006.

It is interesting that the common practice is for Muslims to involve an *'imām* in their marriage ceremony, yet as was noted above, there is no requirement under Islamic law that an *'imām* needs to be involved, as the requirements for a valid marriage contract just need to be met. However it is very rare for a Muslim couple to marry without the ceremony being officiated by an *'imām* and this will be discussed further below.

On the one hand Australian law recognises marriages made according to specific cultural and religious ceremonies, yet on the other hand the concept of the marriage itself remains one that is derived from canon law.<sup>719</sup> Therefore, the law itself which purports to be secular and non-religious actually reflects Christian ideals and traditions.

To explore this further, the legal definition of marriage which is derived from the case *Hyde v Hyde and Woodmansee*<sup>720</sup> will be considered, where it was held that 'Marriage, as understood in Christendom, may....be defined as the voluntary union for life of one man and one woman, to the exclusion of all others'.<sup>721</sup> This definition is part of Australian law, as the Marriage Act also defines marriage to mean 'the union of a man and a woman to the exclusion of all others, voluntarily entered into for life'.<sup>722</sup> Parkinson and Behrens argue that the use of the words 'as understood in

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<sup>718</sup> Religious Leader, Interviewed 2 June 2006.

<sup>719</sup> Belinda Fehlberg & Juliet Behrens, *Australian Family Law: The Contemporary Context* (2008) at 121.

<sup>720</sup> (1866) L.R. 1P.& D. 130 at 133

<sup>721</sup> *Ibid.*

<sup>722</sup> s.5 Marriage Act 1961 (Cth).

Christendom' makes it a culturally specific definition of marriage.<sup>723</sup> In such a way the law on marriage 'combines deference to a range of religious and cultural practices in relation to marriage ceremonies with a culturally and religiously specific view of what constitutes a marriage'.<sup>724</sup> This questions the supposed neutrality of the secular state which is central to many liberal democratic states. As discussed in chapter 3, people often fail to see the religious historical context of the existing state laws, instead relying on the argument that there is a separation of religion and state, thus making it more difficult to accept the need for the religious norms of minority groups to be accommodated by the official system.

The Marriage Act also sets out certain requirements for a valid marriage; such requirements are derived from the above definition of marriage. Firstly, that neither of the parties is lawfully married to another person, as s.23B(1)(a) of the Marriage Act<sup>725</sup> makes it clear that the marriage is void where either of the parties is at the time of the marriage lawfully married to somebody else. This is reinforced by s.94 of the Marriage Act<sup>726</sup> which makes bigamy a criminal offence.

Furthermore, the parties must not be within a prohibited relationship which is defined as being between a person and an ancestor or descendant of the person or between a brother and sister.<sup>727</sup> This accords well with the principles of marriage under Islamic Law as it too has the same prohibitions.

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<sup>723</sup> Patrick Parkinson & Juliet Behrens, *Australian Family Law in Context, Commentary and Materials* (2004) at 408.

<sup>724</sup> Fehlberg & Behrens, above n719 at 121.

<sup>725</sup> S. 23 B (1)(a) Marriage Act 1961 (Cth).

<sup>726</sup> S. 94 Marriage Act 1961 (Cth).

<sup>727</sup> Fehlberg & Behrens, above n719.

Another central requirement is that the parties consent to the marriage. Again despite the myths and misconceptions that portray forced marriages as an Islamic practice, the discussion above emphasised that it is also a requirement under Islamic law that both parties freely consent to the marriage. This is reinforced by the fact that marriage in Islam is seen as a contract that relies on offer and acceptance for validation. Whilst undoubtedly there are cases where a young woman may be pressured to marry someone chosen by their family, community leaders and 'imāms have worked hard for many years to educate the community that this is not an Islamic practice.<sup>728</sup> In fact, many 'imāms indicated that they go to great lengths to satisfy themselves that the parties have consented, some even talking to the girl alone to ensure that she is happy with the marriage.<sup>729</sup> Some religious and community leaders recounted their experience in the following way:

*The 'imām will not allow a marriage contract to take place unless the girl consents; if the 'imām gets a glimpse of her lack of consent then the marriage ceremony will not proceed....Islamically the girl has complete freedom to choose her spouse.*<sup>730</sup>

*There are some cultural practices that encourage arranged marriages but this is against Islam.*<sup>731</sup>

*From my experience arranged marriages do occur and cause some problems, particularly those who marry people from overseas...But usually these*

<sup>728</sup> Personal Communication with 'imāms and Community Leaders.

<sup>729</sup> See interviewee comments below.

<sup>730</sup> Religious Leader, Interviewed 25 January 2003.

<sup>731</sup> Religious Leader, Interviewed 7 May 2006, 17 August 2008.



*marriages end up failing. Also it needs to be said that these are cultural practices not sanctioned by Islam.*<sup>732</sup>

*We need to understand what we mean by arranged marriages...whilst many parents can assist their child to find the right partner...nobody can be forced into marriage...there was a case where a girl did not want to marry someone her parents wanted her to, she had ran away from home, well after the intervention of the 'imām the issue was resolved.*<sup>733</sup>

*We do get calls from young women that their parents are forcing them to marry someone they do not want to marry...in cases where we have intervened particularly with the assistance of a religious leader we have been able to rectify the situation.*<sup>734</sup>

These comments demonstrate that community leaders are aware of and are responding to this issue. It is interesting to note that this issue is an example where a greater understanding of Islamic principles and an awareness of the distinction between culture and religion can help to address this social concern. In this way, relying on religious principles is integral to the enhancement of the rights of Muslim women in Australia.

There is also the requirement that the parties are of a marriageable age, this being 18 years according to s.11 Marriage Act.<sup>735</sup> Section 12 of the Marriage Act allows this to be lowered for one party to a marriage, as it allows any person who is at least 16 years

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<sup>732</sup> Community Leader, Interviewed 6 August 2006.

<sup>733</sup> Community Worker, Interviewed 2 September 2006.

<sup>734</sup> Community Leader, Interviewed 18 August 2007.

<sup>735</sup> s.11 Marriage Act 1961 (Cth).

of age to apply to the court for an order authorising him or her to marry somebody who is over 18 years.<sup>736</sup> This is granted if the ‘circumstances of the case are so exceptional and unusual as to justify the making of the order’.<sup>737</sup> Dickey observes that judges have adopted a ‘distinctly liberal interpretation of this requirement’, although the circumstances must relate to the particular parties concerned and not a general group to which they belong. For example, permission to marry was not granted in a case where it was argued marriage at a young age is in accordance with Greek law and custom.<sup>738</sup> Whilst Islamic law sets the minimum age at puberty, there is no evidence that the Muslim community have any problems with the age set at 18, with many *’imāms* indicating that they do not encourage people to marry before that age anyway:

*The community understands that the needs of people have changed and that young people are not marrying as young as they used to.*<sup>739</sup>

It is interesting to appreciate that in Australia the law relating to marriageable age was based upon the presumed age of puberty. Until relatively modern times, it was 12 years for girls and 14 years for boys, which is even younger than the presumed age of puberty under Islamic law.<sup>740</sup> However, whilst most *’imāms* said that they would not encourage anybody to marry younger than 18, many did express a view that they felt it somewhat hypocritical of a legal system to have the age of consent to sexual intercourse lower than the minimum age of marriage as, in their opinion, this would

<sup>736</sup> S.12 Marriage Act 1961 (Cth).

<sup>737</sup> s.12(2) Marriage Act 1961 (Cth).

<sup>738</sup> A. Dickey, *Family Law* (5<sup>th</sup> ed, 2007) at 132; *Re S.G.* (1968) 11 FLR 326 at 328.

<sup>739</sup> Religious Leader, Interviewed 4 September 2007.

<sup>740</sup> Dickey, above n738 at 130.

serve to allow for sex outside of marriage, something deemed a sin according to Islam:

*The age issue isn't really a problem for the community, but what baffles the community is the marriageable age is different to the age of consent to sexual relations – so there is a complex contradiction there.*<sup>741</sup>

Again, whilst most 'imāms said that they would not conduct a marriage ceremony for those below the minimum age, there were those who indicated that they would officiate over a marital agreement pursuant to Islamic law, with all those involved being fully aware that the marriage cannot be registered under Australian law:

*I don't see a problem. It is not a marriage under Australian law, we all know that, but if a young couple really want to be together then isn't it better from a religious perspective that there is a marriage than to let them commit a sin by having a relationship outside of marriage. But I will only do this if the girl is over 16.*<sup>742</sup>

*The age issue – I bless the marriage after 16, but don't register it till they are 18.*<sup>743</sup>

Finally the other requirements set out in the Marriage Act, such as that the marriage needs to be solemnised by or in the presence of an authorised celebrant<sup>744</sup>, notice

<sup>741</sup> Religious Leader, Interviewed 7 July 2008.

<sup>742</sup> Religious Leader, Interviewed 7 April 2007.

<sup>743</sup> Religious Leader, Interviewed 23 January 2003.

<sup>744</sup> s41 Marriage Act 1961 (Cth).

needs to be given<sup>745</sup> and witnesses need to be present<sup>746</sup> pose no difficulty for Muslims who wish to adhere to Islamic law in regards to marriage.

Whilst there is no formal recognition of a religious marriage if it does not comply with and is registered under the Marriage Act, the discussion above has demonstrated that, generally speaking, requirements specified under the Act have been integrated into the concept of an Islamic marriage as practised in Australia. However, it is important to realise that whilst most marriages are registered and comply with Australian law, it is the religious marriage that determines the nature of the relationship, meaning that without a religious marriage they would not be counted as married in the eyes of the community.<sup>747</sup> This was emphasised by many interviewees, for example:

*I know that I have to satisfy the requirements under Australian law, but really I feel that what is most important is whether I am married under Islamic law.*<sup>748</sup>

*My faith is central to my life in all respects....without being Islamically married I wouldn't feel married at all.*<sup>749</sup>

However, it also needs to be said, that not all Muslims seek to have their marriages registered under Australian law, although many 'imāms felt that this was not a desirable option:

<sup>745</sup> 42 Marriage Act 1961 (Cth).

<sup>746</sup> 44 Marriage Act 1961 (Cth).

<sup>747</sup> Ihsan Yilamz, 'Marriage Solemnization among Turks in Britain: the Emergence of a hybrid Anglo-Muslim Turkish Law' (2004) 24 *Journal of Muslim Minority Affairs* 57 at 61.

<sup>748</sup> Community Member, Interviewed 22 April 2006.

<sup>749</sup> Community Member, Interviewed 7 March 2006.

*Some people conduct a marriage ceremony without registering it, but that is not right.*<sup>750</sup>

This will be considered further in the next section of the chapter.

### **3.2. Different Stages of an Islamic Marriage – When is a Marriage a Marriage?**

This leads to the important question of when should an Islamic marriage be recognised as a marriage under the Marriage Act? A Muslim marriage as practised in Australia has a number of stages which may be separated by a length of time, so the question is very pertinent. To understand this, one needs to appreciate how Muslims marry in Australia. First, there is usually an engagement period which can be as short or as long as the parties agree. This is followed by a religious marriage ceremony known as *'aqd qiraān* or *Katb ālkitab*. At this ceremony, the couple enter into a marriage contract according to Islamic law, but are not afforded the status of husband and wife until another ceremony takes place, akin to a wedding reception, whereby the couple begin actually living together as a married couple.

The marriage begins with a period of *khutbah* or betrothal where the man requests the hand of a woman and she accepts. This can be seen as a mutual promise to marry. This engagement period is usually the time when the couple really get to know one another and can easily change their mind about the marriage. The engagement period is called *Khutbah* – it is a promise of a man with the intention that he will marry a

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<sup>750</sup> Religious Leader, Interviewed 2 June 2006.

certain woman. It is a sort of agreement that serves as a preliminary to the contract of marriage (*Nikāh*).<sup>751</sup>

There are differing practices among the various cultural groups about how the engagement is conducted. Some celebrate it with a large party, whilst others make it known only to a very small and select group of close family and friends, leaving the publicity for a later ceremony:

*The Khūbah is more of a cultural than a religious requirement. It is merely when somebody indicates their willingness to marry another person. If they both agree then they set a date for the ceremony and contract to take place.*<sup>752</sup>

Regardless of how it is celebrated, most acknowledge that the engagement period serves the important function of providing the couple with a religiously sanctioned space to get to know one another properly with the intention to marry:

*Islam prohibits marriage before the parties have gotten to know one another – that is the period of engagement.*<sup>753</sup>

Finally, the engagement is not binding on either party, as Nasir notes that ‘Classical Islamic jurists and modern legislators are unanimous that either party has an

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<sup>751</sup> Shahzad Iqbal Sham, ‘Some Aspects of Marriage and Divorce in Muslim Family Law’ at 13 [http://www.pu.edu.pk/szic/journal/currentissue\\_pdf/E-1%20Shehza%20sham%20\(Islamic%20Law%20of%20Marriage%20and%20Divorce\).pdf](http://www.pu.edu.pk/szic/journal/currentissue_pdf/E-1%20Shehza%20sham%20(Islamic%20Law%20of%20Marriage%20and%20Divorce).pdf) accessed 13 January 2011.

<sup>752</sup> Religious Leader, Interviewed 11 December 2003, 2 June 2006, 17 September 2008.

<sup>753</sup> Religious Leader, Interviewed 4 September 2007.

unquestionable right to break the betrothal'.<sup>754</sup> However differing views exist as to whether there should be compensation if the promise is broken.<sup>755</sup>

Once the couple agree that they are ready to marry, they take the next step which is to negotiate a marriage contract and have an Islamic marriage ceremony known as *Katb ālkitab*. At this ceremony, the couple will officially enter into the marriage contract. Again, there are many different ways that the *Katb ālkitab* is performed, although most are officiated by an *'imām* or religious leader even though, as discussed above, there is no specific requirement for this in Islamic law. However it does illustrate the religious importance of marriage, with many, even those who are not practising Muslims, seeking some religious sanction to their relationship. Although there are cultural variations, the ceremony begins with the *'imām* reciting *Qur'anic* verses, and explaining the marriage contract to the couple.<sup>756</sup> The *'imām* then asks about the *mahr* that has been agreed upon and this is recorded in the marriage contract. The *'imām* then asks about any other terms or conditions agreed upon by the couple. The *'imām* then asks for the consent of both parties and then gets the couple to sign the necessary documents.<sup>757</sup>

Another important reason why an *'imām* is present at this ceremony is that, as mentioned previously, most of them are also registered marriage celebrants and can conduct a marriage ceremony that also complies with Australian law and allows the couple to have their marriage registered:

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<sup>754</sup> Nasir, above n688 at 40.

<sup>755</sup> Ibid at 40-41.

<sup>756</sup> Azizah, al Hibri, 'The Nature of the Islamic Marriage: Sacramental, Covenantal or Contractual?' in John Witte Jr & Eliza Ellison (eds) *Covenant Marriage in Comparative Perspective* (2005) at 210.

<sup>757</sup> Ibid.

*The marriage has two parts, one part is valid according to Shari'ah and is called Katb ālkitab, and the other part is the civil registration of the marriage according to Australian law. So first you have the Katb al-Kitab and then you register the marriage; 99% of Muslims who marry do so in this manner.*<sup>758</sup>

*I made sure that the 'imām who performed the marriage ceremony was a recognised marriage celebrant so that the marriage ceremony would be both religiously and civilly binding as a marriage.*<sup>759</sup>

*I guarantee that I will not conduct a marriage if you tell me that you are not going to register it, you can give me a million dollars, I will say I will not do it, I will not do anything outside the law.*<sup>760</sup>

*Katb ālkitab* is followed by another ceremony or celebration which is more akin to a wedding reception, after which the common practice is for the couple to proceed to live together. However, as al-Hibri states, 'The *Kitab* ceremony usually precedes the wedding by a period of time ranging from minutes to years.'<sup>761</sup> Some couples have the *Katb ālkitab* and wedding party at the same time, whilst others will wait up to two years after the *katb āl-kitab* before living together. However, although they might not be living together, many still regard themselves as husband and wife. Yilmaz argues that it is the religious marriage ceremony that 'determines the nature of the relationship and is perceived as dominant; the official one is only seen as mere

<sup>758</sup> Community Leader, Interviewed 6 August 2006.

<sup>759</sup> Community Member, Interviewed 28 November 2007.

<sup>760</sup> Religious Leader, Interviewed 23 January 2003.

<sup>761</sup> Al Hibri, above n756.



formality,<sup>762</sup> Al-Hibri agrees as she says it is the date of the execution of the marriage contract, and not the wedding, which determines the marital status of the parties.<sup>763</sup>

For most, their marriage is registered at the time that they have a religious marriage ceremony, for others they try to delay registration until the date of their wedding reception – both scenarios have implications for the couple. In the former case, where the marriage is registered, but the couple do not really see themselves as husband and wife in a legal sense, as they have not had a wedding party, they have not moved in together and essentially they are still living as if they are not married, yet once the marriage is registered, then in a legal and technical sense they are married. This means that, for example, if one party was in receipt of a study allowance, then this may be affected by their partner's income, which then becomes relevant to their entitlement as they are legally married, even though their partner may not be maintaining them as they are not living as husband and wife. Hence they will not be living together or be financially interdependent. Yet they are regarded as married by the Marriage Act and may lose benefits such as a study allowance because of this.

The more serious implication is that if they separate, under Islamic law it is not a complicated process as they have not consummated the marriage, yet under Australian law they have to get divorced, which includes a twelve month separation period and counselling. Many see this is as being irrelevant to their situation because they weren't really married in the first place. The alternative scenario can also have its problems, as, if the couple are 'religiously married' but not officially married

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<sup>762</sup> Yilmaz, above n553 at 3.

<sup>763</sup> Al Hibri, above n756 at 212.

under the Marriage Act and, in their wedding preparations, they buy assets together but then separate before registering the marriage, then the parties cannot apply for a property settlement under the Family Law Act because they are technically not married, nor do they live in a *de facto* relationship. Again this can have some problems for Muslims in Australia. This was an issue that community leaders and interviewees spoke about at length:

*It would be good for the Australian law to understand the different processes in an Islamic marriage. It would overcome a big problem that occurs particularly for women when they separate prior to consummation, so that they are not obliged to wait twelve months before they can remarry – there is no benefit to making them wait this period of time, rather it is no good as it can encourage adultery.<sup>764</sup>*

*We have some significant differences between Islam and Australian law...A woman is not regarded as a wife until the marriage is consummated. Divorce has certain rulings if it occurs before or after any consummation. This often leads to many misunderstandings...a couple may have gone through 'aqd qiraān and people call them Mr and Mrs so and so, wife and husband, yet we say they are not husband and wife despite having a marriage certificate....sometimes a couple may not consummate the marriage for quite some time after the marriage ceremony. If they get a divorce during this time then it has its own conditions...now under Australian law the marriage is taken to have occurred from when the parties sign...not so at an Islamic level.<sup>765</sup>*

<sup>764</sup> Community Leader, Interviewed 6 July 2008.

<sup>765</sup> Community Leader, Interviewed 18 August 2007.

*I will register the majority of marriages at the time of katb-al-kitab – unless I feel that there is something wrong, I will advise the father to delay registration as long as possible – to delay is much better, yes she will be divorced but at least she won't have to wait one year.<sup>766</sup>*

*I have a girl who was only married for 15 days and they got a divorce, thank God the paper was with me and not registered yet...I don't encourage this because it is not legal.<sup>767</sup>*

The above quotes also raise another concern that religious leaders have with respect to the twelve month separation period required by Australian law before they can be divorced. Whilst chapters 8 and 9 will discuss this issue in the context of divorce, an issue also arises relating to remarriage, with many finding it a problem to have to wait twelve months before forming a new relationship. This is particularly significant in light of the fact that for Muslims it is impermissible to have a relationship outside of marriage:

*There are certain marriages in Islam that Australian law will never recognise...there are the marriages that occur within that one year of separation that is required under Australian law for divorce, that is potentially a criminal offence, but Australian law does not object to one of the parties having a sexual relationship during that period.<sup>768</sup>*

*This fact that under Australian law they have to be separated for one year before they can remarry is a gross injustice to those individuals...that is why*

<sup>766</sup> Religious Leader, Interviewed 6 August 2006.

<sup>767</sup> Religious Leader, Interviewed 11 October 2006.

<sup>768</sup> Community Leader, Interviewed 15 March 2003.

*we are happy to conduct a religious ceremony but we alert them that this marriage cannot be registered and because the religious ceremony by itself unless done by a celebrant will not automatically be recognised by Australian law there is no issue of breaking the law.*<sup>769</sup>

*Really I think one year is a long time when a woman has been through a tough marriage...she has to wait a year after she has made this difficult decision to get a divorce...when Islamic law allows us a divorce the Australian law should respect this...in violent marriages why should she wait twelve months?*<sup>770</sup>

*What if in that twelve months God sends her a good man, will she talk to him whilst she is officially married to another man – that is ḥarām – this is an important point for Muslim women*<sup>771</sup>

The other related issue is if couples have registered their marriage at the time of *Katb ālkitab* but divorced prior to living together, then many thought it was not suitable that they go through the same divorce process, as the necessary counselling (a requirement if divorce is sought within two years of being married) is not really relevant to their circumstances:

*It was strange to be asked to talk about my husband when we had to go to counselling before we could get our divorce...I mean yes, legally he was my husband and I suppose religiously he was as well, but since we never lived together I didn't see him in a husband kind of way...and to be honest the*

<sup>769</sup> Community Leader, Interviewed 17 June 2008.

<sup>770</sup> Community Member, Interviewed 18 December 2003.

<sup>771</sup> Community Member, Interviewed 1 December 2007.

*counselling was a bit irrelevant because by the time we went to counselling I had finalised our religious divorce and was almost engaged to somebody else.*<sup>772</sup>

*This is when the contract is made, but it does not necessarily imply that consummation has taken place or that the couple is husband and wife. If there is no consummation (which usually takes place when the husband has a house ready for her) and the couple separate then there is no waiting period for the wife.*<sup>773</sup>

Perhaps, rather than the need to change the law with respect to the twelve month separation period, the process just needs to be made more relevant to Australian Muslims as their circumstances may be somewhat different in terms of counselling and other related parts of the divorce process. Rather than amending laws, the more appropriate recommendation is to make the process more religiously and culturally appropriate.

#### **4. The *Mahr* or Dowry**

As mentioned above, a fundamental part of the marriage contract is the *mahr* or dowry which is given by the husband to the wife. The discussion will now consider what this is under Islamic law and, more importantly, how it is being applied by Muslims in Australia.

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<sup>772</sup> Community Member, Interviewed 14 January 2006.

<sup>773</sup> Religious Leader, Interviewed 17 April 2006.

#### 4.1. What is the *Mahr*?

The *Mahr* or dowry has many different names. It is also known as *al-sadaq* which comes from the root word *sidq* meaning sincerity, thus reflecting the husband's sincerity in wanting to marry the woman.<sup>774</sup> It is also known *al-nihlah* (the gift), *al-fareedhah* (the obligation), *al-hibaa* (the gift), *al-iqr* (the payment) and *al-sadaqah* (the charity).<sup>775</sup> The dowry or dower is a right exclusively for the wife. It is her possession and none of her guardians or relatives shares any part of it.<sup>776</sup>

It is recommended that the marriage contract state the dowry, and this is based on the following *Qur'anic* verse:

All others are lawful, provided ye seek (them in marriage) with gifts from your property.<sup>777</sup>

The narration of the Prophet also says:

Seek something [to give her as a dower] even if it be a ring made of iron.<sup>778</sup>

Many Islamic scholars have written about the significance of the *mahr*, Ibn Taymiya stated that it is an essential component of the marriage as he makes reference to the *hadith* or narration of the Prophet:

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<sup>774</sup> Saalih ibn Ghaanim al-Sadlaan, *The Fiqh of Marriage in the Light of the Qur'an and Sunna* (Jamaal al-Din M.Zarabozo trans, 1999 ed) at 9.

<sup>775</sup> Ibid.

<sup>776</sup> Ibid at 10.

<sup>777</sup> The Holy Qur'an Chapter 4, verse 24.

<sup>778</sup> Cited in Al-Sadlaan, above n 774 at 12.

The conditions that have the most right to be fulfilled are those conditions that make the private parts lawful.<sup>779</sup>

Some describe the *mahr* as a bride price, but Islamic scholars point out that it is not a consideration for the contracting of the marriage, rather it is ‘seen as an effect of the contract of marriage rather than the price paid by the husband’.<sup>780</sup> If the marriage contract is concluded without stating a specific dower, the contract is still valid, but the husband is required to give the wife a dower comparable to the dower that similar women would receive.<sup>781</sup> This means a *mahr* that ‘would be desirable to a woman like her’, which refers to her relatives or other women in the town in which she lives.<sup>782</sup>

There is no maximum amount as to the *mahr*, and this is supported by the following *Qur’anic* verse:

But if ye decide to take one wife in place of another, even if ye had given the latter a whole treasure for dower, Take not the least bit of it back: Would ye take it by slander and manifest wrong?<sup>783</sup>

The use of the word *qinṭar* is not meant as setting a maximum, but rather as an expression implying a large amount.<sup>784</sup> However, the Prophet did discourage the fixing of excessively high amounts of *mahr* particularly by those who had no intention of paying it, as evidenced by his words:

<sup>779</sup> Cited in Al-Sadlaan, above n 774 at 13.

<sup>780</sup> Pearl and Menski, above n1 at 179.

<sup>781</sup> Al-Sadlaan, above n774 at 13.

<sup>782</sup> Ibn Rushd, above n696 at 535.

<sup>783</sup> The Holy Qur’an, Chapter 4, verse 20.

<sup>784</sup> A-Sadlaan, above n774 at 16.

A man, who marries a woman in return for an amount of money, but has the intention of never paying it, is in reality an adulterer. One, who borrows money with the intention not to pay it back, is in reality a thief.<sup>785</sup>

It is left up to the woman to decide on what is a suitable *mahr* even if it seems excessive, as there is the example of what occurred a few years after the death of the Prophet, when the Caliph was opposed to the practice of demanding very high amounts and in a speech at the mosque recommended that dowries be reduced to moderate limits, and a woman replied to him ‘‘umar, Commander of the Believers. Why do you want to deny us a God-given right?’’ and she proceeded to recite the verse referring to the *qinṭar*. The Caliph then admitted he was mistaken and withdrew the recommendation.<sup>786</sup> There are differing views as to the minimum amount of *mahr* with some schools of jurisprudence fixing a minimum amount, yet others hold the view that it can be anything which has value, either material or non-material, as long as the wife agrees to it.<sup>787</sup>

Payment of the *mahr* can be either prompt (paid at the time of the marriage contract) or deferred to be paid over time. It can also be a mixture of both, that is that a certain amount is to be paid promptly with another amount to be paid at a later date. The wife is able to refuse to cohabit with the husband until any prompt *mahr* is paid by the husband.<sup>788</sup> In regards to the deferred amount, this is a debt owing by the husband until it has been paid. If the husband dies before the *mahr* has been paid, then the

<sup>785</sup> Cited in Maudoodi, above n677 at 75.

<sup>786</sup> Abd al-Ati, above n695 at 67.

<sup>787</sup> Al-Sadlaan, above n774 at 24.

<sup>788</sup> Aftab Hussain, *Status of Women in Islam* (1987) at 466.



amount will be taken from his estate as a debt owing on his estate. If divorce takes place prior to the amount being paid, then there are different circumstances that need to be taken into account. The rules pertaining to payment of the *mahr* upon divorce will be considered in greater detail in the next two chapters, but the general principle is that if the husband divorces his wife she is entitled to be paid the full amount of *mahr* owing to her.

However, as the discussion above has shown, Muslims often enter into a marriage contract some time prior to living together as husband and wife. If the situation arises where the couple divorce prior to consummation of the marriage, there is some differing opinion as to what happens to the agreed *mahr*. If during that time the couple have been in ‘true seclusion’ meaning they have been alone together with the opportunity to have sexual intercourse, then the jurists argue that the woman is entitled to the entire *mahr*, even if there has not been actual consummation.<sup>789</sup> Other jurists such as ‘*imām* Ahmed specifically state that any kind of physical pleasure, such as kissing, even if not in private would require the wife to recover the entire *mahr*.<sup>790</sup> Other jurists are of the opinion that only half of the *mahr* is owed if there has not been actual consummation of the marriage.<sup>791</sup> If there has been no seclusion and no consummation, but there is a valid marriage contract, then the jurists agree that the wife has a right to half of her *mahr*, this is based on the following *Qur’anic* verse:

And if ye divorce them before consummation, but after the fixation of a dower for them, then the half of the dower (Is due to them).<sup>792</sup>

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<sup>789</sup> Al-Sadlaan, above n774 at 41.

<sup>790</sup> Ibid.

<sup>791</sup> Ibid at 49.

<sup>792</sup> The Holy Qur’an Chapter 2, verse 237.

This does not apply when the marriage is annulled, or the wife agrees to pay something to the husband in order to be released from the marriage (*Khul'ah*), but this will be discussed in more detail in chapter 8.

## 4.2. The *Mahr* in Australia?

It is very clear from the research conducted that the *mahr* is very important in the marriage process of Australian Muslims. All the *'imāms* interviewed spoke about its significance:

*Mahr is a right of the wife. It is a gift from the husband to the wife at the time of the marriage contract, this is out of respect and reverence for the wife. It is a symbol of good treatment of the wife, a present and in the case of divorce it allows the wife to have some economic security.*<sup>793</sup>

*It is a right actually guaranteed for the wife and we should not sacrifice that.*<sup>794</sup>

*This is an important part of the marriage process. It is a pillar of the marriage...it is a present that has no minimum or maximum, it is a right that belongs to the wife...it is a divine right not merely ink on paper.*<sup>795</sup>

*In the cases that I see the mahr is highly respected and adhered to.*<sup>796</sup>

<sup>793</sup> Religious Leader, Interviewed 7 May 2006, 17 August 2008.

<sup>794</sup> Community Leader, Interviewed 5 December 2007.

<sup>795</sup> Religious Leader, Interviewed 25 January 2003.

<sup>796</sup> Religious Leader, Interviewed 9 July 2007.

*It is a gesture, a gift...it is so that she has financial security and independence from the beginning of the marriage.*<sup>797</sup>

Many of these 'imāms mentioned that one of their concerns is the practical unenforceability of this important part of the marriage contract, as Australian law does not recognise or accommodate it:

*The problem that we have is that we know that under Islamic law it is compulsory, but under Australian law it is not recognised.*<sup>798</sup>

*Whilst this is not enforced under Australian law, we encourage Muslims to abide by it, as we tell the men that this is a religious obligation. We cannot do anything for those who do not want to pay it, but all marriages are conducted with an agreed mahr.*<sup>799</sup>

However, despite the lack of official enforceability, 'imāms said that many Muslim men abided by Islamic law and paid the *mahr*, particularly if it had a component that required prompt payment:

*It is important as a contract cannot take place without an agreed mahr. It is also important because the majority of people abide by the requirement of paying this amount upon divorce – even though it is not enforceable.*<sup>800</sup>

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<sup>797</sup> Religious Leader, Interviewed 11 December 2003, 2 June 2006, 17 September 2008.

<sup>798</sup> Religious Leader, Interviewed 17 April 2006.

<sup>799</sup> Religious Leader, Interviewed 6 August 2006.

<sup>800</sup> Religious Leader, Interviewed 7 July 2007.

*A lot of negotiation takes place about the mahr, both at time of marriage and divorce, but most come to a suitable arrangement.<sup>801</sup>*

*I think there is a lot of awareness about the mahr – the women are interested in it because it is for them and the men are keen because basically there is no marriage without it.<sup>802</sup>*

There is a lot of variety in how it is practised, with some opting for a single prompt payment, but it would seem that the most common practice is for the *mahr* to comprise both a prompt amount and a deferred amount:

*It is usually practised in the community in two parts. A smaller up front amount known as Muqadam and a deferred usually much larger amount known as Mutakhar.<sup>803</sup>*

The variety also extends to the type of *mahr* that is agreed upon, that is what might constitute the *mahr*. For most it is a monetary amount or some tangible material object or possession like property or furniture:

*I have seen men agree to anything from a gold coin to well over \$100 000 – it really all depends on the individual couple.<sup>804</sup>*

Several community leaders commented on the problem that they saw with what they regarded as excessive *mahr*:

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<sup>801</sup> Religious Leader, Interviewed 7 July 2008.

<sup>802</sup> Religious Leader, Interviewed 11 December 2003, 2 June 2006, 17 September 2008.

<sup>803</sup> Community Leader, Interviewed 5 June 2006, 23 July 2008.

<sup>804</sup> Religious Leader, Interviewed 6 August 2006.

*From my experience, it would seem that some men will agree to anything when they want to marry a woman....but what is the point of a large amount if there is no chance that he can pay it.*<sup>805</sup>

*Some parents seem misguided, encouraging their daughters to ask for a big mahr, including a large wedding, expensive furniture etc...I think this is a real problem when they must know that the young man will have to borrow money to do this.*<sup>806</sup>

However, others put forward a justification for an expensive *mahr*:

*The Mahr is there as financial security for the woman...nobody can take that away from her.*<sup>807</sup>

*Because most of the time the mahr is not paid till divorce, it can be seen as part of the property settlement.*<sup>808</sup>

In contrast, several interviewees spoke of the rise in the number of women who are requesting specific things for their *mahr*, some even being non-material things:

*It is part and parcel of the Islamic marriage...people won't conduct a marriage without it. It could be something small like a gold coin or something material or furniture...to some the material possessions are not at*

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<sup>805</sup> Community Leader, Interviewed 17 June 2008.

<sup>806</sup> Community Leader, Interviewed 5 December 2007.

<sup>807</sup> Community Leader, Interviewed 10 March 2003, 11 July 2008.

<sup>808</sup> Community Leader, Interviewed 6 August 2006.

*all important and they look to something spiritual instead...to others they want a big wedding and a big dowry.<sup>809</sup>*

*Even though the dowry is a requirement of validity of marriage it can be quite symbolic – it does not have to be monetary – it could be a small gift, a trip overseas – the woman decides.<sup>810</sup>*

*I have had cases where a woman wants a trip to hajj or she wants the husband to facilitate her Islamic education, some even ask to go overseas to seek this.<sup>811</sup>*

*When I discussed with my parents what my mahr was going to be I made it quite clear that I was not interested in money – I wanted something truly special – my first trip to hajj and a lifelong commitment to my spiritual development.<sup>812</sup>*

Therefore, the types of things that constitute *mahr* can be quite diverse. This is also the case in other countries, as one US study examining Islamic family law lists some examples of *mahr* in the US, including:

\$35000, a Qur'an and set of ḥadith, a new car and \$20 000, a promise to teach the wife certain sections of the Qur'an, \$1 prompt and \$100 000 deferred, Arabic lessons, a computer and a home gym, a trip around the world including stops in Mecca, Medina and Jerusalem, a leather coat and a

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<sup>809</sup> Community Leader, Interviewed 13 July 2008.

<sup>810</sup> Religious Leader, Interviewed 7 July 2008.

<sup>811</sup> Religious Leader, Interviewed 4 September 2007.

<sup>812</sup> Community Member, Interviewed 4 May 2006.

pager, a wedding ring as immediate *mahr* and one year rent for deferred *mahr*.<sup>813</sup>

This demonstrates that Muslim women are seriously considering the issue of *mahr* and what it means to them and seeking to apply it in a way that suits their needs. Of course the greatest limitation with respect to the *mahr* is its lack of enforceability in the Australian context but, as noted above, many Muslims still seek to enforce it themselves by relying on the moral or religious obligation that it symbolises. This is particularly relevant if the couple divorce and the *mahr* has not been paid. This will be explored in detail in chapters 8 and 9. This situation also shows the agency exercised by Muslim women in Australia, thus questioning the assumption that they are vulnerable and oppressed by religious practice.

## 5. The Marriage Contract

### 5.1. What is the Marriage Contract under Islamic Law?

The discussion earlier demonstrated that marriage involves a combination of *'ibaādaāt* or devotional acts and *mu'aāmalat* or dealings with others.<sup>814</sup> It is a contract with religious rights and obligations, but a contract nonetheless. Ali argues that:

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<sup>813</sup> Asifa Quraishi and Najeeba Syeed-Miller, 'No Altars: A Survey of Islamic Family Law in the United States' (2004) at 9 < <http://www.law.emory.edu/IFL/cases/USA.htm> > accessed 10 January 2011.

<sup>814</sup> Ali, above n669 at 158.

Marriage is essentially a contract between two parties...and being in the nature of a contract, unless expressly stipulated, does not confer any right on either party over the property of the other. The legal capacity of the wife is not subsumed in that of the husband and so she retains the same powers of using and disposing of her property, or of entering into contracts regarding it, of suing and being sued without her husband's consent. She may even sue her husband...and is in no respect under his legal guardianship.<sup>815</sup>

The first part of this chapter outlined the basic requirements of a marriage contract. It involved the offer and acceptance of the parties, witnesses to this agreement and usually the amount of *mahr* specified. The discussion will now consider the use of additional conditions that can be integrated into the marriage contract, and enforced by Islamic courts in the same way as normal contractual conditions are enforced.<sup>816</sup> Hussain lists some of the conditions that have historically been approved by Muslim Jurists as valid conditions:

- The husband cannot absent himself from the matrimonial residence for a specified period of time
- The wife cannot be forced to prepare food or wash dishes
- The husband shall not keep the wife in the same house as his other wife
- The husband shall pay the wife a specified amount of maintenance by or on specified dates
- The husband shall not leave the place where they are living without the wife's permission<sup>817</sup>

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<sup>815</sup> Id at 157.

<sup>816</sup> Hussain, above n694 at 84.

<sup>817</sup> Ibid.



It is encouraged that these agreements are made in writing. It is also argued that there is great religious importance in fulfilling these conditions and contracts as al-Hibri argues ‘A Muslim should not breach a contract after affirming it. In fact, fulfilling one’s *’ahd* (contractual obligation) is placed in the *Qur’an* alongside prayer, charity and truthful testimony’<sup>818</sup> This is emphasised by the words of the Prophet:

The conditions which you have the most duty to fulfil are those by which you have made marital relations lawful.<sup>819</sup>

Al-Hibri argues that it is wrong to suggest that an Islamic marriage is merely a ‘civil contract’ because this strips the marriage contract of its momentous religious status as the contract most worthy of fulfilment.<sup>820</sup> Understanding and appreciating the religious significance of the marital relationship will show the importance of fulfilling the conditions placed in a marriage contract. It is argued that the use of marriage contracts in this much more detailed form provides a ‘possibility of including conditions in a marriage contract that provides...a legally and religiously acceptable medium for introducing modifications in the law of marriage and divorce’.<sup>821</sup> It allows marriage laws to suit the particular needs of the parties.

## 5.2. How is the Islamic Marriage Contract used in Australia?

The discussion will now consider how Muslims in Australia are using Islamic marriage contracts. One of the most surprising findings that came from this research

<sup>818</sup> Al Hibri, above n756 at 188.

<sup>819</sup> Cited in Hedaya Hartford & Ashraf Muneeb, *Your Islamic Marriage Contract* (2<sup>nd</sup> ed, 2007) at 25.

<sup>820</sup> Al Hibri, above n756 at 189.

<sup>821</sup> S.Haeri, ‘Divorce in Contemporary Iran: A male prerogative in self-will’, in Chibli Mallat and Jane Connors (eds) *Islamic Family Law* (1990) at 58.

was the lack of awareness in the community about the importance of marriage contracts. Whilst all *'imāms* who were interviewed made reference to a basic contract that they used, in which at the time of the marriage ceremony they entered the details of the couple, the names of the witnesses and the agreed *mahr*, very few of them mentioned that any further conditions were added:

*I use my own contract that the parties sign. It includes their details, the witnesses that were present and the mahr. I don't often add anything else to this paper...nobody really asks for anything else to be added.*<sup>822</sup>

Qureyshi and Miller argue that additional stipulations, other than the dower, which further define the marital relationship, are not well utilised because 'the dower is obligatory whereas additional stipulations are not only optional but also a subject of little public awareness'.<sup>823</sup> This is supported by the comments made by other community leaders about their own lack of knowledge of the potential use of marriage contracts:

*As social workers and community workers we often don't know what a marriage contract is from an Islamic perspective let alone from an Australian law perspective, so even if couples enquire how can we help them?*<sup>824</sup>

*If people understood that the marriage contract is an important document that can be recognised, that it is not just ink on paper then people will take it*

<sup>822</sup> Religious Leader, Interviewed 23 January 2003.

<sup>823</sup> Quraishi & Syeed-Miller, above n813 at 10.

<sup>824</sup> Community Leader, Interviewed 15 March 2003.

*more seriously – but the majority of the community have no idea about this.*<sup>825</sup>

*There should be a written contract between the parties, but it only states the mahr, the details of the parties, witnesses and signatures. But no other conditions are written on it. Parties usually don't think about conditions they can put in, they are too much in love to think about such things, they just agree about everything, later the problems emerge.*<sup>826</sup>

*I don't think that anyone is conscious of anything more than the paper that the 'imāms get you to sign.*<sup>827</sup>

*I get the impression that most people don't draw up a formal agreement but it would be great if they did.*<sup>828</sup>

Similar sentiments were expressed by several interviewees as they reflected on their own marriage:

*I didn't even know that there was such a thing.*<sup>829</sup>

*There were so many papers to sign, I really don't know if one of them was a marriage contract.*<sup>830</sup>

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<sup>825</sup> Community Leader, Interviewed 5 June 2006, 23 July 2008.

<sup>826</sup> Religious Leader, Interviewed 2 June 2006.

<sup>827</sup> Community Leader, Interviewed 5 December 2007.

<sup>828</sup> Community Leader, Interviewed 4 November 2007.

<sup>829</sup> Community Member, Interviewed 14 January 2006.

<sup>830</sup> Community Member, Interviewed 11 October 2006.

*Nobody explained to me that I could add any particular conditions. I just thought that you agreed on the mahr.*<sup>831</sup>

*Some of these documents are in Arabic – a foreign language to many of us...women should be encouraged to take the time to understand the importance of this document and talk about issues that may arise in their future marriage – away from the glitz and glamour of a wedding.*<sup>832</sup>

However, many of the 'imāms spoke about the importance of detailed marriage contracts and that there were a small but increasing number of couples who were drawing up such detailed marriage contracts. It is argued that this provides a good opportunity for the couple to discuss many important issues – 'it forces the bride and groom to have a reality check before marriage'<sup>833</sup>. This was mentioned by some of the interviewees:

*The marriage contract is written usually by the 'imām, signed by the parties and the witnesses. It is permissible for either party to place conditions based on a ḥadith where the Prophet said – 'The Muslims abide by the conditions unless it is a condition that makes permissible the impermissible or makes impermissible the permissible'.*<sup>834</sup>

*Some of the conditions that we have included – that the wife wants to remain living in Australia, she wants to remain close to her family, the right to half*

<sup>831</sup> Community Member, Interviewed 6 March 2006.

<sup>832</sup> Community Member, Interviewed 3 March 2006.

<sup>833</sup> Quraishi & Syeed-Miller, above n813 at 11.

<sup>834</sup> Religious Leader, Interviewed 17 April 2006.

*the matrimonial home, the right to divorce – any condition is permissible so long as it does not contravene the Islamic way of life.*<sup>835</sup>

*A condition that upon divorce their assets would be divided 50/50 would be valid.*<sup>836</sup>

The increasing use of detailed marriage contracts is a growing trend in the UK and the US as Muslim couples are seeking to draft more detailed and personalised marriage contracts, rather than the ‘boiler-plate, fill-in-the-blank marriage agreements’ that currently exist.<sup>837</sup> Quraishi and Miller point out that in the US:

There is an interest in drafting more detailed, personalised Muslim marriage contracts – documents that are not a generic stamp of mere legal status conferred by some external authority, but rather, as a full, detailed expression of the way each unique couple define themselves.<sup>838</sup>

Indeed, many young couples are seeing the drafting process:

not only as an allocation of rights and duties, but also as an exercise in learning to express their new identity as a couple, and even more importantly, as a way to open up discussion (and determine compatibility) on important family issues (career, children, finances, residence location etc) that might otherwise be postponed to more stressful times.<sup>839</sup>

<sup>835</sup> Religious Leader, Interviewed 25 January 2003.

<sup>836</sup> Religious Leader, Interviewed 6 August 2007.

<sup>837</sup> Saminaz Zaman, ‘Amrikan Shari’a: The Reconstruction of Islamic Family Law in the United States’ (2008) 28 *South Asia Research* 185 at 196.

<sup>838</sup> Quraishi & Syeed-Miller, above n813 at 11.

<sup>839</sup> Ibid.

One interviewee who had gone through the process of drafting one such contract spoke about what it meant for her:

*It was a great opportunity to discuss lots of things...I felt that I could say what I most wanted out of the relationship, and we could decide on lots of things like who would do the housework, how we would look after the kids when we had them.*<sup>840</sup>

The use of marriage contracts is being encouraged not just as a means of getting the couple to talk about their future lives together, but also as a tool for protecting the rights of Muslim women within marriage. Al-Hibri argues that many women do not even know their rights under the marriage contract in Islam.<sup>841</sup> Indeed in the US Muslim women's organisations and activists are encouraging women to educate themselves about the use of marriage contracts as a tool for their empowerment, and many see it as a way of protecting their basic Islamic rights.<sup>842</sup> Islamic scholars Hartford and Muneeb, in their book *Your Islamic Marriage Contract*<sup>843</sup> say that 'we began to see that many of the problems people were having could be addressed simply by constructing suitable marriage contracts'.<sup>844</sup>

<sup>840</sup> Community Member, Interviewed 2 February 2008.

<sup>841</sup> Azizah al-Hibri, 'Muslim Marriage Contract in American Courts' (Paper presented at the Minaret of Freedom Banquet, May 20 2000) at 6 < <http://www.minaret.org/azizah.htm> > accessed 11 January 2011.

<sup>842</sup> Quraishi & Syeed-Miller, above n813 at 10.

<sup>843</sup> Hedaya Hartford & Ashraf Muneeb, above n819.

<sup>844</sup> Ibid at 9.

Recently, the same has happened in the UK, with the launch of the *Muslim Marriage Contract*,<sup>845</sup> an initiative endorsed by many key Muslim organisations. This is a model marriage contract that parties can tailor to suit their particular needs, although what is most significant about this contract is that it provides for a clear power to divorce to the wife, a prohibition on the husband entering into a second marriage and it encourages the use of additional conditions to be agreed upon by the parties. The document was welcomed by many, such as Dr Mir-Hoseini, who said that:

The idea of marriage as a contract is one of those powerful concepts in Islamic legal tradition that allows two individuals to regulate their most intimate relationship not only within the bounds of the *Shari'ah*, but also in accordance with the demands of time and place. The launch of the new standard marriage contract is a welcome initiative, a right step in the right direction that provides the Muslims in the UK with a model for a harmonious and egalitarian marriage.<sup>846</sup>

However, many others expressed disagreement with the terms mentioned above, on the basis that they may be contrary to Islamic principles. This view was expressed by some interviewees:

*In my view adding additional clauses to a marriage contract that are beyond the simple requirement of an Islamic marriage would end up complicating the relationship.*<sup>847</sup>

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<sup>845</sup> See above n 320.

<sup>846</sup> The Muslim Parliament of Great Britain, 'Muslim Institute to launch model Muslim Marriage Contract' (Press Release, 8 August 2008)

<<http://www.muslimparliament.org.uk/MuslimMarriageContract.html>> accessed 30 October 2010.

<sup>847</sup> Community Leader, Interviewed 15 March 2003.

*It is a simple matter, knowing what the dowry is, what the responsibilities are according to Islamic law, then it becomes superfluous to add additional protection by adding these clauses to a marriage contract...then the 'imām would have to consider whether they are fair to both parties.<sup>848</sup>*

*Inserting a wife's right to divorce...well that is disputed amongst scholars...she has a right to Khul'ah' but not necessarily to initiate divorce – that may be against God's will...like a condition that he is not to take on a second wife, some scholars view that as void as well.<sup>849</sup>*

However many more interviewees spoke about the need to make better use of marriage contracts, particularly if they can play a role in promoting women's rights:

*Marriage contracts are important in cross-cultural marriages because different cultures expect different things, and the process of drawing up a contract would help to clarify many issues.<sup>850</sup>*

*I see it as a protection measure – to protect women's rights, sometimes men too, but the majority of women are the ones missing out. They start off their marriage on the basis this is an Islamic marriage and do their marriage contract with full understanding that they have a contract before God, so when problems occur they want to go back to their marriage contract.<sup>851</sup>*

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<sup>848</sup> Community Leader, Interviewed 13 July 2008.

<sup>849</sup> Community Leader, Interviewed 15 March 2003.

<sup>850</sup> Community Leader, Interviewed 4 November 2007.

<sup>851</sup> Community Leader, Interviewed 5 June 2006, 23 July 2008.



*If these contracts can be used to minimise conflict and remove misunderstanding between husband and wife then we should encourage their use.*<sup>852</sup>

Many leaders mentioned the need for greater community education about the use of marriage contracts which is dependent on the education and awareness of Muslim women of their rights – that is why ‘many activists take the need for education on the topic of marriage contract law so seriously’.<sup>853</sup> As some community leaders said:

*I think we need greater community education about marriage contracts – we need to learn what occurred at the time of the Prophet where women could actually say I want X, Y and Z and enter into such contracts and they are binding.*<sup>854</sup>

*I think that some young women might be reluctant to assert their views about certain conditions if there isn’t greater community acceptance of the use of marriage contracts – I recall a case where a marriage was called off because of a girl requesting certain conditions to be agreed upon, the families just would not accept this.*<sup>855</sup>

*The reluctance to use marriage contracts comes from a lack of understanding of Islamic law – for example how many people would know that a woman under Islamic law is not obligated to perform housework? Our cultural*

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<sup>852</sup> Community Leader, Interviewed 10 March 2003, 11 July 2008.

<sup>853</sup> Quraishi & Syeed-Miller, above n813 at 11.

<sup>854</sup> Community Leader, Interviewed 10 March 2003, 11 July 2008.

<sup>855</sup> Community Leader, Interviewed 5 November 2008.

*understandings are what stop many from thinking outside the square when it comes to their marriage contract.*<sup>856</sup>

However, one needs to bear in mind that, like the issue of the *mahr*, there is the difficulty with enforceability and that may be one of the reasons why *'imāms* do not spend much time in explaining the potential nature of a marriage contract. Without the prospect of enforceability, the *'imāms* may consider it a waste of time to negotiate an agreement that is neither recognised at law nor enforced by law.

*I would certainly encourage greater use of a marriage contract if I knew it was enforceable.*<sup>857</sup>

*At the end of the day I can spend hours facilitating an agreement between the couple, but then if somebody wants to break the contract, who can really stop them?*<sup>858</sup>

Whilst there has been some commentary on the interpretation of Muslim marriage contracts in US courts<sup>859</sup>, mainly in the context of upholding prenuptial agreements, the situation is quite different in Australia, as the discussion below will demonstrate.

Hartford and Muneeb argue that:

For protective measures a couple should have a written contract as well as registering it legally according to the country or state in which they live.

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<sup>856</sup> Community Leader, Interviewed 6 August 2006.

<sup>857</sup> Religious Leader, Interviewed 23 January 2003.

<sup>858</sup> Religious Leader, Interviewed 18 February 2008.

<sup>859</sup> Al-Hibri, above n841.

Both men and women are at risk of losing their rights when the marriage is not certified by their local or state governments.<sup>860</sup>

Thus we need to consider how an Islamic marriage contract may intersect with Australian law.

### **5.3. Binding Financial Agreements – the Development of a Contract that satisfies both Islamic Law and Australian Law**

Part VIIIA of the Family Law Act allows couples to enter into a financial agreement before marriage<sup>861</sup>, during marriage<sup>862</sup> or after divorce.<sup>863</sup> A Binding Financial Agreement may cover property and financial matters, spousal maintenance and other ‘incidental and ancillary’ matters, a phrase which Fehlberg and Behrens argue is currently untested.<sup>864</sup> This is part of a wider trend in Australian Family Law towards private agreements and an emphasis on the resolution of disputes away from the court. There are formal requirements that need to be satisfied, such as that the agreement must be signed by both parties and must contain a statement that prior to signing it each party received independent legal advice on the effect of the agreement on his or her rights, and on the advantages and disadvantages to him or her at that time of entering into the agreement.<sup>865</sup> Whilst the emphasis is on financial matters, such agreements may also concern other matters as well.<sup>866</sup> Essentially, the

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<sup>860</sup> Hartford & Muneeb, above n819 at 10.

<sup>861</sup> s.90B Family Law Act 1975 (Cth).

<sup>862</sup> s. 90C Family Law Act 1975 (Cth).

<sup>863</sup> s. 90D Family Law Act 1975 (Cth).

<sup>864</sup> Fehlberg & Behrens, above n719 at 560.

<sup>865</sup> s.90DA(1) Family Law Act 1975 (Cth); Dickey, above n 738 at 655.

<sup>866</sup> ss 90B(3), 90C(3), 90D(3) Family Law Act 1975 (Cth).

agreement is a contract and subject to the law of contract.<sup>867</sup> Most importantly if an agreement is binding the court is prevented from dealing with matters covered by that agreement, except in certain circumstances.<sup>868</sup>

There have been initiatives by some Muslim lawyers, one in particular who is also an *'imām*, to draw up a document at the request of the couple that meets the requirements of both Binding Financial Agreements under Australian law and Islamic law. However, these lawyers suggest that they are not seeing many couples who want this done:

*After spending a lot of time and effort in researching and drafting this type of document it is somewhat disheartening to not have it being used by community members. I think that cost and lack of awareness of its importance means that at least for the short term not too many people are going down this path.*<sup>869</sup>

Rather, it would seem that when Muslim marriage contracts are being used, they remain quite informal documents drafted by *'imāms* or the parties themselves. Nonetheless this remains an area for great potential in harmonising the application of Islamic principles of marriage and Australian marriage law without the need for significant change in the official law. It also stands out as an important avenue for the protection of the rights of Muslim women.

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<sup>867</sup> Dickey, above n738 at 658.

<sup>868</sup> Ibid.

<sup>869</sup> Personal Communication with Sydney Based Muslim Lawyer, 13 July 2008.

## 6. Financial Rights within Marriage

A married Muslim woman is entitled to her legal and financial independence. This is symbolically represented by the fact that a Muslim woman retains her maiden name upon marriage.<sup>870</sup> In regards to her financial independence, al-Hibri argues 'her husband may not touch any of her assets'<sup>871</sup>, and the husband is obligated to support his wife even if she is wealthier than he is.<sup>872</sup> These are part of 'a larger framework of Muslim women's rights,'<sup>873</sup> but the following discussion will consider the religious obligation of the husband to financially support the wife during marriage.

### 6.1. *Nafaqah* or Maintenance

Maintaining the wife is a necessary right of the wife. It is inclusive of food, clothing and housing according to what the husband can afford. This is based on the following

*Qur'anic* verse:

The mothers shall give suck to their offspring for two whole years, if the father desires to complete the term. But he shall bear the cost of their food and clothing on equitable terms. No soul shall have a burden laid on it greater than it can bear. No mother shall be treated unfairly on account of her child Nor father on account of his child..<sup>874</sup>

And the following words of the Prophet:

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<sup>870</sup> Al-Hibri, above n841 at 7.

<sup>871</sup> Ibid.

<sup>872</sup> Ibid.

<sup>873</sup> Ibid.

<sup>874</sup> The Holy Qur'an, Chapter 2, verse 233.

Fear Allah with respect to women. You have taken them by the trust with Allah and have made their private parts permissible by the word of Allah.....Their rights upon you are that you provide for them and clothe them according to what is right and customary.<sup>875</sup>

Several jurists agreed that the amount of maintenance cannot be determined by law because of the need to take into account the individual circumstances of the husband and the wife which can vary according to changes in location, time and position in society.<sup>876</sup> However there is no doubt that the wife is entitled to maintenance according to her husband's means including food, clothing, housing, toiletries, medical care and household help. Theoretically the wife is not required to prepare food for the family or clean the house but if she chooses to do so such acts are viewed as voluntary charitable contributions to the family done only with her consent, as she is her husband's wife, not his servant. This is quite interesting given that one of the most significant criticisms of Islamic law is that it is oppressive towards women. As Hamza Yusuf, a current Islamic scholar, has said:

The Islamic tradition does show some areas of apparent incompatibility with the goals of women in the west, and Muslims have a long way to go in their attitudes towards women. But blaming the religion is again to express an ignorance both of the religion and of the historical struggle for equality of women in Muslim societies. A careful reading of modern female theologians of Islam would cause western women to be impressed by legal injunctions more than 1000 yrs old that, for instance, grant women legal rights to domestic help at the expense of their husbands. 3 of the 4 schools of thought

<sup>875</sup> Cited in Al-Sadlan, above n774 at 136.

<sup>876</sup> Ibn Rushd, above n696 at 63.

consider domestic chores outside the scope of a woman's legal responsibilities toward her husband. Contrast that with US polls showing that working women still do 80% of domestic chores.<sup>877</sup>

In determining the requisite maintenance to be provided, it is not just important to consider the financial resources of the husband but also the standard of the wife prior to marriage. If the wife was accustomed to having the assistance of a maid, then the husband is obliged to provide her with a maid as well.<sup>878</sup> This is also a matter that can be agreed upon at the time of negotiating the marriage contract, whereby the wife can specify the maintenance that she requires from the husband, including personal maids.

The importance of this right cannot be emphasised enough, as it is the basis upon which a woman can take money from the husband without his consent if he has the means and is not sufficiently providing her with money to live on. This is based on the story of the woman called Hind, the wife of Abu Sufyaan who came to the Prophet and said:

O Messenger of Allah, Abu Sufyaan is a miserly man. He does not give me enough to maintain myself and my child. I take from his wealth without his knowledge. Is there any sin upon me for that? He replied 'Take from his wealth according to what is customary as will suffice for you and for your child'.<sup>879</sup>

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<sup>877</sup> Hamza Yusuf, 'Coming to Terms with Islam in the West', *IslamicCity.com* (23 June 2008) <http://www.islamicity.com/articles/Articles.asp?ref=ZI0806-3598> accessed 11 January 2011.

<sup>878</sup> Hussain, above n694 at 92.

<sup>879</sup> Cited in Al-Boukhari, *Sahih Al-Boukhari* vol 7, Book 64, ḥadith no.272 (trans Mahmoud Matraji, 1993 ed).

This also forms the basis for several schools of jurisprudence who hold the opinion that any arrears in maintenance are seen as a debt on the husband which can be claimed, however much time has elapsed.<sup>880</sup>

## 6.2. How *Nafaqah* is applied in Australia

Historically, ‘at common law, a husband was under an obligation to provide his wife with accommodation, food, clothing and other necessities of life appropriate to his estate and condition in society’.<sup>881</sup> However until the 1940s, no part of a husband’s duty to maintain his wife could be directly enforced at common law.<sup>882</sup> Presently, under the Family Law Act an application for spousal maintenance can be made during marriage, after separation or after divorce, but applications made during marriage are uncommon.<sup>883</sup> Also, maintenance orders can be made against either party, as s.72 provides that:

A party to a marriage is liable to maintain the other party, to the extent that the first-mentioned party is reasonably able to do so, if, and only if, that other party is unable to support herself or himself adequately due to:

- (a) having the care of a child of the marriage under 18 years of age
- (b) limited capacity for employment due to age or physical or mental incapacity, or
- (c) any other adequate reason<sup>884</sup>

<sup>880</sup> Pearl & Menski, above n1 at 183.

<sup>881</sup> Dickey, above n738 at 350.

<sup>882</sup> Ibid.

<sup>883</sup> B.Fehlberg & J.Behrens, above n719 at 601; *In the Marriage of Eliades* (1980) 6 FamLR 916.

<sup>884</sup> s.72 Family Law Act 1975 (Cth).



This is clearly very different from the right to maintenance under Islamic law where the principle is quite clear that husbands are under an obligation to financially maintain the family.<sup>885</sup> While there is no evidence that Muslim women apply to the family court for maintenance orders during marriage, many 'imāms say that they commonly deal with complaints by women that the men are failing in their financial responsibility. Whilst they cannot force compliance, the 'imāms readily remind the husbands of their responsibility according to Islamic law:

*Most Muslim men abide by this requirement to maintain their families. There are some that are neglectful of this, but the majority do...we do get cases where the wife will come to us and complain that her husband is not maintaining her adequately.*<sup>886</sup>

*I have cases where I spend much time convincing the man of his duty towards financially maintaining his wife – this is her right...sometimes men can be very unreasonable in this way – he says he is dedicated to Islam but then when it comes to money he doesn't want to give her her rights.*<sup>887</sup>

*We need to provide more education about this to the community...the wife might not be aware of the things she can do to resolve this.*<sup>888</sup>

*Sometimes couples come for counselling because they are having problems, and it very quickly becomes apparent that one of the key issues is that the woman feels that the husband is not adequately maintaining her.*<sup>889</sup>

<sup>885</sup> See earlier discussion in chapter 7.

<sup>886</sup> Religious Leader, Interviewed 17 April 2006.

<sup>887</sup> Religious Leader, Interviewed 23 January 2003.

<sup>888</sup> Community Leader, Interviewed 5 December 2007.

<sup>889</sup> Community Worker, Interviewed 11 June 2003, 7 October 2008.

Several Muslim women interviewed for this research shared their views about how they felt about their husbands being obligated to maintain them:

*I think that it makes a lot of sense to have it so clear that the financial responsibility lies with him, there is no arguing, he pays for most things for the household.<sup>890</sup>*

*I know that I don't have to spend my money on the family, but as we are both working I felt that we should share the responsibility of the finances, but having said that I am not his servant and expect that he will share in the household work as well.<sup>891</sup>*

This is not to say that all Muslim men fulfil this obligation, as one of the social workers interviewed for this research said that some men use this as a way to abuse their wives:

*Many of our clients have left situations where their independence was cut off because of a lack of access to financial resources...men need to understand their responsibility and realise that withholding money from women can be a form of abuse that is contrary to Islamic principles.<sup>892</sup>*

This raises an important point, that in Islam the obligation of the husband to maintain the wife is a responsibility on the husband, not an avenue to be used for the abuse of

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<sup>890</sup> Community Member, Interviewed 17 January 2006.

<sup>891</sup> Community Member, Interviewed 1 February 2008.

<sup>892</sup> Community Worker, Interviewed 18 August 2007.

the wife. Again, this shows that having a correct understanding of how Islamic principles are to be applied will help to ensure that women are not disadvantaged.

## 7. Conclusion

The discussion above has demonstrated that for Muslims in Australia, Islamic family law remains relevant and applicable in the way that they get married. Quite often Muslims seek to satisfy the requirements of both the official and the unofficial laws, as the two spheres arguably influence and impact on one another.<sup>893</sup> Thus, Muslims are not lost between cultures. Rather, as Yilmaz argues, ‘they skilfully navigate across different cultures. In the normative space they reach the same end as skilful legal navigators. They apply relevant law in relevant contextual situations aiming to meet demands of different overlapping normative orderings.’<sup>894</sup> Therefore, the assumed uniformity of law only exists at the official level, with the reality showing a plurality of laws existing alongside it.

In the area of marriage, this chapter documented in detail the way that Muslims in Australia go through the marriage process, and more significantly the implications for Muslims when Islamic principles of marriage intersect with Australian law. It was argued that there is sufficient flexibility in Australian marriage laws to allow Muslims to generally abide by most of the Islamic principles relating to marriage, although it was clear that there exists a lack of awareness of this.

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<sup>893</sup>Yilmaz, Ihsan, *Muslim Laws, Politics and Society in Modern Nation States: Dynamic Legal Pluralisms in England, Turkey and Pakistan* (2005) at 5.

<sup>894</sup>Ibid at 3.

The central question of this research is how Islamic principles of family law can be recognised or accommodated by the Australian legal system. In regards to marriage laws, the discussion above has demonstrated that there are more areas of commonality than of difference between the Islamic law of marriage and Australian law. This understanding has implications both for the Australian Muslim community as well as for the state, for it opens up the possibility that, rather than seeking any formal legal accommodation or amendments to the current law, perhaps what is more useful is to explore ways of making existing legal principles and services apply in a more religiously sensitive way.

This would need to be a dynamic process, whereby the official legal system recognised that there are other norms and principles which govern the way that people marry in Australia and that for existing legal structures and processes to be relevant to all Australians, they need to be delivered in a religiously and culturally sensitive way. It would also mean that the Muslim community itself needs to be aware of the existing flexibility in the current arrangements and to explore this as a way of harmonising the intersection of Islamic law and Australian marriage law. Both the state or the official legal system as well as the Muslim community need to consider ways of changing and developing processes which ensure a smooth navigation for Muslims between two different legal systems. Viewed in this light, the question of accommodation of *Shari'ah* or Islamic law in the Australian legal context is not threatening to the stability of the society as it is not about setting up a separate or parallel legal structure. Rather, it is a question of making existing Australian laws and processes more relevant to the needs of Australian Muslims, a central focus of successful multicultural policies as discussed in chapter 3. Finally, in regards to the

concern raised in chapter 3 that multicultural policies are bad for women, this chapter has demonstrated that in regards to Muslim women and marriage laws there exist many opportunities for the protection and enhancement of their rights, as this would allow them to rely on both Islamic principles and the Australian legal framework for the enforcement of these rights.

## Chapter 8

### Islamic Laws of Divorce

#### 1. Introduction

Like marriage laws, divorce laws are an integral part of any family law system. Indeed, when the issue of accommodation or recognition of *Shari'ah* or Islamic law has been raised, the focus has been on the applicability of Islamic principles of divorce and the community processes that seek to apply these more than any other aspect of Islamic law. The discussion in the previous chapter concerning marriage laws revealed that there were more areas of commonality than points of difference with Australian law. It also considered several avenues for the harmonization of Islamic marriage laws within the existing Australian legal framework, avenues which also could have the same impact in the area of divorce, namely the use of marriage contracts and their intersection with binding financial agreements under the Family Law Act.

This discussion will now consider whether the same potential exists in the area of divorce. This is particularly significant because, as earlier chapters have demonstrated, most of the arguments against recognition or accommodation were

centered around the gender concerns associated with the divorce process. This issue will be considered when we explore the community processes that deal with divorce in the Australian context in the next chapter. To aid in our understanding of these processes, we need to examine key aspects of Islamic laws of divorce. This chapter will outline the general Islamic principles associated with divorce, the different types of divorce that exist in Islamic law and how they apply differently to men and women.

The chapter will also set out the general principles of property settlement and post divorce financial entitlements according to Islamic law, and provide the basis for my argument in chapter 10 that there are strong grounds for the protection of women's financial rights upon divorce, yet this is an issue that needs to be given greater prominence and attention in the way that they are applied in the community processes. This understanding of Islamic laws of divorce is crucial to the discussion in chapter 9 that considers their intersection with Australian law.

## **2. General Principles of Divorce under Islamic Law**

### **2.1. Islamic View of Divorce**

In the technical language of the *Shari'ah*, the divorce means the separation which the husband wants as a matter of right, often referred to as *talāq*.<sup>895</sup> Doi argues that Islam takes a balanced view about divorce, recognising that

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<sup>895</sup> Maudoodi, above n677 at 29.

when a marriage becomes impossible to sustain, it is better for the parties to amicably separate rather than being miserably bound together...but on the other hand, it seeks to make ṭalāq a serious business and something abhorrent to Muslims.<sup>896</sup>

This view of a balanced approach was one expressed by most 'imāms interviewed for this research, for example:

*Islam understands that whilst it is better for a marriage to remain intact, the reality is that not all marriages will work out and people should not have to remain in an unhappy relationship for the rest of their lives.*<sup>897</sup>

*To understand divorce, you need to understand marriage – I mean if a relationship between a husband and wife is not fulfilling the main objectives of marriage, then divorce becomes an option.*<sup>898</sup>

*Marriage to us is not a sacrament, if it fails, it fails due to human shortcomings and we are not compelled to stay in it.*<sup>899</sup>

The permissibility of divorce in Islam can be traced back to the importance placed on marriage as a contract between a husband and a wife, as was discussed in chapter 7. Whilst the contract is sacred, with great significance attached to its formation and compliance with its terms, it also has an important function of being ultimately a negotiated agreement by the parties, and one which recognises the right of divorce if

<sup>896</sup> Abdur Raḥmmahn I. Doi, *Women in Shari'ah* (2006) at 83.

<sup>897</sup> Religious Leader, Interviewed 7 July 2008.

<sup>898</sup> Religious Leader, Interviewed 2 June 2006.

<sup>899</sup> Religious Leader, Interviewed 11 December 2003, 2 June 2006, 17 September 2008.



one party breaches a condition agreed upon in the contract. However, as noted above, this needs to be balanced with the fact that Islam does not encourage parties to easily tread the path of divorce. Rather, the Qur'anic principles encourage people to look beyond the deficiencies of their partner, and seek to reconcile their differences:

On the contrary live with them on a footing of kindness and equity. If ye take a dislike to them, it may be that ye dislike a thing and Allah brings about through it a great deal of good.<sup>900</sup>

Divorced women shall wait concerning themselves for three monthly periods. Nor is it lawful for them to hide what Allah Hath created in their wombs, if they have faith in Allah and the Last Day. And their husbands have the better right to take them back in that period, if they wish for reconciliation.<sup>901</sup>

There are also numerous ḥadith (narrations from the Prophet) that relate to divorce, some of these are:

In the eyes of Allah it is the most hateful of the lawful things.<sup>902</sup>

Marry and do not divorce, for Allah does not like men and women whose only aim is the satisfaction of the sexual lust.<sup>903</sup>

Finally, it is important to note that if parties are to divorce, they should do so in an amicable way. The Qur'an stresses this most for men who divorce their wives:

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<sup>900</sup> The Holy Qur'an Chapter 4, verse 19.

<sup>901</sup> The Holy Qur'an Chapter 2, verse 228.

<sup>902</sup> Cited in Maudoodi, above n677 at 29.

<sup>903</sup> Ibid.

A divorce is only permissible twice: after that, the parties should either hold Together on equitable terms, or separate with kindness.<sup>904</sup>

This was emphasized by several community leaders:

*The Qur'an specifically refers to good treatment of the spouse at the time of divorce – does that happen? Well, not always, as people are usually hurt and angry and do not control their emotions. A big part of my job is to remind people of their religious obligation to be kind and just at this difficult time. It is funny that some people take their prayers and fasting very seriously, seeing them as obligatory, but can easily lose sight of the obligation of good treatment towards their spouse – an equally important religious obligation.*<sup>905</sup>

*I have seen some very good examples of good conduct during divorce, but I think I have seen many many more examples of the exact opposite – unfortunately people forget that they are not just dealing with their partner, but they are also acting before God.*<sup>906</sup>

However, as will be demonstrated in the discussion below, there are several concepts within Islamic law that govern the termination of marriage and that come within the broader concept of divorce as commonly understood in the Australian legal context

## 2.2. Types of Divorce

There are several ways that a marriage can be terminated according to Islamic law, and whilst these will be dealt with in some detail later in the discussion, it is important

<sup>904</sup> The Holy Qur'an, Chapter 2 verse 229.

<sup>905</sup> Community Leader, Interviewed 5 June 2006, 23 July 2008.

<sup>906</sup> Community Leader, Interviewed 5 November 2008.

to introduce them and identify what they are called. The most common form of divorce is known as *ṭalāq*, and this occurs when the husband seeks to end the marriage. It is almost always an exclusive right of the husband and takes effect upon the husband communicating his desire to divorce to the wife. In some Islamic schools of thought, the husband can delegate this right of divorce to the wife either at the time of the marriage contract, or at a later time, this is called *ṭalāq e-tafwīḍ*. Divorce can also occur by mutual consent of both husband and wife, on terms agreed by them, and this is known as *mubaraat*. A wife can also initiate a process known as *khul'*, by agreeing to forgo a portion of her dowry she can seek to end the marriage. Finally, it is also possible for a court or judicial body to make an order of dissolution of the marriage in certain circumstances, and this is known as *tafriq* or *faskh*. Each form of divorce or separation operates in a different way and, as will be seen below, has differing implications as to when the divorce takes effect, and the financial adjustment that occurs after divorce.

### 2.3. 'Iddah or Waiting Period

One final matter by way of introduction to the concept of divorce in Islam was discussed in the previous chapter about marriage, and that is the waiting period of a woman upon divorce, known as the *'iddah*. This is the waiting period that a Muslim woman must go through before she can remarry after divorce, it is usually three months, but if she is pregnant then it lasts until the child is born.<sup>907</sup> Waiting periods are also relevant to men, as in certain forms of divorce, they indicate when a divorce actually takes effect.

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<sup>907</sup> Hussain, above n694 at 112.

The 'iddah has two main objectives. The first is to ascertain whether the wife is pregnant at the time of divorce.<sup>908</sup> The second is to allow time for reconciliation as it is argued

by dwelling in the same house...they must live under conditions that facilitate reconciliation between them or revocation by the husband of the divorce pronounced by him. It may also be strong proof of the difference between the two being irreconcilable.<sup>909</sup>

This is particularly important as the most preferred form of divorce in Islam is the one that gives the most time for reconciliation, as it is acknowledged that every effort should be made to keep the marital bond intact.<sup>910</sup> This is based on the Qur'anic verse:

And their husbands have the better right to take them back in that period, if they wish for reconciliation.<sup>911</sup>

Indeed this was well reflected by comments made by the interviewees:

*I see the rahmmahh (mercy) in the Islamic process – in the way that it leaves room for the couple to get back together, even after the divorce process has begun. I have seen many husbands who come to regret their decision to divorce during the 'iddah.*<sup>912</sup>

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<sup>908</sup> Id at 112.

<sup>909</sup> Aftab Hussain, above n788 at 556-7.

<sup>910</sup> Maudoodi, above n677 at 28.

<sup>911</sup> The Holy Qur'an Chapter 2, verse 228.

<sup>912</sup> Community Leader, Interviewed 1 February 2007..

*If the conflict is new, we try reconciliation first and delay divorce to give room for reconciliation. We also encourage a divorce process that gives time for reconciliation during the waiting period.*<sup>913</sup>

It is important to note that according to Islamic law, the husband has an obligation to continue to maintain the wife during this time, as mentioned in the following Qur'anic verse:

Let the women live (in 'iddat) in the same style as ye live, according to your means: Annoy them not, so as to restrict them. And if they carry (life in their wombs), then spend (your substance) on them until they deliver their burden: and if they suckle your (offspring), give them their recompense: and take mutual counsel together, according to what is just and reasonable.<sup>914</sup>

Furthermore, women are encouraged to remain residing in the marital home during the 'iddah, again with the purpose that this may create a greater opportunity for reconciliation. However, it was clear from the interviews that the community leaders certainly did not recommend this when the wife did not want to, or if there were issues of personal safety for the wife

*It is her right to remain in her home, if somebody needs to leave it should be the husband, it is not right islamically for a wife to have to pick up the kids and leave, unless of course if there is some danger for her or the kids.*<sup>915</sup>

<sup>913</sup> Religious Leader, Interviewed 6 August 2006..

<sup>914</sup> The Holy Qur'an Chapter 65, verse 6.

<sup>915</sup> Religious Leader, Interviewed 9 July 2007.

## 2.4. Family Dispute Resolution in Islam

One of the key characteristics of how Islam deals with marital disputes, is the advice given to both parties to reach an amicable settlement of their dispute. It is highly advisable that this is done through informal means of dispute resolution. In particular the Qur'anic verse instructs the couple to seek intervention from family members or respected arbiters:

If you fear a breach between them twain, Appoint two arbiters, one from his family and the other from hers; If they wish for peace, Allah will cause their reconciliation: For Allah hath full knowledge and is acquainted with all things.<sup>916</sup>

This verse provides the basis for the development of family dispute resolution processes outside the formal legal system. Lukito argues that in Islamic legal tradition mediation is recognised as a primary means of resolving family disputes for 'the parties to avoid the more serious consequence of the juridical process'.<sup>917</sup> This was discussed in some detail in earlier chapters, where it was argued that alternative dispute resolution concepts like conciliation, mediation and arbitration are not new to Muslim communities, as they have a rich tradition in Islamic practice.

Furthermore, the earlier discussion demonstrated that the Muslim community in Australia has developed its own informal processes to resolve family disputes and deal with issues of a family law nature based on these Islamic principles applying in

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<sup>916</sup> The Holy Qur'an, Chapter 4 verse 35.

<sup>917</sup> Lukito, above n607 at 333.

an Australian context. Chapter 7 concentrated on how these processes operated in the context of marriage, and the next 2 chapters seek to build on that analysis, to explore in more detail how these processes apply in the context of divorce by firstly considering how Muslims divorce and secondly how the couple settle their financial affairs upon divorce. It is very clear that, just as was the case in the issue of marriage, when it comes to divorce processes Muslims in Australia are very conscious of the need to abide by two sets of legal principles, at times in two different settings.

### 3. Talāq

The chapter will now turn to a consideration of the various concepts of divorce in Islam. However, it is important to appreciate that this discussion is only an introduction into this area of Islamic law, and it is beyond the scope of this project to consider in detail the various aspects of Islamic divorce law. The objective of this discussion is to provide the reader with some background into the legal principles that *'imāms* and other community leaders use as a basis for helping couples to resolve their disputes.

This part of the chapter will focus on the divorce known as the *ṭalāq*, which is probably the most well known way of ending an Islamic marriage, and one which is commonly understood to be an instantaneous form of divorce, effected by the husband telling the wife she is divorced. The discussion below will show that *ṭalāq* is far more complex than this, and even within the category of *ṭalāq*, there are several forms of divorce. Let us now examine what *ṭalāq* is and how it comes into effect.

### 3.1. Procedures of Divorce

Whilst there are differing forms of *ṭalāq*, the essence of this type of divorce is that it is initiated by the husband, an indication by him that he wishes to end the relationship.

This needs to be communicated to the wife, and may be done orally or in writing.

Whilst there is no prescribed formula for pronouncing divorce, the words used must expressly convey the intention of the husband that he has dissolved the marriage tie.<sup>918</sup> Nasir argues that the words used may be 'explicit (*sarih*) or implicit (*kinaya*)'.<sup>919</sup>

Some scholars stipulate that there needs to be witnesses to the communication made by the husband to the wife. Others disagree, arguing instead that it is enough that the communication was made by the husband. However, as was mentioned earlier, in matters associated with *ṭalāq*, men are commanded to show the wife kindness and generosity as 'they are enjoined to restrain themselves from being vengeful or spiteful, and from displaying harshness to them or maltreating them'.<sup>920</sup> This is based on the following verse:

When ye divorce women, and they fulfil the term of their ('Iddah), either take them back on equitable terms or set them free on equitable terms; but do not take them back to injure them, (or) to take undue advantage; if anyone does that he wrongs his own soul. Do not treat Allah's Signs as a jest, but solemnly rehearse Allah's favours on you, and the fact that He sent down to you the Book and Wisdom, for your instruction. And fear Allah and know that Allah is well acquainted with all things.<sup>921</sup>

<sup>918</sup> Doi, above n896 at 88.

<sup>919</sup> Nasir, above n688 at 106.

<sup>920</sup> Aftab Hussain, above n788 at 581.

<sup>921</sup> The Holy Qur'an, Chapter 2 verse 231.



It is these verses that make good treatment of women at the time of divorce a duty on men. As to when the *ṭalāq* or divorce comes into effect will depend on which form it takes, and this will be considered below.

### 3.2. *Talāq ar-Raji‘i* – Revocable Divorce

This form of *ṭalāq* involves the husband pronouncing or communicating the *ṭalāq*, but it does not come into effect until the expiration of the *‘iddah* (waiting period). In other words, it is divorce with the possibility of reconciliation. In this type of divorce the husband pronounces *ṭalāq* once – after which the wife’s *‘iddah* starts – before the end of the *‘iddah* the husband may take his wife back – this is called *raj‘a* or return – but this is lost once the *‘iddah* is completed and the *ṭalāq* becomes irrevocable.<sup>922</sup> Pearl and Menski state that ‘at any time during this period, the husband has the option to revoke the pronouncement either expressly by word of mouth or implicitly by resuming marital relations, without the necessity of a new contract’.<sup>923</sup>

This type of *ṭalāq* is only allowed twice, as Doi argues ‘after that the parties must definitely make up their mind either to dissolve their marriage permanently or to live honourably together’.<sup>924</sup> This is based on the following verse:

A divorce is only permissible twice. After that the parties should either hold together on equitable terms or separate with kindness.<sup>925</sup>

<sup>922</sup> Doi, above n896 at 109.

<sup>923</sup> Nasir, above n688 at 109.

<sup>924</sup> Doi, above n896 at 85.

<sup>925</sup> The Holy Qur’an, Chapter 2 verse 229.

There are two types of *Talāq ar-Raji* 'i, and these will be considered in turn below.

### 3.2.1. Talāq Āaḥsan

The term Āaḥsan means the most approved.<sup>926</sup> In this context, this form of *ṭalāq* is the most favoured by the Prophet.<sup>927</sup> The essential elements of this form of *ṭalāq* are set out by Doi<sup>928</sup>:

1. The husband must pronounce only one *ṭalāq*
2. The *ṭalāq* must be pronounced only when the wife is in a state of purity after menstruation
3. The husband must after pronouncing the *ṭalāq*, abstain from intercourse with his wife for a period of three months – the 'iddah

At the completion of the 'iddah, the divorce comes into effect as 'the dissolution of the marriage tie arises directly from the unilateral *ṭalāq* pronounced three months earlier'.<sup>929</sup> The implication of this is that there is no longer a right to resume the marriage without a new marriage contract. This constitutes one *ṭalāq* or divorce.

### 3.2.2. Talāq Ḥasan

The term ḥasan means approved and this form of divorce commands a degree less in the approval of the Prophet as compared to *ṭalāq Āaḥsan*.<sup>930</sup> This *ṭalāq* is pronounced

<sup>926</sup> Doi, above n896 at 85.

<sup>927</sup> Pearl & Menski, above n1 at 280.

<sup>928</sup> Doi, above n896 at 85.

<sup>929</sup> Pearl & Menski, above n1 at 280.

<sup>930</sup> Doi, above n896 at 87.

three times in three successive periods, as Doi sets out its procedure in the following way:<sup>931</sup>

1. The first pronouncement of *ṭalāq* is made in a period of purity from menstruation known as *tuhur*
2. After the first pronouncement of *ṭalāq* the husband shall not have sexual intercourse with his wife
3. A second pronouncement is made in the second *tuhur* followed by sexual abstinence
4. At this point there can be reconciliation before the pronouncement of the third *ṭalāq*
5. A third pronouncement of *ṭalāq* is made in the third *tuhur* – when this is made the divorce becomes irrevocable

### 3.3. Talāq al-Bain – Irrevocable Divorce

There are two types of irrevocable divorce and these will be considered below.

#### 3.3.1. Bain Bainoona Sughra – Minor Irrevocable Repudiation

This occurs after the expiration of the first and second periods of 'iddah of a revocable divorce or *ṭalāq* and is known as a minor irrevocable repudiation, because although the divorce has taken effect the husband may marry his repudiated wife under a new contract, for a new dower and subject to her consent.<sup>932</sup>

#### 3.3.2. Bain Bainoona Kubra – Major Irrevocable Repudiation

This occurs after the third repudiation, that is the third *ṭalāq*. It is known as a major irrevocable repudiation because it is temporarily prohibited for the husband to remarry the wife after this *ṭalāq*. As Nasir states 'He can only remarry her after she

<sup>931</sup> Id.

<sup>932</sup> Nasir, above n688 at 110.

has been duly married to another, genuine consummation has taken place, her second marriage has been duly dissolved, and she has counted her 'iddah'.<sup>933</sup> In other words, they can only remarry after she has genuinely married and divorced someone else.<sup>934</sup> Maudoodi argues that this is 'to make a man think a hundred times before he makes the third pronouncement of divorce'.<sup>935</sup> In particular, it acts as a deterrent for men who seek to abuse their wives by constantly divorcing them.

### 3.4. *Talāq al-Bid'a* – Divorce of Innovation

This is the form of divorce commonly associated with Islam, where the husband says "I divorce you" 3 times in one sitting or conveys it to the wife in writing. In other words it is three pronouncements of *ṭalāq* at the one time. Doi argues that this was a practice that developed after the time of the Prophet and is in fact contrary to the principles of Islam because it leaves no room for conciliation and no chance for reconsideration.<sup>936</sup> However, whilst it is not encouraged, nor religiously sanctioned, it is deemed to be legally effective according to Islamic law, although there is some difference with how the jurists view the effect of this kind of *ṭalāq*. The Hanafi jurists consider that this triple *ṭalāq* takes effect only as a single divorce, but the Shafi'i hold that it is legal and effective, although reprehensible.<sup>937</sup> Pearl and Menski argue that the moral disapproval of this has not hindered its popularity in many parts of the Muslim world 'for the obvious reason that it suits men'.<sup>938</sup> This is despite the fact

<sup>933</sup> Id.

<sup>934</sup> Doi, above n896 at 88.

<sup>935</sup> Maudoodi, above n677 at 33.

<sup>936</sup> Doi, above n896 at 88.

<sup>937</sup> Hussain, above n694 at 103.

<sup>938</sup> Pearl & Menski, above n1 at 281.

that many scholars hold the simultaneous pronouncement of three divorces to be a sin.<sup>939</sup>

## 4. Other types of Divorce

Divorce in Islam is not limited to *ṭalāq*, and in fact Islamic law provides many other ways for the termination of marriage, even ones that do not require the consent of the husband. These forms of divorce will now be considered below.

### 4.1. Khul' or Khul'ah

Just as Islamic law gives man the right to divorce as a husband, it also gives women the right to khul'ah, that is to seek separation from the husband.<sup>940</sup> Doi argues<sup>941</sup> that khul' is derived from *khul' al-thawb* which means releasing or removing the dress from the body, and that this relates to the Qur'anic verse:

They are your garments. And ye are their garments.<sup>942</sup>

*Khul'ah* is based on the following Qur'anic verse:

If a wife fears cruelty or desertion on her husband's part, there is no blame on them if they arrange an amicable settlement between themselves; and such settlement is best; even though

<sup>939</sup> Maudoodi, above n677 at 32.

<sup>940</sup> Ibid at 34.

<sup>941</sup> Doi, above n896 at 96.

<sup>942</sup> The Holy Qur'an Chapter 2 verse 187.

men's souls are swayed by greed. But if ye do good and practice self-restraint, Allah is well-acquainted with what ye do.<sup>943</sup>

It is also based on the way that the Prophet dealt with a woman who sought to be separated from her husband simply because she no longer wanted to remain married to him. This is what is commonly referred to as the tradition of ibn Abbass who relates

that the wife of Thabit bin Qays came to the Prophet and said 'O Messenger of Allah, I don't find anything wrong with him from the religious and moral points of view, but I detest disbelief after entering the fold of Islam; The Messenger of Allah said, 'will you return to him his orchard (that he had given to you)'. She said yes, the Messenger of Allah said to Thabit 'accept the orchard and divorce her through a single repudiation.'<sup>944</sup>

There are two important considerations that need to be discussed here. Firstly, there is the issue of whether *khul'ah* is dependent on the consent of the husband. Some scholars argue that his consent is required, namely those scholars from the Hanafi and Shafi'i schools of jurisprudence, yet other schools of thought contend that the Prophetic tradition that supports Khul does not require this.<sup>945</sup> Al-Hibri supports this conclusion by arguing that Egypt now has changed its laws so that a husband's consent is not required for *khul'ah*.<sup>946</sup>

The second important aspect of *khul'ah* is that it involves a woman forgoing a part of her dowry in consideration for the husband to divorce her. Maudoodi argues that if a

<sup>943</sup> The Holy Qur'an chapter 4 verse 128.

<sup>944</sup> Cited in Ibn Rushd, above n696 at 79.

<sup>945</sup> Mida, R, Zantout, 'Khul: Between Past and Present', *Islamic Law and Law of the Muslim World* (New York Law School Research Paper Series 08-14, July 2006) at 8.

<sup>946</sup> Al-Hibri, above n841 at 6.

woman wants separation she has to forgo what she has received from her husband and the husband needs to be willing to accept this. Therefore according to Maudoodi separation by *khul'ah* will be legally effective only when the husband accepts the money she offers and divorces her.<sup>947</sup> In other words *Khul'ah* is completed when the woman demands separation on payment of part of the whole of the *mahr*; the man accepts the payment and divorces her. Furthermore *khul'ah* needs only the mutual agreement of the spouses, it does not have to be supported by a court order.<sup>948</sup>

Thus, the issue of consent and payment of at least some portion of the dowry are closely related. Even if one accepts the view that the husband does not have to expressly consent to the divorce, there would seem to be an implied consent by the acceptance of the dowry from the wife. So what if the husband refuses the woman's request or offer? This is where it becomes necessary for a court or arbitrator to intervene, either to enforce *khul'ah* (if the view is accepted that the husband's consent is not required) or to make an order dissolving the marriage, and this will be considered below.

## 4.2. Mubara'ah

This occurs when both parties consent to the divorce. It is irrevocable and does not require the wife to pay any compensation.<sup>949</sup> This type of divorce allows the couple to come to their own agreement as to the terms of their divorce. It is interesting that if the husband is the one who makes the initial offer of a mutually agreed divorce, his

<sup>947</sup> Maudoodi, above n677 at 35-36.

<sup>948</sup> Ibid.

<sup>949</sup> Doi, above n896 at 97.

offer may not be retracted before the wife has given an answer, and it becomes effective once the wife accepts.<sup>950</sup>

### 4.3. Talāq e-Tafwid – Delegated Divorce

As was discussed in the previous chapter, a condition may be inserted in the initial marriage contract that gives the wife the right to divorce. In legal terms, the husband is agreeing to delegate his right to *ṭalāq* to the wife in certain circumstances.<sup>951</sup> Hussain describes it as existing 'where the wife has included in her marriage contract a condition that the husband delegates his right of divorce to the wife so that she can exercise it herself when any of the conditions of the marriage contract are violated.'<sup>952</sup> This right can be delegated to the wife at the time of marriage or afterwards and may be conditional or unconditional. In these circumstances the wife can initiate the divorce process as a husband would initiate *ṭalāq*.

### 4.4. Faskh or Tafriq

This is where the wife asks a court or arbitrator to make an order of dissolution of marriage. This is usually relevant where there is some perceived fault on the part of the husband.<sup>953</sup> In particular, when the wife can prove that the husband has violated his mutual duties or mistreated her, she is granted a judicial separation or *tafriq*.<sup>954</sup> These circumstances include the following:

<sup>950</sup> Pearl & Menski, above n1 at 284.

<sup>951</sup> Ibid at 283.

<sup>952</sup> Hussain, above n694 at 108.

<sup>953</sup> Ibid at 108- 110.

<sup>954</sup> Zantout, above n945 at 1.



- Apostasy
- Impotence, insanity or suffering from certain diseases
- Absence on part of the husband
- Ill treatment
- Failure to pay maintenance

However it is important to note that there is some disagreement between the different schools of thought<sup>955</sup> on this issue.<sup>956</sup> This form of divorce is made according to the two jurists *'imāms* Malik and Ibn Hambal.<sup>957</sup> The important point to note here, is that if there was any fault on the part of the husband or any mistreatment, then obtaining the *faskh* or *tafriq* means that the wife does not forgo any financial rights upon divorce. This will be considered in more detail in the discussion below.

Therefore it can be seen that divorce in Islam can take several forms, but the important question for the purpose of this research is how relevant are they to the way that Muslims in Australia go about divorce? How are these principles applied in Australia? These critical questions will be considered in detail in the next chapter. We now turn to examine another important issue, one that is closely related to the divorce process, and that is the financial entitlements of the parties upon divorce, or what is commonly referred to as property settlement.

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<sup>955</sup> Pearl & Menski, above n1 at 285.

<sup>956</sup> Nasir, above n688 at 114.

<sup>957</sup> Ibid at 115.

## 5. Financial Entitlements under Islamic Law

Firstly, there is the issue of the dowry or *mahr*. This was considered in some detail in the previous chapter. The relevance of this issue here is that when *ṭalāq* occurs, or there is a judicial order of *tafriq* then the husband is obligated to pay any outstanding *mahr* owed to the wife. This is because the *mahr* is legally a debt owed to the wife. It is important to remember that there may not be any amount owed to the wife if she had received the full amount of *mahr* at the time of marriage.

However, if the wife sought to end the marriage through *khul* then, depending on the agreement between the couple, she may forfeit a part of or the entire *mahr* amount. The discussion in the next chapter will detail how this is applied by Muslim couples in Australia, and the impact that this can have on the decisions made by men and women as to how they go about seeking an end to their marriage.

To many, this is where any discussion about financial entitlements in Islam stops, with the only relevant issue being the *mahr*. As the discussion below will demonstrate, it can mean that in many cases women can walk away from a marriage with little or no financial entitlements. More seriously, it can mean that even in cases where a couple own property, a woman may feel that she is not Islamically entitled to any part of it. Thus, one can easily see why it is the area of divorce that creates the most controversy when the question of legal accommodation of Muslim family law is raised. However, it is the argument of this chapter, that Islam actually does provide a foundation for women securing their financial rights upon divorce, even though knowledge of this is not widespread. As El-Sheikh argues

the predominant scholastic understanding and prevailing judicial applications in the Muslim world of today indicate that women are not entitled to any post-divorce financial support (*Mut'at al-talāq*) and property settlement, or any wealth of their household that accumulated during the marital course, under the pretext that these women have already exhausted their shares of being sheltered, clothed and fed by their husbands during the period of their marital life. They conclude by saying that those women are only entitled to three months of spousal support during their religiously prescribed waiting period.<sup>958</sup>

He goes on to argue that this area of law is one of the most marginalized and neglected parts of Islamic law, despite the fact that 'the Qur'an has addressed this topic in several verses and the practical Sunna confirmed its application during the lifetime of the Prophet'.<sup>959</sup>

Similarly, al-Hibri also argues that the issue of financial rights for women post divorce has been a neglected area of jurisprudence as she says 'What I have discovered is that the Qur'an does give a basis for additional financial rights for the woman but no one bothered to develop those sufficiently because everyone was living in a Muslim country.'<sup>960</sup> Here Al-Hibri, is arguing that there has not been due attention paid to how this area of law is applied by the Muslim community when they are living as a minority in a predominately non-Muslim country.

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<sup>958</sup> Muhammad Adam El-Sheikh, 'Post-Divorce Financial Support from the Islamic Perspective (*Mut'at-al-talaq*)', International Institute of Islamic Thought (2008) at 1 <http://iiit.org/Research/SummerScholarsInstitute/TableofContents2008/PostDivorceFinancialSupport/talbid/254/Default.aspx> accessed 11 January 2011.

<sup>959</sup> Ibid.

<sup>960</sup> Al-Hibri, above n841 at 13.

The basis for granting women financial rights upon divorce is a concept known as *Mut'a*. Its linguistic definition is enjoyment or happiness, but legally it refers to the post divorce financial support or payment to be made by the husband to the wife.<sup>961</sup> It is a kind of support or provision which has to be given to the divorced woman by the husband at the time of divorce. According to Ibn Rushd it is a gift of consolation paid to divorced women.<sup>962</sup> It is based on the following Qur'anic verses:

There is no blame on you if ye divorce women before consummation or the fixation of their dower; but bestow on them (a suitable gift), the wealthy according to his means, and the poor according to his means; a gift of a reasonable amount is due from those who wish to do the right thing.<sup>963</sup>

For divorced women Maintenance (should be provided) on a reasonable (scale). This is a duty on the righteous.<sup>964</sup>

O ye who believe! When ye marry believing women, and then divorce them before ye have touched them, no period of iddat have ye to count in respect of them: so give them a present. And set them free in a handsome manner.<sup>965</sup>

There is strong evidence from established scholarly work, that reputable Islamic Jurists and Qur'anic commentators agreed that this payment by the husband to the wife is either highly recommended or obligatory.<sup>966</sup> El-Sheikh mentions several of these scholars, including Al-'*imām* al-Tabari who is 'among the oldest Qur'anic

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<sup>961</sup> El-Sheikh, above n958.

<sup>962</sup> Ibn Rushd, above n696 at 117.

<sup>963</sup> The Holy Qur'an Chapter 2 verse 236.

<sup>964</sup> The Holy Qur'an Chapter 2 verse 241.

<sup>965</sup> The Holy Qur'an Chapter 33, verse 49.

<sup>966</sup> El-Sheikh, above n958.

commentators...he strongly advocated for women's rights in the *mut'at*. He sturdily defends his belief that payment of *mut'at-al-ṭalāq* to a divorced woman is an obligation on the husband'.<sup>967</sup>

Amongst jurists, there are two different opinions, with some arguing it is mandatory and others holding that it is recommendable.<sup>968</sup> Let us consider, briefly, the views of the main Islamic jurists on this issue. *'imām* Abu Hanifa endorses it as obligatory in cases of divorce prior to consummation, but otherwise it would be recommendable.<sup>969</sup> *'imām* Malik ibn Anas views it as recommendable for a husband to pay this amount to a wife upon divorce.<sup>970</sup> However, as Mohd and Abd Malek note it is the Shafīī jurists who have given more prominence to the discussion on *mut'ah*.<sup>971</sup> These jurists hold that the payment of *mut'ah* is obligatory in the case of a wife being divorced by her husband whether by revocable or irrevocable divorce.<sup>972</sup> *'imām* Ahmed ibn Hambal's view is similar to *'imām* Shafī's view, that it is obligatory when the husband divorces the wife.<sup>973</sup>

This is just a brief summary of the views of the most known Islamic jurists, and its purpose is to show that there exist Islamic principles that provide for the provision of financial benefits to women upon divorce, although it should be remembered that the concept of *mut'a* applies when the husband has initiated the divorce through *ṭalāq* or *mubaraat* or there has been a judicial order of separation where the husband has been

<sup>967</sup> Id.

<sup>968</sup> Ibid at 3.

<sup>969</sup> Ibid.

<sup>970</sup> Ibid.

<sup>971</sup> Azizah Mohd & Normi Abd Malek, 'Muslim Women's Rights to Mut'ah after dissolution of marriage under Islamic Law: An absolute or limited right' (2009) 17 *International Islamic University of Malaysia* 33 at 34.

<sup>972</sup> Ibid at 38.

<sup>973</sup> El-Sheikh, above n958 at 3.

at fault. It should also be noted that *mut'a* applies in addition to the *mahr* amount the wife may also receive, as well as any other property adjustments that need to occur as result of her contributions to the marriage. Furthermore, just as the wife had a role to play in determining the amount or content of the dowry or *mahr*, she too is entitled to request the *mut'a*.<sup>974</sup> However, it must be remembered that *mut'a* does not apply where the woman seeks to end the marriage through *khul*.

The question may be asked how is the *mut'a* to be payed and what is the value of the *mut'a*? Firstly, the husband should provide it without being prompted. The couple may also seek to reach an agreement of the amount to be paid.<sup>975</sup> If the two parties dispute its amount, it must then be determined by the *Qādy* (Muslim Judge), taking into consideration both the financial means of the husband and the wife, according to the dominant opinion in the Shaf'i school. It then becomes binding on the husband to deliver this amount to the divorced woman. In the situation where there is no *Qādy*, then what is called a *Muhakkim* is brought into the situation, who is a just person, with knowledge in the legal aspect of the matter, whom both parties agree to have rule in the situation.<sup>976</sup>

Finally, it needs to be remembered that other than *mahr* and *mut'a*, a woman is entitled to ensure that certain financial contributions she made, whether it is by way of providing for the household needs or through her payment towards any marital property is duly compensated. This needs to be understood in the Islamic context of

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<sup>974</sup> Opinion sought from Shafi Jurist (*Shaykh 'umar Bin Hussein AlKhatib*), Tarim, Hadramawt, Yemen, April 2010

<sup>975</sup> Mohd & Abd Malek, above n971 at 49.

<sup>976</sup> Opinion sought from Shafi Jurist (*Shaykh 'umar Bin Hussein AlKhatib*), Tarim, Hadramawt, Yemen, April 2010

the husband being obligated to maintain his wife throughout the marriage as was discussed in the previous chapter.

In the event that the husband did not provide for her food or clothing, then the total amount is considered a debt, and the husband is liable for it. If the wife has financially contributed to the repayments on a home loan, then she owns the home according to the proportion which she has paid. If she was the only one contributing to the home loan repayments, then the house is considered her property upon separation, even if it were registered under the husband's name. Likewise any other items such as furniture, vehicles or any other joint property that she has payed for is considered her property. In regards to any financial contribution she made to the running of the household, then if she intended that to be a loan, and the husband understood this, then all amounts she contributed are considered a debt and the husband is liable to pay. This does not mean that she needs to expressly indicate at every contribution that she makes to the household finances that she is providing her husband with a loan, rather it is implied that the amount she contributes falls into the category of a loan unless she expressly states otherwise.<sup>977</sup>

It is imperative to remember that these principles of property settlement apply to a context where men have the entire responsibility of maintaining the family unit, and women should not be spending any of their income on the family. Furthermore, these principles apply in the context that women upon divorce, will become the financial responsibility of another man, whether the father, brother, uncle etc. Thus, Islamically they do not have the responsibility of providing for themselves. However,

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<sup>977</sup> Opinion sought from Shafi Jurist (*Shaykh* 'umar Bin Hussein AlKhatib), Tarim, Hadramawt, Yemen, April 2010

as will be discussed in the next chapter the situation in the Australian context is different from this, as El-Sheikh notes about the US context

The prevailing western socio-economic life style which includes Muslim communities as part of the American structural fabric, is based on family cooperation among the adult members in the household. Often, both the husband and the wife work...one or both of them may have more than one job and usually a joint bank account. Therefore, they share expenses of life and equally enjoy the surplus of their earnings. If their marital life ends for any reason, all the real and personal assets, in principle, shall be subject to a communal division.<sup>978</sup>

Thus, quite often the family is not operating according to the Islamic principles of men maintaining women, and indeed it is this issue that poses the greatest challenge for seeking to apply Islamic principles of property settlement to Muslim couples in Australia, and this will be considered in the next chapter. However, it also needs to be remembered that Islam above all encourages the amicable settlement of disputes, thus there is nothing stopping a Muslim couple from reaching a negotiated settlement of their financial interests, and still be complying with Islamic law.

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<sup>978</sup> El-Sheikh, above n958 at 5.



## 6. Conclusion

The discussion above has provided a background to enable us to understand the principles underpinning the informal community processes that may Australian Muslims use when going through a divorce. The next chapter will analyse these processes as it will document what happens when Muslims navigate their way through the divorce process. This chapter has outlined the different options available to Muslims when seeking to end their marital relationship, all with an emphasis on the amicable resolution of family disputes and the emphasis on the good treatment of women in the divorce process. The discussion also explained the Islamic principles that govern the financial settlement upon divorce, and argued that there is a strong basis for the protection of the financial interest of women upon divorce, yet acknowledged that this was an issue in need of scholarly and community attention.

## **Chapter 9**

### **Divorce processes in Australia**

#### **1. Introduction**

This chapter seeks to build upon the analysis in chapter 8 to document and understand the process by which Muslims in Australia divorce and attempt to resolve their financial affairs upon divorce. However, before turning to this important task of documenting and understanding how Muslims get divorced in Australia, it is imperative to consider the Australian legal context. In particular this chapter will consider the Australian framework for family dispute resolution, divorce and post-divorce financial entitlements and how this intersects with the community processes used by many Muslims. Using the data gathered from the research, the discussion will outline the community processes that have developed to allow Australian Muslims to navigate their way through both Islamic and Australian divorce law.

These community processes, whilst being informal, unofficial and unenforceable are very important to Australian Muslims, and in particular to Muslim women. Thus any discussion or debate about whether these processes should be given recognition by the state or the official legal system would be incomplete without an understanding of how these community processes operate and why they are important to Muslim communities. This chapter will seek to provide this understanding about divorce

process and the Muslim community. The analysis of these community processes will highlight some concerns with the current practice, some of which formed the basis of the arguments against recognition of *Shari'ah* in the UK and Canadian contexts. These include the ad hoc nature of the processes, the lack of attention to important procedural safeguards and most importantly the gender concerns.

However, I will argue that what did not emerge clearly in the international debates (as described in chapter 4) was that the call for greater recognition is not an attempt to set up a separate and parallel legal system that would have the effect of compromising women's rights, but rather it is an attempt by the Muslim communities to integrate their processes into the mainstream official legal setting and help smooth the path for Muslims who need to navigate their way through these different legal settings associated with divorce. In particular, the research demonstrates that community and religious leaders are very aware that the existing processes operate in the shadow of Australian law, and that there is a need to evaluate the existing community arrangements so that a way forward can be found which facilitates this need for Australian Muslims to comply with both Islamic and Australian laws of divorce.

I argue that there is a way forward, but unlike the international response, this does not mean that we take the position that there is no room for these community processes because they threaten the stability of Australian society or because they are bad for women. Rather, I argue that we need to understand and evaluate these community processes and seek ways to make the existing official legal framework more suited to the needs of the Muslim community. This can be found in the strong emphasis both

in Islam and in Australian family law on the use of alternative forms of dispute resolution to resolve family disputes.

## 2. Family Dispute Resolution

Recent changes to the Family Law Act, particularly with the introduction of Family Relationship Centres across Australia in the last few years, have reflected the preference for keeping family disputes out of the court system. This means that there is greater encouragement than ever before to facilitate some sort of agreement between the parties through various forms of Family Dispute Resolution commonly known as FDR. Section 60I of the Family Law Act (Cth) provides that the parties must ‘make a genuine effort to resolve that dispute by family dispute resolution’.<sup>979</sup>

Family dispute resolution is defined as:

A process (other than a judicial process):

- (a) in which a family dispute resolution practitioner helps people affected, or likely to be affected, by separation or divorce to resolve some or all of their disputes with each other; and
- (b) in which the practitioner is independent of all of the parties involved in the process<sup>980</sup>

It has been suggested that the term does not specifically refer to any particular form of dispute resolution because ‘some of the legislative requirements are arguably

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<sup>979</sup> s.60I Family Law Act 1975 (Cth).

<sup>980</sup> s.10F Family Law Act 1975 (Cth).

inconsistent with the traditional mediation model such as the legislative requirement that advisers are to suggest particular outcomes to clients.<sup>981</sup> However, the main point is that the parties have avenues of dispute resolution that lie outside the court process.

The discussion in previous chapters has already made reference to the practices of Muslims in countries such as the UK, Canada and Australia<sup>982</sup> with respect to their use of unofficial and unenforceable community processes, based on Islamic law to resolve their family disputes.<sup>983</sup> What is interesting to note, is that these processes can be and indeed are now increasingly being described as a form of alternative dispute resolution, thereby fitting in with the current changes to the Family Law Act outlined above. Whilst Muslims might not go to Family Dispute Resolution Practitioners, or Mediation services run by mainstream organisations, or even avail themselves of the services offered by the multitude of Family Relationship Centres, they are resolving their disputes in a conciliatory manner. This is based principally on Islamic principles, as discussed above, which encourage the peaceful settlement of conflict, particularly in the area of family law.<sup>984</sup> As mentioned earlier in Islamic law ‘peaceful conflict settlement is to be achieved either by means of conciliation (*Sulh*) or arbitration (*Tahkim*) or mediation (*Wasaata*)’.<sup>985</sup> In particular, in family conflicts, the Qur’an instructs Muslims to adhere to these principles of dispute resolution, as Chapter 4, verse 35 says:

<sup>981</sup> Fehlberg & Behrens, above n719 at 334.

<sup>982</sup> Pearl & Menski, above n1; Yilmaz, above n747; McFarlane, above n356; Black, above n485.

<sup>983</sup> Ihsan Yilmaz, ‘Law as Chameleon: The Question of Incorporation of Muslim Personal law into the English Law’ (2001) 21 *Journal of Muslim Minority Affairs* 297 at 303.

<sup>984</sup> Bouheraoua, above n593 at 2.

<sup>985</sup> *Ibid.*

If ye fear a breach between them twain, appoint (two) arbiters, one from his family, and the other from hers; if they wish for peace, Allah will cause their reconciliation: For Allah hath full knowledge, and is acquainted with all things.<sup>986</sup>

On this basis, we see that what usually happens is that Muslims in family conflict will seek the help and advice of family members, as some interviewees said:

*When we first started having problems, I sought advice from my parents, and of course they attempted to help us to resolve our problems, actually come to think of it, they did this many times, before we went to see an 'imām.<sup>987</sup>*

*I turned to his brother for advice, as we were living with him at the time. I believed that he listened to his brother, and that he could help.<sup>988</sup>*

Then if things cannot be resolved or if they don't have any family around them, they will go to community leaders or community organisations for assistance:

*I really didn't know where to go, my family are all overseas and I had a young child. I was very distressed, but thank God somebody gave me the number of an organisation and I was able to get some advice about where to go and what to do.<sup>989</sup>*

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<sup>986</sup> The Holy Qur'an, Chapter 4, verse 35.

<sup>987</sup> Community Member, Interviewed 2 July 2008.

<sup>988</sup> Community Member, Interviewed 27 November 2006.

<sup>989</sup> Community Member, Interviewed 18 December 2003.

*I have no family to turn to, I didn't know what to do - I considered just going to the Mosque for help, but then I asked around and I was told that the MWA could help.<sup>990</sup>*

*My husband and I sought some counselling for our problems, we would go to meet up with a respected community leader, we truly appreciated the time she spent with us and the space she created for us to talk, I don't think we would still be together if we had sought help from our families.<sup>991</sup>*

Several representatives of well established Muslim community organisations based in Sydney were interviewed for this research, and they indicated that they played an important role for people wanting to resolve family disputes. They serve a number of functions and are often a first point of contact for many who don't know where to go, particularly if they are not familiar with the *'imāms* or they do not have a regular mosque that they attend. Some organisations like the Muslim Women Association are able to offer assistance directly to the community members, whilst others can refer them to other services. For example when a woman with family difficulties walks into the front door of an organisation like the Muslim Women Association, she will be interviewed, a case plan will be made for her, depending on her individual circumstances this can involve counselling, dealing with Centrelink issues, immigration issues, housing (particularly when women may be escaping situations of domestic violence), separation and divorce processes. There is a strong emphasis on supporting women to make decisions for themselves, as some community workers from this organisation said:

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<sup>990</sup> Community Member, Interviewed 16 December 2007.

<sup>991</sup> Community Member, Interviewed 1 February 2008.

*Sometimes we are accused of being homebreakers....but we do no such thing....in fact we do the exact opposite, we go to great lengths to facilitate reconciliation between a wife and her husband, sometimes we succeed and sometimes we don't. Ultimately it is up to the woman to make the decision as to whether she wants to reconcile with her husband, our role is to support her in her decision. Once she makes that decision then we guide her through the divorce process, seeking the intervention of a religious leader and encouraging her to seek appropriate legal advice.<sup>992</sup>*

*Supporting women through the process of divorce – working through issues with 'imāms, advocating on behalf of certain women – it is all part of our job.<sup>993</sup>*

*Educating women about their rights – many women are now beginning to question that if Islam gives me these rights then how can I ensure that I enjoy them and what is the process that I can go through to seek those rights without having to feel guilty about it<sup>994</sup>*

*When we are involved in the process, we develop case plans for each couple...our mediation process reduces the pain and agony because we do case planning for the children as well as the women. We try to support the families as much as we can.<sup>995</sup>*

Whilst each organisation has different ways in dealing with people seeking assistance, they all indicated that unless there were exceptional circumstances such as violence,

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<sup>992</sup> Community Worker, Interviewed 6 June 2003, 7 October 2008,

<sup>993</sup> Community Worker, Interviewed 10 June 2003, 4 July 2008.

<sup>994</sup> Community Leader, Interviewed, 5 June 2006, 23 July 2008.

<sup>995</sup> Community Worker, Interviewed 18 August 2007.



they all offered avenues to support reconciliation. This was mainly done by attempting to mediate between the parties, seeking the intervention and advice of religious leaders where necessary, referring couples to services that can meet their needs, but ultimately if the couple or at least one party chooses to divorce, then the matter will be referred to an *'imām*. This was described by several interviewees in the following way:

*Many women come to our organization for assistance and our staff refer them to the appropriate people or services. Most assessments are done at the community organization level, if mediation needs to take place then it is planned and set out for the couple with a specific religious leader agreed to by the couple and close family. When the mediation takes place the leader and community worker are there to help sort it out. When the decision to divorce is made then the religious leader handles it from then on because it then becomes an Islamic law issue – the community workers will then help if there is a fallout<sup>996</sup>*

*Mediation from an Islamic perspective is not dissimilar to other types of mediation processes, but there is a religious element to it – we rely on Islamic principles to remind both parties that you are under a religious obligation to resolve these issues with mercy.<sup>997</sup>*

*If a couple can't resolve their conflict, they usually turn to other family members, elders who try to intervene and reconcile the parties. If that doesn't happen, then the intervention of community or religious leaders is sought – their job is initially to listen to the stories of both – sometimes it can*

<sup>996</sup> Community Leader, Interviewed 5 June 2006, 23 July 2008.

<sup>997</sup> Community Worker, Interviewed 2 September 2006.

*still be easily resolved, other times the couple are clearly heading for divorce and attempts at reconciliation are a waste of time or in cases where there is abuse or violence simply not appropriate.*<sup>998</sup>

Thus it can be seen that families, respected community members, leaders and community organisations all play an important role in helping couples resolve their dispute. However if matters cannot be resolved then one of the parties will seek the intervention of an *'imām*, a religious figure that is respected by both parties. The next section of this chapter will consider in detail what happens at a community level once one of the parties seeks to initiate a divorce. However it can be said that at these various stages, what takes place is a combination of conciliation, negotiation and mediation with the ultimate purpose of both clarifying the status of the relationship between the couple (are they married or divorced) and facilitating an agreement to resolve their dispute (this is usually about property settlement upon divorce).

One final question that needs to be asked before examining these processes below, is why do Muslims in Australia seek to pursue these community processes? Pearl and Menski writing about the UK context argue that disputes resolved in this way are preferable to Muslims because they have a focus on healing wounds and bringing the parties together, whereas proceedings in courts risk exacerbation of such difficulties.<sup>999</sup> Similarly Poulter finds that 'Muslim community agencies and organizations may be particularly well placed to resolve family problems through the

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<sup>998</sup> Community Leader, Interviewed 18 August 2007.

<sup>999</sup> Pearl & Menski, above n1 at 79.

processes of counselling, mediation and arbitration, and will often be the ‘first port of call’ for those in difficulty’.<sup>1000</sup>

The question of why Muslims in Australian pursue community processes was asked to both community leaders as well as people who had accessed the community divorce processes interviewed for this research. Their responses indicated that firstly, in particular for women the issue of obtaining a religious divorce was incredibly important. As Black argues there are a variety of reasons that a religious divorce is important to Muslim women which are ‘spiritual, personal, practical (to enable re-marriage) and also legal. Only the *Shari’ah* divorce will accord her with divorcee status within her faith community and in the eyes of ‘God’.’<sup>1001</sup> This was definitely reflected by sentiments expressed by women interviewees:

*Obtaining an Islamic divorce is more important to me than an Australian divorce.*<sup>1002</sup>

*If I don't obtain an Islamic divorce, then it is as if I haven't been divorced at all even if I have an Australian divorce.*<sup>1003</sup>

Many also said that they did not feel comfortable with either the mainstream services that offered family dispute resolution or the court system:

*Going to court wore me down – I felt alone and helpless.*<sup>1004</sup>

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<sup>1000</sup> Poulter, above n310 at 235.

<sup>1001</sup> Black, above n485 at 216.

<sup>1002</sup> Community Member, Interviewed 16 December 2007.

<sup>1003</sup> Community Member, Interviewed 18 December 2003.

<sup>1004</sup> Community Member, Interviewed 1 December 2007.

*The court system is a frightening thing for people to enter into. Islamically with family disputes there is no need to go to such a high authority to resolve your dispute.*<sup>1005</sup>

*I felt that the mediation process with the Family Relationship Centre was a difficult process, we had to go several times before there was any mediation, and then there were issues that were important to our dispute that the mediator couldn't grasp because of their religious importance to us.*<sup>1006</sup>

*I didn't feel comfortable talking to the mediator, I mean how could I explain what I wanted from a religious perspective to him – he wouldn't understand.*<sup>1007</sup>

Others felt that they had more to gain from the community processes, particularly when there was no or very little marital property:

*There was no point in going to see a lawyer, we didn't have any property to split. But I still wanted my mahr, and I knew that I could only get that through the 'imām.*<sup>1008</sup>

*He had spoken ill of me in front of his family and in the wider community, and I wanted the opportunity to have my say, to tell my side of the story, I*

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<sup>1005</sup> Community Leader, Interviewed 10 March 2003, 11 July 2008.

<sup>1006</sup> Community Member, Interviewed 18 February 2008.

<sup>1007</sup> Community Member, Interviewed 1 February 2008.

<sup>1008</sup> Community Member, Interviewed 27 November 2006.

*wanted to tell the 'imām what he had put me through, I guess I wanted support for the decisions I had made in putting an end to the marriage.*<sup>1009</sup>

Clearly there are many reasons why Australian Muslims turn to informal community processes in matters of divorce and the comments above reflect on the importance of these processes for Muslims, in particular Muslim women. This was also mentioned by community leaders:

*It may be advantageous for many women whose husbands have very little money, there is no point in going to court as there is no property or money, but through a Shaykh the mahr is still a debt and he needs to work out a method of repayment.*<sup>1010</sup>

This supports Shachar's argument as discussed in earlier chapters that such community processes are significant to women of faith. Shachar's view, like that of many interviewees is that for Muslim women

A civil divorce is merely part of the story; it does not, and cannot, dissolve the religious aspect of the relationship.<sup>1011</sup>

The research indicates that the religious aspect of the relationship is of great significance to Muslim women, thus these community processes cannot simply be dismissed by assuming that the only relevant process is that provided by the Family

<sup>1009</sup> Community Member, Interviewed 11 March 2007.

<sup>1010</sup> Community Leader, Interviewed 5 June 2006, 23 July 2008.

<sup>1011</sup> Shachar, above n291 at 576.

Law Act 1975. Such an assumption would deny the fact that Muslim women are already affected by the intersection of different legal settings.<sup>1012</sup>

Many of those interviewed saw the importance of these community processes in the context of wanting to resolve their dispute outside the formal court system, and ultimately wanting a process that is religiously relevant. As recent research suggests:

Recent independent evaluations of the 2006 family law reforms, of family relationship services, and of family dispute resolution services have identified significant gaps in service provision to clients from culturally and linguistically diverse backgrounds and barriers limiting their access to the services. CALD families are generally under-represented in mainstream family mediation and dispute resolution services.<sup>1013</sup>

Armstrong has just concluded a three year project aimed at developing strategies to enable Family Relationship Centres to enhance access to their services for CALD communities and to explore how family dispute resolution could be more culturally responsive.<sup>1014</sup> Some of these strategies, as well as other initiatives to develop more culturally and religiously relevant family dispute resolution services will be considered in chapter 10. In particular the recent initiative by Legal Aid in NSW to sponsor the training and accreditation of Muslim legal practitioners as Family Dispute Resolution Practitioners, may provide a greater incentive for Muslims to access

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<sup>1012</sup> Id at 578.

<sup>1013</sup> Susan Armstrong, Paula Bruce & Ross Butler, 'Culturally Reflexive Dispute Resolution: an initiative of Anglicare and CatholicCare' (Paper presented at the Fourth National ADR Research Forum, Brisbane, 16-17<sup>th</sup> July 2010) at 3 <[www.Nadrac.gov.au](http://www.Nadrac.gov.au)> accessed 4 October 2010.

<sup>1014</sup> Ibid at 1.

mainstream family dispute resolution services as they become more sensitive to their particular needs.

The discussion above has demonstrated that within the Australian legal framework there is a strong emphasis on resolving family disputes through alternative dispute resolution processes (that is processes outside of the court system), in particular Family Dispute Resolution (a process similar to mediation). Operating outside of this official framework is the existence of informal Muslim community processes of family dispute resolution which are ultimately based on the Islamic principle that family disputes should be resolved in an amicable way. The discussion below will examine these community processes in more detail, but it is interesting to note that whilst they share the same objective as the family dispute resolution processes set out under the Family Law Act 1975 they operate in isolation of each other. . However it should be remembered that there is great diversity in the Australian Muslim community and that whilst the interviewees have all expressed views emphasising the importance of the community processes, there will also be some Australian Muslims who choose not to interact with these community processes,

### **3. Divorce**

The thesis thus far has emphasized that Muslims in Australia rely upon Islamic legal principles to resolve their family law matters, and just as the previous chapter documented this in the area of marriage, this chapter has shown this to be the case in the matter of divorce. Again, as was the case in marriage, this does not mean that

they do not rely upon Australian law, but rather try to find ways to navigate between the two. As Black argues

this 'one law for all' creed ignores the reality that *Shari'ah* law is currently operating in Australia.....this does not mean every Muslim Australian is defying or avoiding Australian laws and by-passing the Australian legal system, but means choices are negotiated within the parameters of both laws.<sup>1015</sup>

This is well supported by the data of this research project, with many interviewees clearly indicating that both sets of laws were important to the way they resolved their family disputes.

According to the Family Law Act, a divorce is granted when the marriage has broken down irretrievably, this is according to s.48 of the Family Law Act which states that

- (1) An application under this Act for a divorce order in relation to a marriage shall be based on the ground that the marriage has broken down irretrievably.
- (2) Subject to subsection (3), in a proceeding instituted by such an application, the ground shall be held to have been established, and the divorce order shall be made, if, and only if, the court is satisfied that the parties separated and thereafter lived separately and apart for a continuous period of not less than 12 months immediately preceding the date of the filing of the application for the divorce order.

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<sup>1015</sup> Black, above n485 at 215-216.



- (3) A divorce order shall not be made if the court is satisfied that there is a reasonable likelihood of cohabitation being resumed.<sup>1016</sup>

Generally speaking other than the need to prove that there has been a period of 12 months separation, and to satisfy the court that proper arrangements have been made for the care, welfare and development of any children of the marriage under 18yrs, there are very few requirements needed to end a marriage.<sup>1017</sup> Thus, the process is relatively simple.

However as previously discussed for Australian Muslims, it is not so straightforward. Just as having a valid Islamic marriage is important to them, so too is acquiring a religious divorce. As one community leader said:

*When things start to go wrong in a marriage we find that the majority of women want to go back to their marriage contract and abide by Islamic law – what does the Qur'an say – it is very clear that in cases of problems or conflicts you bring arbiters and mediators and if there is a need to separate you do so with mercy – it is supposed to be amicable.*<sup>1018</sup>

In fact, as noted above, for Muslim Women, irrespective of religiosity, obtaining a religious divorce is far more important than a 'legal' divorce. In order to obtain a religious divorce, Muslims need to seek the assistance and authority of an 'imām. Whilst in some cases husbands can pronounce ṭalāq without the intervention of an

<sup>1016</sup> S48 Family Law Act 1975 (Cth).

<sup>1017</sup> s.55(A)(1), 48(2) Family Law Act 1975 (Cth).

<sup>1018</sup> Community Leader, Interviewed 18 August 2007.

'*imām*, most couples will still consult an '*imām* to clarify that a divorce has taken place.

An '*imām* typically attempts reconciliation at first. Many '*imāms* interviewed for this research spoke of their efforts in this regard, for example:

*I can mediate between the people, I can solve most of the problem...I can say to them you are wrong in what you are doing.*<sup>1019</sup>

*I believe that it is important to help the couple work through their differences, this is particularly important if I know that I am the first person to intervene in the matter, but if the couple have been referred to me by a community leader or professional and I know that attempts at reconciliation have failed, then obviously there is not much point in going down the path of reconciliation.*<sup>1020</sup>

*Sometimes we specifically call an '*imām* to join us in our efforts to reconcile the couple when we know that it is important to hear the advice of a religious leader.*<sup>1021</sup>

However, once it is quite clear that there is no chance of reconciliation then an '*imām* will begin the process of dealing with issues of divorce. All of the '*imāms* interviewed recognised that whilst divorce should not be encouraged, is an accepted part of Islamic family law. As some said:

<sup>1019</sup> Religious Leader, Interviewed 23 January 2003.

<sup>1020</sup> Religious Leader, Interviewed 7 May 2006, 17 August 2008.

<sup>1021</sup> Community Leader, Interviewed 1 February 2007.

*Marriage is there to achieve certain objectives, if it fails to do this then divorce may be a better option – this is acceptable in Islam.*<sup>1022</sup>

*No stigma attached to being divorced – it is well known that the Prophet married divorced women to set an example.*<sup>1023</sup>

Therefore, after attempts at reconciliation have been unsuccessful, the parties begin their navigation between the various intersecting procedures and processes of obtaining both an Islamic divorce as well as a divorce according to Australian law. Furthermore as Buckley notes, this may be further compounded by a need to comply with the laws of another country if the marriage had been registered in that foreign country.<sup>1024</sup> So what do the parties do next? For many, they already have a religious leader that has attempted reconciliation and they will turn to him for advice on dissolving the marriage. For others, the relationship may have been over for quite some time and they seek the advice of an *'imām* to formalise their divorce, as one *'imām* said:

*Sometimes there is cooperation between the couple. There may be a long period of separation and there is evidence that they cannot get back together – then we just go through the steps for divorce.*<sup>1025</sup>

At this point, the *'imāms* attempt to ascertain according to the various schools of Islamic law whether a divorce has taken place if it has been initiated by the husband

<sup>1022</sup> Religious Leader, Interviewed 11 December 2003, 2 June 2006, 17 September 2008.

<sup>1023</sup> Religious Leader, Interviewed 6 August 2006.

<sup>1024</sup> Anisa Buckley, 'Shari'ah, State law and the 'Divorce Dilemma': Challenges Facing Muslim Women in Western Countries' in Shahram Akbarzadeh, (ed) *Challenging Identities: Muslim Women in Australia* (2010) at 78.

<sup>1025</sup> Religious Leader, Interviewed 17 April 2006.

or is to be granted when requested by the wife. It is important to note that all the *'imāms* interviewed had extensive knowledge of Islamic laws of divorce, which they sought to apply to the cases that come before them. Some *'imāms* will do this on their own, whilst others have formed groups or boards of *'imāms* who come together on a specified day and consider the matters that each *'imām* brings to the group for consideration:

*I will have many people that come to me to sort out their divorce issue, if it is straightforward, or if the parties are in agreement then I deal with it myself. But if it is a complicated dispute then I will write down the couple's story and refer the case to when we all come together.*<sup>1026</sup>

*It is better that more than one 'imām is involved when we deal with difficult cases – there may be a perspective that as an individual I have missed, but others can pick up on.*<sup>1027</sup>

It is obvious that the first step in the process is to listen to the parties involved, and then seek to apply the Islamic legal principles. The *'imāms* indicated that there are different processes involved depending on who initiates the divorce. As the discussion above explained, husbands can pronounce divorce through *ṭalāq* without the intervention of an *'imām*, although most couples will come and see an *'imām* to confirm that a divorce has taken place:

*A couple or somebody from their family may come to me after the husband has divorced the wife, and in that case I advise the wife to commence the*

<sup>1026</sup> Religious Leader, Interviewed 18 February 2008.

<sup>1027</sup> Religious Leader, Interviewed 11 October 2006.

*waiting period, and then we move on to deal with issues to do with mahr and her financial entitlements.*<sup>1028</sup>

*We get many cases where husbands have pronounced ṭalāq when they are angry and they then regret it, and they want some advice as to what they can do...the difficult situation that arises is when they do what they see in many Arabic movies and pronounce three ṭalāqs in the one time.*<sup>1029</sup>

This issue of men pronouncing ṭalāq in this manner, which as was discussed above is actually contrary to Islamic principles is an issue that the 'imāms have attempted to deal with at a wider community level:

*We remind men, through our sermons and our talks that they should not go down this path of divorce where they eliminate any chance of reconciliation, it is not right.....I think that more people now know about this issue.*<sup>1030</sup>

It is interesting that most interviewees, excluding the religious leaders, were not aware that there were differing ways of ṭalāq, with some more preferred Islamically than others. This was particularly the case for those community members interviewed:

*I don't know much about divorce laws, that is why I needed to seek the advice of the 'imām.*<sup>1031</sup>

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<sup>1028</sup> Religious Leader, Interviewed 17 April 2006.

<sup>1029</sup> Religious Leader, Interviewed 7 July 2008.

<sup>1030</sup> Religious Leader, Interviewed 6 August 2006.

<sup>1031</sup> Community Leader, Interviewed 6 July 2008.

As the discussion above demonstrates, when a divorce is initiated by the husband or is mutually agreed to by both husband and wife, then the process is relatively straightforward. The husband will pronounce *ṭalāq* if he hasn't already done so and the couple will move on to finalising issues to do with property settlement and financial entitlement. Furthermore after seeking the advice and intervention of an *'imām* and the finalisation of their Islamic divorce, the majority of couples will then seek to begin the divorce process under the *Family Law Act*.<sup>1032</sup> In fact this is encouraged by the *'imāms*, as one *'imām* reported that he told couples:

*The divorce is not final, unless they get an Australian divorce. I will never give anyone any paper to say they have been divorced.. even sometimes they come and ask they want a paper to prove their separation, I will write them a letter to say Mr and Mrs so and so come to see on such and such a date and they want to divorce, I advised them to seek a legal divorce.*<sup>1033</sup>

Thus the *'imāms* interviewed seemed to have a strong awareness that the processes they were overseeing were operating in an unofficial capacity, and that they were essentially unenforceable. They seek to inform the parties of the importance of finalizing their affairs according to Australian law.

However several interviewees expressed their concern that one of the difficulties with obtaining a divorce under the Family Law Act is with respect to the mandatory 12 month period of separation. They argued that once they have been through the community processes, which may involve several attempts at reconciliation, and have

<sup>1032</sup> Family Law Act 1975 (Cth).

<sup>1033</sup> Religious Leader, Interviewed 23 January 2003.

arrived at a point where they have a religious divorce, they can then face the problem of waiting some months before they can apply for a divorce under Australian law. The significance of this, is that for practicing Muslims, they cannot form relationships outside of marriage, so many women felt that they could not move on even if they believed themselves to be divorced. Others spoke about the need to finalise their divorce relatively quickly when they have left abusive marriages and felt that the 12 months prolonged their ability to deal with their situation:

*Really 1 year is a long time when a woman after a tough marriage has then to wait a year after she has made this difficult decision to get a divorce.*<sup>1034</sup>

*In violent marriages why should she wait a year.*<sup>1035</sup>

*I think that the separation time should be reduced...I mean give them a few months, but accept a report from a reputable 'imām that recommends divorce for a particular couple.*<sup>1036</sup>

This raises an important question as to whether there should be recognition of a religious divorce, just as there is recognition of a religious marriage ceremony that complies with the requirements set out in the *Marriage Act*.<sup>1037</sup> Parkinson whilst admitting that there is a public interest in ensuring that divorce should be allowed only after a period of separation which is sufficient to allow time for consideration, attempted reconciliation and considering the welfare of the children nonetheless argues that 'it would be possible to allow a party to seek a declaration, after twelve

<sup>1034</sup> Community Member, Interviewed 22 April 2006.

<sup>1035</sup> Community Member, Interviewed 18 December 2003.

<sup>1036</sup> Religious Leader, Interviewed 7 April 2007.

<sup>1037</sup> Marriage Act 1961 (Cth).

months' separation, that a customary divorce was valid, and subject to consideration of the welfare of the children, thereby maintaining the substance of the existing requirements of the law.'<sup>1038</sup> It could further be argued that this period could be reduced as long as the other requirements were met. This would give the parties the option of relying on a declaration based on the religious divorce or making an application for a dissolution.<sup>1039</sup> This was also suggested by some interviewees:

*Under the Marriage Act people can agree to get married in any form or ceremony they wish provided that they meet the formalities which are fairly small. I really can't see why people can't get divorced in exactly the same way – if they can't agree and one party feels disadvantaged then they can appeal to the family court....it is a paternalistic argument to suggest that this would disadvantage women.*<sup>1040</sup>

*We have always had a monocultural legal system and nobody has thought outside the square about ways of doing it.*<sup>1041</sup>

However, the more difficult and complex situation arises when the wife initiates the divorce, and the husband objects to it. As Black argues it is not difficult for a man to comply with both Australian and Islamic law, but it is not as easy for a wife as she will generally speaking not have the power of unilateral extra-judicial pronouncement – *ṭalāq*. This means she will also have to seek a religious divorce from a person or tribunal she believes has religious authority to decree this.<sup>1042</sup> It is in these

<sup>1038</sup> Parkinson, above n484 at 487.

<sup>1039</sup> Ibid.

<sup>1040</sup> Community Leader, Interviewed 4 November 2007.

<sup>1041</sup> Community Leader, Interviewed 5 June 2006, 23 July 2008.

<sup>1042</sup> Black, above n485 at 216.



circumstances that many Muslim women feel frustrated by the community processes, as one interviewee said:

*I felt that there were so many hurdles to get through to get my divorce, and my husband was being deliberately hurtful, he would not cooperate with the 'imām and I just felt that it dragged on and on before I could get my divorce.<sup>1043</sup>*

This process was described by one of the 'imāms interviewed in the following words:

*Most of the time, the lady comes and she wants a divorce, I tell her bring your husband and two witnesses and you can be islamically divorced in 5 minutes, but if she says that her husband doesn't want to, I will tell her OK tell me your story and I will write her story in brief about her complaint, then I will send him a letter – your wife has come in complaining that your family life is not continuing and I would like to see you, I will give him a date, time and place and tell him you can come and discuss this matter, and if you would like I can advise your wife to attend this meeting as well. So some of them will come and their wife will be there, sometimes I have difficulty with both there at the same time.<sup>1044</sup>*

*The people come and speak their story in front of the five 'imāms, then every 'imām will give his opinion, If one party doesn't turn up, we give them 3 chances (we send letters), and if they don't turn up we tell her she is*

<sup>1043</sup> Community Member, Interviewed 11 March 2007.

<sup>1044</sup> Religious Leader, Interviewed 23 January 2003.

*separated, but we don't give her the paper until she has the Australian divorce.*<sup>1045</sup>

Thus, the *'imāms* make several attempts to make contact with the husband, usually with the aim of convincing him to pronounce divorce. This is to prevent the problem that occurs when the parties obtain a divorce under Australian law, but the husband for whatever reason refuses to divorce his wife under Islamic law, the usual motivation being to force her to forgo her property rights upon divorce. Whatever the reason, the result is the existence of a limping marriage, where for all intents and purposes the marriage has ended, but the woman cannot remarry because she is still 'religiously' married. This is a difficult and perplexing situation for the *'imāms* in Australia with severe consequences for many Muslim women. The Family Law Council in its 2001 report found that

for those who find themselves caught between what are effectively two discrete legal systems, the consequences of being divorced under the rules of one system and not being able to be divorced in the other, can be emotionally, financially, and spiritually debilitating.<sup>1046</sup>

The approach taken by some *'imāms*, is that if there is any document or evidence that the husband in the divorce proceedings or anywhere else, has consented to the divorce or said that he is divorced, then they will grant the woman a divorce. As some *'imāms* said:

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<sup>1045</sup> Religious Leader, Interviewed 25 January 2003.

<sup>1046</sup> Family Law Council, above n423 at 6-7.

*Muslims need an open mind – this is how our scholars became scholars – because they found solutions to problems existing in their time. An example is many years ago, before we had so many 'imāms in this country, a man could go to court and divorce his wife, he will then go and get married again and the wife can't remarry because she has not been islamically divorced. My opinion was that if the man had gone to the court and made that representation seeking divorce then I will accept that the woman is divorced...many years ago other 'imāms would not accept this approach...I was a pioneer...but now many 'imāms accept this.<sup>1047</sup>*

*If the man divorces the wife under Australian law, then Islamically he also divorces her.<sup>1048</sup>*

Whilst this has not solved the problem for all women, it has certainly helped. The Family Law Council in its report on Civil and Religious Divorce in 2001 recommended that a final divorce not be granted until the court is satisfied that all impediments have been removed to the other party's remarriage, but these recommendations have not been implemented.<sup>1049</sup> However the Family Law Council Report also observed that there was very little consensus from Islamic community as to how the government could deal with these issues.<sup>1050</sup> Many would argue that it is not the role of the Family Court or indeed any secular court to interfere with or concern itself with the application of religious norms or laws that operate outside its jurisdiction. This view was expressed by several interviewees:

<sup>1047</sup> Religious Leader, Interviewed 25 January 2003.

<sup>1048</sup> Religious Leader, Interviewed 2 June 2006.

<sup>1049</sup> Family Law Council, above n423.

<sup>1050</sup> Ibid at 4.

*I don't think that the answer is to make a civil divorce connected to a religious divorce....it looks like interfering with the religious rights of people.*<sup>1051</sup>

Whilst others thought that it had merit:

*Women are suffering, I think that when they go to court to get a divorce, it should be one that ensures that they are able to remarry...otherwise men can go about their life and remarry but the women remain hanging..this is not right.*<sup>1052</sup>

Other approaches have been to bring the parties together to negotiate and to explain to the husband that keeping a wife in such circumstances is a breach of the fundamental principles of Islam, and this is generally the approach that 'imāms adopt. Another approach that has been adopted in the UK by the Muslim community has been to advise women prior to entering into a marriage contract to include within its terms a clear right to divorce.<sup>1053</sup> This has resulted in several key Muslim organisations and religious leaders agreeing on a pro forma marriage contract that encourages couples to insert such a term.<sup>1054</sup> However, it should be noted that this pro forma contract has been opposed by key religious leaders, particularly some who oversee the operation of *Shari'ah* courts in the UK. They objected on the following basis:

After a thorough study of the document, the Council finds that the proposed contract contains numerous flaws which contradict the Qur'an, Sunna and

<sup>1051</sup> Community Leader, Interviewed 5 June 2006, 23 July 2008.

<sup>1052</sup> Community Leader, Interviewed 3 April 2003.

<sup>1053</sup> Zaki Badawi, 'Muslim Justice in a Secular State', in Michael King (ed) *God's Law Versus State Law: The Construction of Islamic Identity in Western Europe* (1995) at 78.

<sup>1054</sup> see above n320.

Ijma' of our previous scholars including the four great *'imāms*, despite the fact the document claims to refer to those sources. Moreover, this contract has introduced into the *Shari'ah* many elements that are alien to both the text and the spirit of the *Shari'ah*.<sup>1055</sup>

In particular, they objected to the provision in the contract which delegated a right to divorce to the wife, as they argue that this contradicts Islamic principles. They state:

From the onset, the contract grants absolute right of divorce to the wife in contrary to the text and spirit of the Qur'an, Sunna and Ijma'. According to the contract:

ṭalāq e-tafwid is delegated right to divorce given by husband to his wife. If and when the wife exercises this delegated right she does not lose her *Mahr* amount. The reason behind the rejection of this kind of tafwid (delegation) is the fact that it goes against the text and the aims of *Shari'ah* in marriage. Throughout the Qur'an, wherever Allah talks about divorce, He addresses men divorcing women. It is neither in the Qur'an nor in the Sunna of the prophet that a woman divorces her husband. Linguistically, for a woman to even say, 'I divorced my husband' is an invalid statement. In the Sunna we read the following ḥadīth, 'Any woman asking her husband for a divorce for no valid reason, will never sense the fragrance of paradise'. Also, the story of Qays ibn Thabit's wife is illustrative of the broader point as it shows that though she disliked her husband and feared she would be unable to grant him his rights she deferred nonetheless to the Prophet in order to settle the matter.

<sup>1055</sup> Islamic *Shari'ah* Council (UK), 'ISC stand on the Marriage Contract' <- [http://www.islamic-shari'ah.org/index2.php?option=com\\_docman&gid=4&task=doc\\_view&Itemid=99999999](http://www.islamic-shari'ah.org/index2.php?option=com_docman&gid=4&task=doc_view&Itemid=99999999)> accessed 13 January 2011.

It is true that in some schools of thought the husband can make tafwid of ṭalāq but never ṭalāq e-tafwid. This means that the husband withholds the divorce he initiated until his wife chooses to take its course. An example is a man saying to his wife, 'You are divorced if you do so and so'. If the wife does the action stated, the divorce takes place. Similarly, if the husband said to his wife, 'You are divorced whenever you want', when she says, 'I want it to happen now' she will be divorced.

Critically, we should also differentiate between scenarios jurists mention and allow and what the Islamic norm is in any part of the *Shari'ah*. The *Shari'ah's* norms in marriage contracts do not recommend or encourage this type of behaviour, let alone promote it. Once we make it the norm and promote it we may in fact open doors to greater social problems.<sup>1056</sup>

However reputable scholars hold different views on this matter, in particular Hartford and Muneeb in their book *Your Islamic Marriage Contract*<sup>1057</sup> state that:

Upon making a valid marriage contract, the husband "owns" the right of divorce. Thus it is permissible for him to transfer this right to his wife. In doing so he does not lose the right himself. It is better in this circumstance that the wife stipulates the right to divorce herself under specific conditions: such as if he abandons her. This offers the woman a measure of security. It might be noted that upon receiving the right to divorce herself, for example,

<sup>1056</sup> Id.

<sup>1057</sup> Hartford & Muneeb, above n819.

after the occurrence of a certain condition, it is completely up to her if she uses it or not.<sup>1058</sup>

This has yet to become an issue in the Australian context as the research indicates that there is very little awareness of the use of Islamic marriage contracts by Australian Muslims. Thus there are very few cases of *ṭalāq e-tafwid* or delegated divorce in the community. Although clearly this is an avenue the community should explore because of the potential that it has in alleviating the difficulties some Muslim women face in obtaining a religious divorce.

However, the current situation in the Australian context is that the problem remains, that women can face considerable difficulty if their husbands do not consent to a divorce. The question may be asked, why do women not terminate the marriage through *khul*, which as was discussed in the previous chapter occurs when a wife initiates the termination of the marriage. The main reasons for this is that this form of dissolution usually requires the wife to forgo her financial entitlements upon divorce, or that in any event the *'imām* she consults is of the view that a husband's consent is required for *khul*. However, despite the financial cost, several women interviewed spoke of their desire to get a divorce being far more important than any financial amount that they agreed to forfeit. Other women spoke of not having any other alternative if they wanted to finalise their affairs.

Returning back to the forms of divorce outlined earlier, the question may be asked why a woman does not rely on the other forms of divorce such as *tafriq* which does not require her to forgo any financial entitlements? The answer is that this requires

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<sup>1058</sup> Id at 11.

the intervention of an Islamic judge or court, neither of which exists in Australia. While there are some 'imāms who are of the view that in these circumstances they can certainly take on some of these judicial functions, there are others who are reluctant to do, saying that there is no enforceability to their decisions. Furthermore, to apply the Islamic law of *tafriq* a judicial officer needs to be legally satisfied that the essential criteria of the law are met in each individual circumstance, and quite simply most 'imāms do not have the time or resources to be able to do this. This means that for many women, *khul* is the only available solution, even in cases where the marriage has been terminated as a result of wrongdoing on the part of the husband:

*When my husband refused to divorce me, the 'imām said that I could do khul, but I had no idea I could ask about any other way to end the marriage.*<sup>1059</sup>

Some of the community leaders spoke about ensuring that the wife was able to get a divorce when the husband refused, but did not elaborate whether this was *khul* or *tafriq*:

*If a woman wants to abide by Islamic law she needs to have her Islamic divorce before she remarries...the religious leaders either put pressure on the man to come in or they will grant her a divorce.*<sup>1060</sup>

*If the wife asks for divorce and the husband refuses we go through a number of steps, we attempt at reconciliation, but if that does not succeed we give him 3 notices and listen to her story. If it is evident that he just wants to*

<sup>1059</sup> Community Member, Interviewed 1 February 2008.

<sup>1060</sup> Community Leader, Interviewed 5 June 2006, 23 July 2008.



*control her and abuse her then we grant the divorce to prevent further harm to her.*<sup>1061</sup>

*A problem is that some 'imāms will not grant a divorce unless the husband says I divorce you, if he does not want to divorce her she can still hang in the air and that is very unfair.*<sup>1062</sup>

*The 'imāms try to summon the husband to reach an amicable divorce, if they don't then they will decide, they will give her a divorce.*<sup>1063</sup>

This issue and its impact on Muslim women is clear and there is no doubt in the current Australian context many Muslim women face difficulty in obtaining a divorce without forgoing some financial entitlements. This is one area where it has been suggested that the existence of a *Shari'ah* court or tribunal could alleviate the hardship faced by women in this situation, because there would be a clear and established authority that they could turn to.<sup>1064</sup>

However, as suggested above the greater use of marriage contracts and greater reliance on Islamic principles that safeguard the financial entitlements of women upon divorce can also address this issue. Some may argue as Okin did that these concerns suggest that these processes are bad for women and therefore should not be allowed to operate. As I have argued earlier, this argument would fail to take into account the importance of obtaining a religious divorce for Muslim women and in light of the fact that the private ordering of disputes in the unofficial realm cannot be stopped then it

<sup>1061</sup> Religious Leader, Interviewed 7 April 2007.

<sup>1062</sup> Community Leader, Interviewed 3 April 2003.

<sup>1063</sup> Community Leader, Interviewed 15 March 2003.

<sup>1064</sup> Yilmaz, above n553 at 5.

would be better to find ways to address these issues whilst still respecting the importance of faith to Muslim women.

Rather than seeing religion as the source of disadvantage for women this would require us to look into religious principles and practices to aid women to deal with such concerns. This is crucial because whether or not the official legal system gives recognition to Islamic family law principles Muslim women will still be in a position where they need to go through the community processes to obtain a religious divorce. Thus the community needs to be supported and encouraged to find ways to resolve this issue relying on Islamic principles, as this will ensure community support, which is vital to the success of any proposed solution. This is of utmost importance to the Muslim community because without a resolution to this issue, the question of recognition of Islamic principles will always be opposed because of the difficulties faced by some women in obtaining a divorce. As Shachar argues any process that seeks to fit into the mainstream official system cannot breach basic protections to which women are entitled to under official law.<sup>1065</sup>

The next step for divorcing couples is to finalise their divorce by obtaining a divorce according to Australian law. However complications can arise when the marriage is registered in an overseas jurisdiction, and the couple again need to comply with another set of laws to finalize their affairs, thus adding another part to the maze that Australian Muslims need to make their way through when ending their marriages. This was described by some interviewees:

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<sup>1065</sup> Shachar, above n291 at 602.

*Even though I am now divorced under Australian law and Islamically I still have a problem because our marriage is registered overseas and I just don't know how I am going to sort that out.*<sup>1066</sup>

*After my divorce here in Australia I still had problems because in Lebanon I was still registered as being married, it took me a long time to finalise everything so that I could remarry.*<sup>1067</sup>

#### 4. Property Settlement and Financial Entitlements

Closely linked to the issue of divorce, is that of property settlement and financial entitlement, the process by which the parties sort out their proprietary and financial interests upon separation. Parties to a marriage can apply to the Family Court for orders settling their property. According to s.79(1) of the Family Law Act. In this section a wide discretion is granted to the court which 'may make such order as it considers appropriate altering the interests of parties in the property'.<sup>1068</sup> In exercising its discretion, the court must take into account a list of factors set out in s.79(4) of the Act. The court identifies and values the parties' property and financial resources, then assesses their contribution to the property and to the welfare of the family.<sup>1069</sup> This assessment is a retrospective exercise which takes into account both financial<sup>1070</sup> and non-financial<sup>1071</sup> contributions to property of both parties. It also takes into account contributions to the welfare of the family<sup>1072</sup>, which the court often

<sup>1066</sup> Community Member, Interviewed 18 December 2003.

<sup>1067</sup> Community Member, Interviewed 16 December 2007.

<sup>1068</sup> s.79(1) Family Law Act 1975 (Cth).

<sup>1069</sup> s.79(4)(a) – (c) Family Law Act 1975 (Cth).

<sup>1070</sup> s.79(4)(a) Family Law Act 1975 (Cth).

<sup>1071</sup> s.79(4)(b) Family Law Act 1975 (Cth).

<sup>1072</sup> s.79(4)(c) Family Law Act 1975 (Cth).

finds difficult to value and assess.<sup>1073</sup> Ultimately the court must ensure that any orders that are made are just and equitable in all the circumstances.

As previously discussed in Islamic law the issue of property settlement and financial entitlements is closely linked to the divorce process. This is unlike the process under the Family Law Act which is independent of divorce proceedings. As outlined in chapter 9 according to Islamic law, there are differing rules for property settlement depending on which party initiates the divorce, so for example if the husband divorces the wife, then as a starting point she will be awarded an amount equal to her *mahr* or dowry as agreed upon at the time of marriage, but if the wife seeks the divorce then she may forgo some of that amount.

In Australia such matters are dealt with by the *'imāms*, usually at the same time as they are dealing with the issue of divorce. What is interesting is that whilst principles of Islamic law are strictly kept to in regards to the divorce process, many *'imāms* were far more flexible in negotiating agreements between the parties about matters to do with property. These *'imāms* indicated that this was largely because they were aware of the existence and availability of the court system, and that they appreciated the fact that ultimately without any formal enforcement of Islamic law, the best they could do was to assist the couple to reach a negotiated agreement concerning their financial affairs in line with Islamic principles.<sup>1074</sup> As some said:

*We need to be realistic that when we advise the couples about their financial entitlements under Islamic law, that they will indeed weigh this up with what*

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<sup>1073</sup> Fehlberg & Behrens, above n719 at 510.

<sup>1074</sup> See discussion in chapter 8.

*they think they would get according to Australian law, and then choose how they want to proceed.*<sup>1075</sup>

*The best outcome is one that works for both parties...I believe there is sufficient flexibility in Islam to allow a couple to come to any agreement that they want, and I also think that this works under Australian law as well.*<sup>1076</sup>

*Islam strongly supports the notion that a couple can agree on their affairs, in fact there are many verses and ahadith that encourage an amicable settlement upon divorce....but the problem is that people don't understand this.*<sup>1077</sup>

However a general lack of awareness of the permissibility and even encouragement of reaching a negotiated settlement according to Islamic law means that couples often find themselves in a bitter dispute as to what their financial entitlements are. This dispute is usually taken before an *'imām*, and the research indicates that there are many different ways that *'imāms* deal with this issue in the community. The *'imāms* are guided by the principles of property settlement according to Islamic law, with all advising the couple that when the husband has initiated the divorce, the wife is firstly entitled to any outstanding *mahr* or dowry amount. They go to great lengths to encourage the husband to pay this amount, knowing that this is unenforceable in Australia:

<sup>1075</sup> Religious Leader, Interviewed 25 January 2003.

<sup>1076</sup> Religious Leader, Interviewed 2 June 2006.

<sup>1077</sup> Religious Leader, Interviewed 11 December 2003, 2 June 2006, 17 September 2008.

*Majority of people abide by the requirement of paying the mahr at the time of divorce...even though it is not enforceable...but we tell them what is ḥalāl and what is ḥarām, and then it is up to them.*<sup>1078</sup>

*Upon divorce the practicing Muslim will pay the mahr without a doubt.*<sup>1079</sup>

*The mahr is very important, especially when there is not much property, so the woman knows there is no point in going to court because there is nothing to give her, but islamically this is still a debt that a husband owes his wife and should be paid.*<sup>1080</sup>

However, where the 'imāms differ in their approach is in what they believe a wife is entitled to in addition to their *mahr* or dowry. For many 'imāms in Australia, the concept of *mutat a'talāq* or post divorce financial entitlement for women is not one that they rely upon when advising couples. Some 'imāms, when questioned about the financial entitlements of a wife upon divorce, quickly replied that it is the *mahr* and no more:

*The wife is entitled to her mahr. If there is children then she is entitled to the child support. If there are no children then she is not entitled to any more than the mahr...extra money that is provided is for the children and is not hers.*<sup>1081</sup>

*The matter is rather simple, if the husband divorces the wife then she is entitled to her mahr. There is nothing else as ordinarily if the woman is no*

<sup>1078</sup> Religious Leader, Interviewed 17 April 2006.

<sup>1079</sup> Community Leader, Interviewed 17 June 2008.

<sup>1080</sup> Religious Leader, Interviewed 25 January 2003.

<sup>1081</sup> Religious Leader, Interviewed 17 April 2006.

*longer married, the responsibility of her maintenance goes back to her father, her brother etc.*<sup>1082</sup>

*If she has not contributed then she is not entitled to take any of his wealth.*<sup>1083</sup>

These statements reflect the criticism made earlier that there has been a lack of attention given to the reality of how Muslims are living their lives and the applicability of Islamic law to the current context that Muslims find themselves in. The reality is that Muslim women are financial contributors to the household and some 'imāms are not considering the applicability of Islamic legal principles to meet the changing needs of couples that come before them, as one community leader said:

*Many of our 'imāms are traditionally minded and not really mindful of many of the circumstances concerning women in our community...particularly when it comes to financial settlement and taking into account the wife's contribution.*<sup>1084</sup>

When these 'imāms were asked about what they would do if a woman had been working and financially contributing to the home, the response by some, was that:

*If she voluntarily spent of her money then she forgoes it, but if she was forced to spend the money and the husband has a lot of wealth then the judge could intervene to award her a sum of money, but within reason, because the general principle is that no one can take from the wealth of others.*<sup>1085</sup>

<sup>1082</sup> Religious Leader, Interviewed 4 September 2007.

<sup>1083</sup> Religious Leader, Interviewed 7 July 2007.

<sup>1084</sup> Community Leader, Interviewed 4 November 2007.

<sup>1085</sup> Religious Leader, Interviewed 17 April 2006.

According to this approach a wife needed to make it very clear that any amount she spent was a loan to her husband and she expected that to be paid back. However as many women community leaders and social workers, who supported women through the divorce process were quick to point out that such a view was flawed because:

*That can't be right, because no woman is going to stand there and say that I am not voluntarily spending...it doesn't make sense.*<sup>1086</sup>

*What woman is going to make a grand statement that the money I pay towards the mortgage or the car or the school fees is a loan..I mean that would probably cause relationship problems.*<sup>1087</sup>

However, other 'imāms took a very different approach. They considered the circumstances of each individual case and were very conscious of the fact that women needed to be duly compensated upon divorce:

*If she is working and putting money into the house she has a right to be compensated because a man should support his wife financially...I will not shy away from a man in such circumstances.*<sup>1088</sup>

*The work of a woman is hers, it is her right to be compensated for her contributions.*<sup>1089</sup>

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<sup>1086</sup> Community Worker, Interviewed 10 June 2003, 4 July 2008.

<sup>1087</sup> Community Leader, Interviewed 17 June 2008.

<sup>1088</sup> Religious Leader, Interviewed 23 January 2003.

<sup>1089</sup> Religious Leader, Interviewed 2 June 2006.



*It all depends on the individual circumstances..If the wife was working and she contributed to the household expenses, then she owns with her husband and it is her right to take joint ownership of any assets.*<sup>1090</sup>

*It is wrong and unjust to claim that a wife is not to be compensated for her financial contributions.*<sup>1091</sup>

*In the divorces that I have seen if the woman makes the claim that she has contributed to the cost of the house then he will make sure she gets her contribution, including whatever profit accrues in relation to that property....there may be some 'imāms who do not do that but they are being unfair and unjust.*<sup>1092</sup>

*I know that it is fair in Islam for a lady to keep her money, it is solely for her and the husband has no right to touch it...I am sorry to say many of our religious leaders don't look to this point.*<sup>1093</sup>

*I had a case of a woman, married for 5 years, she was working and at times earned more than him, they bought a house, he put it in his mother's name, then when she wanted to divorce him because he was unable to have children, he wanted to strip her of everything...she went to many 'imāms and they told her she was not entitled to anything...I was furious, all her earnings was in this house and to leave without anything was just not fair – I consulted many other 'imāms and they would say to me you have a point but this is what Islam says...I said Islam is not blind...Islam is open minded, this lady*

<sup>1090</sup> Religious Leader, Interviewed 7 July 2008.

<sup>1091</sup> Religious Leader, Interviewed 7 May 2006, 17 August 2008.

<sup>1092</sup> Community Leader, Interviewed 15 March 2003.

<sup>1093</sup> Religious Leader, Interviewed 23 January 2003.

*has been working, if she worked and kept her money she would have quite a large sum of money...he wouldn't divorce her either. I advised her that she should see a lawyer.*<sup>1094</sup>

An illustration of how certain 'imāms are dealing with these cases is one described by a community leader:

*A case I had...both were working, her mahr was \$30 000, they had a house and a car. They split amicably with the facilitation of the shaykh - they worked out that under Australian law it was going to take them a long time to sort things out – the husband said I am happy to give her the mahr on top of whatever you think is fairly compensating of her contribution, because she had been working part time. The shaykh said that 1/3 of the share of the house is hers as well as her dowry. The husband then agreed to let her remain in the house with the kids, whilst paying her maintenance for her care of the children – the husband was a practicing Muslim.*<sup>1095</sup>

Thus, whilst the comments above from the interviewees demonstrates that there can be a significant difference in how the 'imāms approach the issue of the financial entitlement of women, several prominent women community leaders expressed a view that there was greater awareness of this issue, and more and more respected and experienced 'imāms are becoming aware of its importance:

*I feel that we have come a long way in the 20 years that I have been working in the community...I don't think that we are all the way there, but I think that*

<sup>1094</sup> Religious Leader, Interviewed 23 January 2003.

<sup>1095</sup> Community Leader, Interviewed 5 June 2006, 23 July 2008.

*most of the 'imāms that deal with the majority of divorce cases are aware of the need to do justice to women.*<sup>1096</sup>

*With the women that come to seek our assistance we try and get the involvement of an 'imām that understands the needs of women, and we have a relationship of trust with these 'imāms, and we tell them that sometimes they need to reconsider their decision when it is unfair.*<sup>1097</sup>

*The reality is that a woman has a choice, if the community processes do not safeguard her financial interests then she has the option of going to see a lawyer, and more and more 'imāms are realizing this.*<sup>1098</sup>

*The 'imāms are realizing that applying Islamic law in Australia is not like applying it in Lebanon or Egypt or Pakistan, here we do have a society where women are maintained by men, I mean after divorce a woman will need to set up home again, she generally does not just fall back into the responsibility of her father or brother, that is just not how we live as Muslims in Australia.*<sup>1099</sup>

It should also be mentioned that some 'imāms interviewed recognized the need to compensate the wife for her non-financial contributions to the marriage as well:

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<sup>1096</sup> Community Leader, Interviewed 5 December 2007.

<sup>1097</sup> Community Worker, Interviewed 18 August 2007.

<sup>1098</sup> Community Worker, Interviewed 10 June 2003, 4 July 2008.

<sup>1099</sup> Community Member, Interviewed 11 March 2007.

*If the husband divorces her she is entitled to her mahr, and we look to compensating her financially for her services in the house – we may estimate it to be 20%, 30%, 40%...this is ḥalāl for her.<sup>1100</sup>*

*The issue is social justice and the need in today's society for something to sustain the wife after divorce. When she has lived with him for a long time, it does not matter if she worked or not because she was looking after the house and kids – that in itself is owed a salary – because in Islam a wife is not compelled to do housework, although it depends on the financial situation of the husband.<sup>1101</sup>*

Others spoke of the need for the husband to be generous to the wife upon divorce, as that would be more suited to the principles of Islam. However, none of these 'imāms used the term *mut'at a'talāq*, and some of them when asked about this concept of Islamic law indicated that it referred to the *mahr* or dowry owed to the wife.

The discussion above has dealt with the case of the husband initiating the divorce, but the situation can be different again when it is the wife who initiates the divorce. As was noted above, how an 'imām deals with the issue of divorce can be central to the question of property settlement. For example if a wife comes to see an 'imām wanting to end the marriage, there are several options available to the 'imām, he may call her husband in and convince him to pronounce divorce (in which case the wife will keep her *mahr* and seek to resolve matters as described above), or he may grant the woman *khul'* (in which case she forgoes some or all of her *mahr*), or he may decide to pronounce a divorce if there are compelling reasons such as abuse,

<sup>1100</sup> Religious Leader, Interviewed 25 January 2003

<sup>1101</sup> Religious Leader, Interviewed 11 December 2003, 2 June 2006, 17 September 2008.

incapacity, absence or failure to maintain the wife (in which case the wife will be entitled to her *mahr*). The issue here, which was mentioned earlier is the reluctance of *'imāms* to pronounce a divorce, rather allowing women to take the path of *khul'*. Whilst both would lead to a dissolution of marriage, the serious consequence is that *khul'* affects the entitlement of women to their *mahr* and possibly to further financial entitlements. This issue is one of concern both to the community workers interviewed and several women who had gone through this process:

*My husband refused to divorce me, so I had no option but to do khul', and the 'imām said that I was not entitled to anything because I wanted to end the marriage, but nobody took into account why I wanted to end the marriage, the fact that he had stolen my money and abused me was not taken into account.*<sup>1102</sup>

*Unfortunately we have had clients who have struggled with getting a divorce from their husband, but we know to advise her of the implications of performing khul', but I am sure that there are women who do not understand this.*<sup>1103</sup>

*I don't want anything from him....just a divorce...he can keep his money*<sup>1104</sup>  
*My Mahr is \$100 000 – but you know when the husband treats his wife badly she will forfeit any amount of money or indeed anything that reminds her of him so that she can be free of him.*<sup>1105</sup>

<sup>1102</sup> Community Member, Interviewed 11 March 2007.

<sup>1103</sup> Community Member, Interviewed 6 July 2003.

<sup>1104</sup> Community Member, Interviewed 3 February 2008.

<sup>1105</sup> Community Member, Interviewed 18 December 2003.

However the women interviewed for this research spoke about the number of options they had, particularly in cases where there is substantial property that needs to be divided, with some women after finalizing their religious divorce, seeking a property settlement in the Family Courts. Some 'imāms saw this as wrong, whilst other 'imāms and community leaders accepted this as an option for women when they felt dissatisfied with the community processes

*In general people like to follow Shari'ah but when they feel they don't get what they want they go to the Australian legal system.<sup>1106</sup>*

*There is a lot of shopping around that happens – people are conveniently choosing when and where to go to get what they perceive as the best deal for them.<sup>1107</sup>*

In fact, some 'imāms even encouraged women to seek the advice of a lawyer when they know that the husband is unfairly treating her:

*If it means getting what she is owed then I encourage her to go to court, because it doesn't matter what I say, I cannot enforce anything, but a court can do that for her.<sup>1108</sup>*

This raises an important issue about the intersection of these informal community processes and the formal legal system, that is, when one or both parties are dissatisfied with the informal process, or when they simply fail to reach an agreement

<sup>1106</sup> Community Leader, Interviewed 1 February 2007.

<sup>1107</sup> Community Leader, Interviewed 10 March 2003, 11 July 2008.

<sup>1108</sup> Religious Leader, Interviewed 23 January 2003.

they have the option of turning to the formal legal system for resolution of their dispute. Indeed as mentioned above, several interviewees indicated that they had chosen to seek the advice of a lawyer and initiate proceedings in the Family Courts when the community processes failed to resolve their dispute.

Finally, many *'imāms* who recognise that they are resolving the couple's affairs in the shadow of Australian law will encourage the couple to negotiate to reach a settlement or compromise that they both can live with. For many this is seen to have Islamic validity as Islamic law recognizes the right of the husband and wife to reach an amicable agreement:

*Islam gives us a lot of discretion to facilitate an agreement between the couple.*<sup>1109</sup>

As discussed above this commitment to reach an amicable settlement coincides with one of the key objectives of family dispute resolution under the Family Law Act 1975, that is to resolve family disputes outside of the court system. This shared commitment is the basis on which I respond to the call for recognition or accommodation of principles of Islamic family law in the Australian context. I argue that this raises the possibility that the family dispute resolution process under the Family Law Act could accommodate the needs of the Muslim community for a religiously relevant dispute resolution process, without the need to specifically recognize Islamic law, thereby avoiding the controversial and often ill informed public debate that has occurred overseas as described in chapter 4. This would respond to the needs of the Muslim community as well as providing for a process that

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<sup>1109</sup> Religious Leader, Interviewed 6 August 2006.

would deal with the concerns that have been raised about the current informal community processes. This will be explored in more detail in the next chapter, but we should appreciate that this applies to how couples resolve matters upon divorce not to the actual process of obtaining a divorce (which can only be resolved from the application of Islamic principles of divorce). This fits Shachar's intersectionist joint-governance approach and will be explained further in chapter 10.

Returning to the discussion about the current community processes in existence – after the couple has reached an agreement they are encouraged to seek legal advice to formalise the agreement and ensure its enforceability:

*After advising the couple and getting them to agree, I advise them to go see a solicitor to make this agreement legal...I think this fits into Australian law.<sup>1110</sup>*

The response from the 'imāms interviewed indicate that in a small number of cases, the couple will actually do this. If they have already instituted proceedings then they will draft consent orders to be filed with the court to resolve their dispute. Whilst they are still subject to scrutiny by the courts which must be satisfied that the orders they make are "just and equitable"<sup>1111</sup>, they are usually made quickly without detailed consideration of s79(4) and s79(2) factors referred to above.<sup>1112</sup>

If proceedings have not been commenced, then the couple can turn their agreement into a binding financial agreement. Part VIIIA of the Family Law Act allows couples

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<sup>1110</sup> Religious Leader, Interviewed 7 July 2007.

<sup>1111</sup> s.79(2) Family Law Act 1975 (Cth),

<sup>1112</sup> Fehlberg & Behrens, above n719 at 559.



to enter into a financial agreement before marriage<sup>1113</sup>, during marriage<sup>1114</sup> or after divorce.<sup>1115</sup> A Binding Financial Agreement may cover property and financial matters, spousal maintenance and other ‘incidental and ancillary’ matters, a phrase which Fehlberg and Behrens argue is currently untested.<sup>1116</sup> Again this is part of a wider trend in Australian family law towards private agreement and an emphasis on the resolution of disputes away from the court. There are formal requirements that need to be satisfied, such as it must be signed by both parties and must contain a statement that prior to signing it each party received independent legal advice on the effect of the agreement on his or her rights, and on the advantages and disadvantages to him or her at that time of entering into the agreement.<sup>1117</sup>

Whilst the emphasis is on financial matters, such agreements may also concern other matters as well.<sup>1118</sup> Essentially, the agreement is basically a contract and subject to the law of contract.<sup>1119</sup> Most importantly if an agreement is binding the court is prevented from dealing with matters covered by that agreement, except in certain circumstances.<sup>1120</sup> However, as mentioned above all community leaders interviewed recognised the fact that it is only in a very small number of cases where they see a couple formalising their agreement to make it enforceable according to Australian law.

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<sup>1113</sup> s.90B Family Law Act 1975 (Cth).

<sup>1114</sup> s. 90C Family Law Act 1975 (Cth).

<sup>1115</sup> s. 90D Family Law Act 1975 (Cth).

<sup>1116</sup> Fehlberg & Behrens, above n719 at 560.

<sup>1117</sup> s.90DA(1) Family Law Act 1975 (Cth); Dickey, above n738 at 655.

<sup>1118</sup> ss 90B(3), 90C(3), 90D(3) Family Law Act (Cth).

<sup>1119</sup> Dickey, above n738 at 658.

<sup>1120</sup> Ibid.

This chapter has outlined the way that Australian Muslims navigate their way through two different legal settings in order to feel that they are divorced. However as discussed throughout this thesis this situation is no different to what Muslim communities are experiencing in similar jurisdictions to Australia, such as the UK, Canada and the US where the evidence suggests that Muslims are settling their disputes through unofficial community processes. Whether it is through *Shari'ah* councils, arbitration tribunals or less structured means, Muslims in those countries have found ways to navigate the intersection of two legal settings. This thesis has demonstrated that there are similar processes of family dispute resolution in Australia being undertaken by *'imāms* except they are far less structured, and more adhoc. It is important to appreciate as noted earlier that unlike the UK and Canada, there is very little use of arbitration in family disputes in Australia, rather the emphasis is on a model closer to mediation or conciliation. To date, in Australia we do not have any established structure or service such as the arbitration tribunals or *Shari'ah* councils in the UK, which allow Muslims to resolve their affairs according to the official law and Islamic law simultaneously. In the current context any *'imām* that is recognised by the community members can attempt to deal with family law issues. Clearly some do this better than others. Whilst an *'imām* is expected to have a certain amount of knowledge of Islamic family law principles, some interviewees questioned whether all the *'imāms* involved in this type of work had the other necessary skills to resolve family disputes:

*I think that it is very ad hoc, there is no systematic way of dealing with issues.*

*The leaders get called on an ad hoc basis to get involved in a dispute, they*

*don't have the skills, they might have the knowledge of the law but not how to deal with it practically.*<sup>1121</sup>

*The way some 'imāms deal with divorce situations is concerning...the 'imāms are usually appointed by mosque committees and rely on the men's support, so the way they deal with cases is affected by these relationships.*<sup>1122</sup>

*How many of our 'imāms are adequately trained in resolution of conflicts?*<sup>1123</sup>

*Having the Islamic knowledge does not necessarily mean you have good communication skills or dispute resolution skills or counselling skills – all of which are extremely important in family dispute resolution...a lack of such skills may actually make a situation much worse.*<sup>1124</sup>

*The worst case that causes most harm is having experts in Islamic law who are performing the role of 'imām but are not in tune with the needs of Muslims living in our society.*<sup>1125</sup>

These comments reflect concerns with the current processes, ranging from their adhoc nature to the issue of the dispute resolution skills of the 'imāms who oversee many of these processes. The community leaders interviewed for this research all accepted that whilst there were these difficulties with the current processes, that they played a very important and valuable role in how Muslims resolved their family law affairs:

<sup>1121</sup> Community Leader, Interviewed 5 December 2007.

<sup>1122</sup> Community Leader, Interviewed 3 April 2003.

<sup>1123</sup> Community Member, Interviewed 11 October 2006.

<sup>1124</sup> Community Member, Interviewed 10 March 2003, 11 July 2008.

<sup>1125</sup> Community Leader, Interviewed 5 June 2006, 23 July 2008.

*The process is not perfect, and certainly there have been criticisms of how we do things, but I think that we need to be careful to acknowledge the good and be honest about the bad, there is no doubt that we need the 'imāms to do what they are doing.*<sup>1126</sup>

*Let's not throw the baby out with the bath water...we need to remember that these processes are actually very much needed, it does not mean that we can't improve them.*<sup>1127</sup>

*These processes are evolving ones, adapting to the needs of the community as it goes along, so of course there are problems that need to be addressed.*<sup>1128</sup>

These same leaders spoke of the need to evaluate these community processes, and accept that if these processes are to be accommodated or recognized by the official legal system they will need to change. This willingness to seek ways to improve current practice goes against the mistaken assumption that Islamic principles are incapable of adapting to the modern day needs of Muslims. Rather these sentiments indicate that applying Islamic law is a dynamic process and based on an appreciation of time and place that it is to be applied in. This means there is a willingness by community leaders to consider ways of improving the current processes to address some of the concerns raised in this research. But it is important to appreciate that this needs to be done by the community itself as some interviewees said:

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<sup>1126</sup> Community Leader, Interviewed 11 March 2003, 28 April 2008.

<sup>1127</sup> Community Leader, Interviewed 18 August 2007.

<sup>1128</sup> Community Leader, Interviewed 13 July 2008.

*I know that we can do things better, actually we can do things better – but any change that is proposed needs to still have an Islamic basis otherwise our 'imāms will not support it.*<sup>1129</sup>

*It is sometimes hard to criticize our own process because immediately you think that someone out there will pick it up and publicise it and before you know it we are tomorrow's headlines...really I am not exaggerating ...we can only look inwards as a community when we are in a safe space, not when we are already daily dodging crisis after crisis.*<sup>1130</sup>

*We are already as a community changing our processes, I mean in the twenty years that I have been in the community much has changed and I have no doubt that this will continue to happen.*<sup>1131</sup>

These comments show a willingness to respond to concerns, but it seems that the public spotlight on the Muslim community is the very thing that makes it difficult to identify these concerns.

## 5. Conclusion

This chapter has demonstrated that in order to end their marital relations, Australian Muslims need to comply with several different processes and legal principles, some of which are community based, informal and as they exist outside the official legal system are unenforceable. However, despite this unenforceability and informality,

<sup>1129</sup> Religious Leader, Interviewed 11 December 2003, 2 June 2006, 17 September 2008.

<sup>1130</sup> Community Leader, Interviewed 17 June 2008.

<sup>1131</sup> Community Leader, Interviewed 5 June 2006, 23 July 2008.

these established community processes have a central role to play in how Muslims in Australia resolve issues relating to divorce. It also showed that whilst there are clear differences in how a divorce is obtained under Islamic law and Australian law, Australian Muslims have by and large found a way to comply with both. Admittedly, at times difficulties arise, but similarly there are also many areas of commonalities that to date have not been recognised or utilised by the Muslim community to improve the process of getting divorced for Australian Muslims. For example, both systems emphasise informal and amicable family dispute resolution processes, and both encourage couples to negotiate their own agreements upon divorce that subject to certain criteria can then be enforced by the law.

It was seen that Muslims rely on these informal community processes for various reasons, most importantly because they believe that obtaining a religious divorce is essential to them. Many men and women successfully utilise these processes to resolve their family disputes, and when required will comply with the official legal system, even if it means going through two separate divorce processes. However, there is no doubt that the community processes described above also have limitations. For example, there are concerns with the ad hoc nature of these processes. More importantly there are concerns with how women experience these community processes, particularly in terms of the difficulty they may face in obtaining a religious divorce in certain cases or the financial entitlements they receive upon divorce.

However, rather than using these concerns as a reason to dismiss the relevance of these community processes, it is more important to seek ways to address them, recognising as Shachar does that Muslim women will continue to use these processes

whether they are given official recognition or not. Furthermore, the community needs to be supported to find its own way, acceptable to the community itself, that deals with these important issues, and the research has indicated that the community leaders are certainly willing to do this.

Returning to the issue at the centre of this research project – the recognition or accommodation of *Shari'ah* or Islamic law in Australia. As we have seen in the UK and Canada, this has been sought through the a reliance on arbitration processes that can be conducted according to religious principles but have the recognition of the official law. However, in Australia we have very little use of arbitration in the family law area, instead we have a much greater emphasis and reliance on a mediation form of family dispute resolution. We have also seen that we have Muslim community processes in place based on Islamic principles of the amicable resolution of family disputes. I will argue in chapter 10, that this shared commitment can allow the development of a process that can meet the needs of the Muslim community as well as fit into the family dispute resolution framework of the official legal system.

# Chapter 10

## Looking Ahead

### 1. Introduction

There is a range of negative opinions and comments expressed whenever the issue of *Shari'ah* is mentioned in the public domain in western countries, including Australia. Typical of these are the recent comments of Cory Bernardi, Liberal Senator for South Australia, Shadow Parliamentary Secretary Assisting the Leader of the Opposition and Shadow Parliamentary Secretary for Families, who has stated:

Already we have sections in our community....calling for aspects of *Shari'ah* law in respect to divorce, property settlement and child custody issues, to be allowed in Australia....Whilst such changes may not at first glance seem to be truly significant, should they be allowed, so too would begin the process of legitimisation of fundamentalist *Shari'ah* as an alternative legal system in this country. That simply cannot be allowed to happen....Of course if the advocates of *Shari'ah* truly believe it is the true path, then the introductory changes (like concessions for *Shari'ah* finance) are simply a stepping stone to a greater embrace of this archaic system. That is why we should not



entertain any thought of introducing any aspect of *Shari'ah* law into Australia. At best it is unnecessary; at worst it is a step in a direction that is incompatible with western life and values.<sup>1132</sup>

This thesis has highlighted these often sensationalised and dramatic public comments made in states all over the world whenever the word *Shari'ah* is mentioned. These debates have largely portrayed *Shari'ah* as a threat to liberal society and its values as well as being particularly disastrous for women. As earlier chapters of this thesis have demonstrated, any suggestion that there could be some form of official recognition or accommodation of the way in which Muslims deal with family law matters is seen as a move towards setting up a parallel legal system in competition to the official state system.

This thesis has explored the question of accommodation or recognition of Islamic family law in the Australian context. Like the debates that have taken place in other countries such as the UK and Canada, the public response has been overwhelmingly negative. More importantly, opinions have been expressed and policies have been made without an accurate understanding of how Muslim communities are actually dealing with family law matters or the circumstances that have led to the request for some sort of official accommodation of Islamic law. It would seem that the use of the word *Shari'ah* obscures the clarity needed to understand why Muslim minority groups seek greater accommodation of Islamic principles. Similarly the thesis has also explained how Muslim minority groups themselves, when making a call for official

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<sup>1132</sup> Cory Bernardi, 'Australia: No Place for *Shari'ah* Law', *Menzies House* (6 September 2010) <<http://www.menzieshouse.com.au/2010/09/australia-no-place-for-shari-ah-law.html>> accessed 20 January 2011.

accommodation, also often lack necessary clarity in actually articulating what they mean by such a demand and why it is necessary.

Thus the question of whether to recognise or accommodate Islamic law in liberal democratic states is taking place amidst a large amount of confusion and assumptions. On the one hand, the Muslim community assumes that the official legal system needs to change to allow Muslims to resolve their family law matters in accordance with Islamic principles, whilst on the other hand the general public response is that any proposed change is a move towards setting up a parallel legal system. This research project has demonstrated that both these sets of assumptions are not entirely correct. There is no evidence that Muslim community leaders have any desire to set up a separate and parallel legal system. In fact, the research indicates the opposite; it demonstrates that Muslim community leaders are seeking ways to fit into the existing legal framework and structure. Furthermore, the research has also demonstrated that Muslims are skilful legal navigators, and are already finding ways to abide by Islamic legal principles as well as Australian family law. However, there are several other key avenues that have not yet been sufficiently explored by the Muslim community, avenues that will further harmonise the navigation between Islamic principles and Australian law in the resolution of family disputes. This does not require any significant legislative change, but rather an exploration of the flexibility within the existing legal framework. When legislative change is recommended, it is to allow the existing legislative framework to better accommodate the needs of Australian Muslims, not to set up a separate or parallel legal system.

Thus this thesis argues that the relevant question should not be whether *Shari'ah* or Islamic law should be recognised or accommodated by the Australian legal system, but rather, the more important and more relevant question is how the Australian family law system or framework can meet the needs of the Australian Muslim community? To answer this question, one needs to understand what the needs are of the Australian Muslim community and in particular how Australian Muslims marry and divorce. It has been a primary objective of this research project to understand the relevance of Islamic family law to Australian Muslims and to document how it intersects with Australian family law in processes that Muslims use to resolve family law matters. It is only with this understanding that one can move beyond the trap of relying on mere assumptions, to recognise that the debate about recognition of *Shari'ah*, a debate that inevitably portrays Muslim communities and their faith as incompatible with the rest of society, is arguably an unnecessary one in the Australian context.

## **2. The “One Law for All” Debate**

For some, the idea that Islamic Law has any role to play in a secular liberal democratic state is incomprehensible, indeed the possibility that legal principles other than the official law are relied upon by citizens is not one that they easily accept. According to this view the only relevant and applicable law is official state law. This was certainly reiterated by several politicians in their comments about the question of accommodating or recognising aspects of Islamic family law. For example, as mentioned in chapter 5 in 2005, the then Deputy Prime Minister and Treasurer of Australia, Peter Costello, said:

There is only one law in Australia. It is the law that is made by parliament and it is enforced by the courts. And every person who lives in Australia has to understand this. This is the law they come under.<sup>1133</sup>

However, this thesis has critiqued this view of law, instead offering a more nuanced understanding of law through the lens of legal pluralism which, as detailed in chapter 3, recognises that the state is not the only producer of law and that non-state communities can produce law as well.<sup>1134</sup> With this comes an appreciation that state or official law is not the only legal order applicable in a society, thus providing an inclusive concept of law that more accurately describes what is actually happening in the wider society. This accords with Davies's recognition that as legal subjects we do not act merely on the basis of formal legal prescriptions, but rather on the basis of the intersecting demands of our own ethical beliefs, our location in a social field, prevailing discourses about right and wrong and any number of more practical considerations.<sup>1135</sup>

This thesis has demonstrated this by considering the ways in which Australian Muslims go about getting married and divorced. Whilst undoubtedly it is acknowledged that the only applicable official and enforceable law is state law, the research has demonstrated that Muslims in Australia refer to and rely on Islamic legal principles to deal with matters of a family law nature, including marriage, divorce and the resolution of family disputes. The research has also demonstrated that there are already in existence community processes that help facilitate this reliance and

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<sup>1133</sup> Nine Network, A Current Affair, 11 November 2005.

<sup>1134</sup> Michaels, above n113 at 12.

<sup>1135</sup> Davies, above n26 at 100.

applicability of Islamic law. In fact, documenting these processes has been a key objective of this research. It has demonstrated that despite the public commentary to the contrary, there already exists a plurality of legal orders in the family law context in Australia, albeit in an informal and unofficial capacity.

This does not mean that Australian Muslims ignore the official state law or seek to act contrary to it, rather, as has been argued throughout this thesis, Australian Muslims are navigating and negotiating their way through multiple legal settings in order to resolve their family law matters. For example, as discussed in chapter 7, many Muslims will choose to go through the various stages of the Islamic marriage process as well as choosing to comply with the requirements of the Marriage Act 1961,<sup>1136</sup> thus rendering their marriage valid both according to Islamic principles as well as Australian law. Similarly, Chapter 9 demonstrated that it is important for Australian Muslims, particularly women, to finalise their divorce according to both Australian and Islamic law.

There is no doubt that Islamic principles of marriage and divorce are important and very relevant to the lives of Australian Muslims and to maintain the view that the only applicable legal norms are those found in the official state law would be to deny the reality of the situation for Australian Muslims. As discussed in earlier chapters, this trend is certainly not particular to Muslims in Australia; in fact it is a common predicament facing all Muslim communities in similar minority settings. This thesis, particularly chapter 4, has looked at the similar situation of Muslim communities in Canada and the UK. In the latter context Pearl and Menski argue that whilst it may

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<sup>1136</sup> Marriage Act 1961 (Cth).

appear that Muslims in Britain are following English law, they are following a path that is informed by religious principles.<sup>1137</sup> Furthermore they contend that ‘Muslims in Britain operate today a form of unofficial legal pluralism’ as the community has developed its own hybrid legal system which informally accommodates Islamic law in Britain.<sup>1138</sup> More recently Yilmaz has also identified the emergence of what he too terms a new hybrid unofficial law as a result of the interaction between English law and Islamic law.<sup>1139</sup> Similarly in the Canadian context it also has been acknowledged that for decades the Muslim community has set in place processes for the unofficial operation of Muslim dispute resolution.<sup>1140</sup>

However, as discussed earlier, Muslim communities in the UK and Canada have more established community processes and structures in place than those which currently exist in the Australian context. Chapter 4 outlined the prevalence of *Shari’ah* courts or tribunals in those international jurisdictions, with recent attempts, successfully so in the UK, to incorporate these processes within the existing arbitration framework of the official legal system.

As this research has demonstrated, the situation in Australia differs as the community processes in Australia are far more *ad hoc* and less structured as to date there are no comparable structures like the *Shari’ah* Courts or Muslim Arbitration Tribunals that currently exist in the UK or Canada<sup>1141</sup>. Furthermore, there is no common practice of using arbitration to resolve family law disputes in Australia, rather the emphasis has been on a mediation model of dispute resolution known in the Family Law Act

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<sup>1137</sup> Pearl & Menski, above n1 at 56-57.

<sup>1138</sup> Ibid at 75.

<sup>1139</sup> Yilmaz, above n553 at 3.

<sup>1140</sup> Fournier, above n308 at 25.

<sup>1141</sup> see discussion in chapter 5

1975<sup>1142</sup> as Family Dispute Resolution (FDR). The implications of this will be explored further below, but it is important to appreciate that the framework for family dispute resolution in Australia is different to Canada and the UK.

This understanding that Islamic legal principles are being relied upon in countries such as Australia, regardless of whether or not the official legal system recognises the processes that facilitate their application, is one often ignored in the public debates. This occurs because the generally prevalent view of law is that it is limited to what is produced and enforced by the state. However, adopting a legal pluralist view, as this thesis has done, gives a greater insight into the multiple normative orders that overlap and intersect in the area of family law.

### **3. The Necessity for Accommodation in a Multicultural State**

Recognising the presence and importance of the application of different legal norms in the area of family law leads to consideration of the question at the heart of this research project, that is, how should a state respond to the differing principles and practices of the various cultural and religious groups found within its borders? This is a particularly important question for countries such as Australia, which, as earlier chapters have demonstrated, has a diverse population that draws its ancestry from all over the globe.

This research addresses this question by relying on the concept of multicultural citizenship, and in particular, as outlined in chapter 3, the work of Will Kymlicka.

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<sup>1142</sup> Family Law Act 1975 (Cth)

Kymlicka's concept of multicultural citizenship provides a justification for the accommodation and recognition of the many different cultural groups found within a liberal democratic state.<sup>1143</sup> It is largely based on recognising the importance of cultural membership for individual members of society, particularly in allowing individuals to make more meaningful choices in their lives. As Kymlicka argues, 'cultures are valuable, not in and of themselves but it is through having access to a societal culture that people have access to a range of meaningful options'.<sup>1144</sup>

This thesis has certainly demonstrated this to be the case in the context of the importance of Australian Muslims relying on Islamic principles to resolve their family law matters. As detailed in chapter 3, Kymlicka makes a case for group differentiated rights for different cultural groups found within liberal democratic states. Policies of accommodation come within these group differentiated rights. Yet he also recognises that such states will always have policies which promote overarching national identities. Thus, according to Kymlicka, multicultural policies do not have the effect of destabilising or fragmenting society, rather they assist in the integration of minority groups into the overall society.

Clearly one of the most prominent arguments made against any policy that would officially recognise or accommodate aspects of Islamic law in liberal democratic states such as Australia is that it would have the effect of setting up a parallel legal system, and therefore such a policy is a sign of the disastrous effects of multiculturalism upon society. However, as the current research demonstrates, this is not the case. Several community and religious leaders emphasised that they are not

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<sup>1143</sup> Kymlicka, above n159 at 15.

<sup>1144</sup> Ibid at 83.



interested in setting up something that sits outside of the official legal system, rather they situate their demand for recognition in the context of wanting to fit within the existing legal framework. This accords well with Kymlicka's work, as he argues that 'there is no evidence from any major western immigrant countries that immigrants are seeking to form themselves into national minorities'.<sup>1145</sup>

Extending this analysis a little further, Kymlicka argues that recognising the different rights of cultural groups for accommodation promotes the integration of the minority group into the majority society. This is because such a process would entail 'a two way process – it requires the mainstream society to adapt itself to immigrants, just as immigrants must adapt to the mainstream'.<sup>1146</sup> Thus, returning to consider the issue of how Islamic law could be accommodated into the mainstream legal context, this research has demonstrated the importance of emphasising this as a two way process, where the mainstream legal system needs to ask itself how it might best meet the needs of the relevant minority group, whilst the minority group itself needs to consider how its own practices can best fit into the official legal framework.

In regard to the needs of the Muslim community in the area of family law, this research has outlined many ways that Muslims have developed adaptations to the mainstream legal setting by navigating their way through the intersection of different legal norms. The thesis has also shown that there are many more ways available to facilitate the application of Islamic family law principles that are still to be explored. Similarly the research has also demonstrated that, unfortunately, the often sensationalised debate and public commentary which has created an environment of

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<sup>1145</sup> Kymlicka, above n182 at 38.

<sup>1146</sup> Kymlicka, above n159 at 96.

fear and hostility has prevented the exploration of ways in which the official legal framework could better accommodate the needs of the Muslim community in the area of family law.

Indeed the failure to consider these issues by examining empirical data such as that gained through the present research, has meant that the focus of public debate has been on asking the wrong question. This thesis argues that the more relevant question is how the existing legal framework can meet the needs of the Muslim community in matters to do with marriage and divorce. In answering this question, this thesis has shown that there are many different ways that have yet to be explored, which meet the needs of the Muslim community without the need for significant legislative change. This will be explored further in the discussion below. This is not to underestimate the importance of Islamic law to the lives of Australian Muslims, as this thesis has demonstrated that Islamic principles of marriage and divorce are central to the way that Australian Muslims deal with family law matters. Rather, it frames the debate in terms of how the needs of the Muslim community can be accommodated within the overall official legal framework, not be situated separate or outside of such a setting.

It is important to appreciate that whilst this thesis has relied on Kymlicka's concept of multicultural citizenship, the current research expands his ideas further. This is because, as Modood has argued and as discussed in chapter 3, Kymlicka emphasises the role of cultural groups but does not deal with religious groups in any detail. This is somewhat ironic as he acknowledges that most of the backlash against multiculturalism has been directed at Muslims, yet he does not explore this central issues of religion. Modood, suggests that rather than focusing on culture it is better to

focus on identity.<sup>1147</sup> This results in what Modood identifies as the formation of hyphenated identities such as British-Muslim, or in the case of this research Australian-Muslim, which would not compete with national allegiance.<sup>1148</sup> This thesis has demonstrated that the formation of an Australian Islamic or Muslim identity is beginning to emerge, which has been identified by academics such as Professor Saeed<sup>1149</sup> as well as by data from this present research project.

Thus whilst the public debates have portrayed the issue as one about the imposition of *Shari'ah* in a liberal democratic state, whether it be Canada, Britain or Australia, this research has shown that such a portrayal is incorrect. As argued in chapter 5, neither the international context nor the Australian context provides any evidence to suggest that Muslim communities seek the recognition of *Shari'ah* as a separate body of law. In the UK and Canada the issue was not about *Shari'ah* or Islamic law but rather it was about whether Muslims were entitled to avail themselves of procedures available under mainstream law to resolve their family disputes, namely faith based arbitration. If this had been made clearer in these public debates then undoubtedly the debates would have been far less sensationalised. In fact, as discussed in earlier chapters, many Muslim groups and religious leaders have argued that it is inappropriate to use the word *Shari'ah* in this context. Rather it is more appropriate to see the issue as a form of Muslim dispute resolution consistent with mainstream law.

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<sup>1147</sup> Modood, above n203 at 40-42.

<sup>1148</sup> Ibid at 48-49.

<sup>1149</sup> Saeed & Akbarzadeh, above n25 at 3.

#### 4. The Australian Context - Exploring Existing Flexibility

In exploring this issue in an Australian context, chapter 5 indicated that, in contrast to what transpired in the UK and Canada, there has not yet occurred the same level of public debate in Australia. Rather there have been comments made by politicians in response to the international debates and the occasional suggestion by community leaders for the accommodation of Islamic law. It is hoped that this research, by documenting the processes by which Australian Muslims marry and divorce, will contribute to a more informed discussion when the issue arises more prominently in the future Australian context. In particular, as argued above, the debate can effectively move away from a focus on the term *Shari'ah*, which has in the past misrepresented the actual need of the Muslim communities as desiring a separate legal system based on a monolithic code of law called *Shari'ah*. As this thesis has argued, there is no such thing as a code of laws that can simplistically be recognised as *Shari'ah*, and, more importantly, Muslim communities have not requested this.

Rather, there needs to be a greater understanding of how Australian Muslims can better navigate their way through the two legal settings that they wish to comply with, and an exploration of developing a family dispute resolution process that meets the needs of Australian Muslims. This focus removes much of the unease and controversy that surrounds the question of recognition of *Shari'ah* or Islamic law and takes the debate to the more relevant question of improving and developing the existing official legal framework to accommodate the needs of all citizens, including the different cultural and minority groups.

This research has clearly demonstrated that one of the misconceptions in the debate about the question of recognition has been the idea that this involves some legislative change that would set up a parallel legal system for Muslims. Indeed, even in the Australian context where we have only had murmurings of this request from the Muslim community over several years, there has been a public backlash against such an idea. As mentioned earlier this has occurred even in recent months, with Senator Bernardi putting together an online petition against *Shari'ah* law in Australia on his website, even though no such thing has been proposed by the Australian Muslim community.<sup>1150</sup> His petition asks people to attest to the following statement:

We the undersigned, believe that *Shari'ah* (or Islamic) law is wholly incompatible with the Australian way of life and western culture.

Accordingly, we call upon the Australian Government and all Australian political parties to reject the introduction of any aspect of *Shari'ah* law in Australia, reject the establishment of *Shari'ah* courts and reject any amendments to our existing laws to allow compliance with *Shari'ah* law.<sup>1151</sup>

These statements involve a serious misunderstanding of the issue and have the unfortunate consequence of creating a backlash against the Muslim community. At the opposite end of the spectrum are the occasional comments made by Muslim community leaders for the recognition of *Shari'ah*. As this thesis has demonstrated, there is a need for those who make such a demand to clarify what this would actually entail. For example, in March 2010, the issue arose, as the president of a key Muslim

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<sup>1150</sup> Cory Bernardi, 'Petition against *Shari'ah* Law in Australia' <<http://www.corybernardi.com/petition-against-shari-ah-law-in-australia.html>> accessed 11 December 2010.

<sup>1151</sup> Ibid.

organisation mentioned in a question and answer session during a Mosque Open Day, the possibility of accepting legal pluralism in Australia and allowing Muslims to apply certain aspects of Islamic law to their disputes. After an immediate negative media response to his comments he clarified his comments that Muslims were obliged to abide by the laws of the land and that it was not an issue high on the agenda of the Muslim community.<sup>1152</sup>

This research has demonstrated the different ways that Australian Muslims and the Muslim community in general have navigated and negotiated their way between Australian family law and Islamic family law. For example, chapter 7 detailed that through the use of *'imāms* as registered marriage celebrants, it is relatively easy and convenient for Muslim couples to comply with the requirements of both legal settings. In fact, that discussion also showed that, generally speaking, there were very similar requirements to be satisfied under both sets of laws. However, developing a better understanding of how Muslims marry in Australia highlighted possible areas in the official legal system that could be adjusted to accommodate the needs of the Muslim community. An example of this is with the issue of the *mahr* or dowry, as the research indicated that all marriage ceremonies conducted by *'imāms* made reference to an agreed *mahr*, but most of the *'imāms* interviewed stressed that this was a moral obligation, as it had no enforceability under Australian law. However, as some Muslim lawyers have indicated, there are ways that can be explored to seek to make it an enforceable obligation. This would not require recognition of Islamic law, but would simply use the existing legal framework to meet the needs of the Muslim couple.

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<sup>1152</sup> Radio 2UE954, 'Call for *Shari'ah* law in Australia', *2UE NewsTalk*, 8<sup>th</sup> March 2010  
<<http://www.2ue.com.au/blogs/2ue-blog/call-for-shari'ah-law-in-australia/20100308-pr2o.html>>  
accessed 2 December 2010.

Another important example discussed in chapter 7 relates to the use of a marriage contract, a central component of Islamic marriage laws. In fact the discussion emphasised the important role that a marriage contract has in safeguarding the rights of Muslim women. The research demonstrated that whilst all marriages conducted by *imāms* involved the couple signing a marriage contract which stated the agreed *mahr* and the details of the witnesses to the marriage, very few Muslim couples were actually aware of the importance of the marriage contract or the fact that they could tailor the contract to suit their particular needs. The marriage contract, as discussed in chapter 7, also has enormous potential in addressing some key concerns that arise upon divorce, particularly in clarifying the process by which Muslim women may seek a divorce. Furthermore there seemed to be little awareness amongst interviewees of the possibility that such contracts could be made legally enforceable by drafting them as Binding Financial Agreements pursuant to the Family Law Act 1975.<sup>1153</sup>

Chapters 8 and 9 explored the way in which Muslims go through the divorce process, recognising that like marriage, Muslims navigate their way through both legal settings in order to secure a divorce according to Australian law as well as Islamic law. This is even more significant an issue for Muslim women, as they need to secure a religious divorce before they can move onto a new relationship. These chapters demonstrated the complex nature of seeking a religious divorce, with differing laws applicable depending on whether it is the husband or the wife who initiates the divorce process. Closely related to the divorce process are the issues of property settlement and the financial entitlements of each party upon divorce. Furthermore the

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<sup>1153</sup> Family Law Act 1975 (Cth).

research showed that whilst in regards to the actual divorce process itself the *'imāms* applied Islamic law, yet in regards to the issue of property settlement the community and religious leaders were acting as facilitators of an agreement between the parties in the shadow of their understanding of both Islamic law and Australian law. Thus understanding the community processes that Muslims participate in becomes just as important as understanding principles of Islamic family law.

In documenting these community processes, it was noted that they were based on a type of mediation process. Chapters 5 and 6 demonstrated that the basis of this community process can be found in Islamic principles of dispute resolution. Bouheraoua argues that 'peaceful dispute and conflict settlement is highly encouraged by Islam, and that in Islamic law, peaceful conflict settlement is to be achieved either by means of conciliation (*Sulh*) or arbitration (*Tahkim*) or mediation (*Wasaatah*)'.<sup>1154</sup> In the context of family law this is further emphasised with several *Qur'anic* verses and narrations of the Prophet. As mentioned throughout this thesis, it is these processes that distinguish somewhat the community processes in the Australian context from what occurs in the UK and Canada.

Chapter 4 demonstrated the existence of informal yet well established *Shari'ah* courts or tribunals in Canada and the UK which the respective Muslim communities have sought to harmonise within the existing arbitration framework of the official legal system. Yet the later chapters demonstrated that the community processes in Australia were far less structured and more *ad hoc*, as they relied upon individual or small groupings of *'imāms*. Furthermore, unlike the focus of the Canadian and UK

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<sup>1154</sup> Bouheraoua, above n593 at 2.



contexts on the use of arbitration, in Australia there is a greater focus on a mediation model known as Family Dispute Resolution (FDR). With an established emphasis on mediation in Islamic principles of dispute resolution, this common ground between the two legal settings again provides a further avenue for the accommodation of the needs of the Muslim community without the need for any formal recognition of *Shari'ah* or Islamic law. This will be explored further in the discussion below, but first it is important to return to one of the key concerns with multicultural policies, that is, their impact on women, and in this case on Muslim women.

## 5. What about Muslim Women?

The briefest of glimpses into the public debates that took place in the UK and Canada concerning the issue of faith based family arbitration reveals that one of the greatest concerns with the recognition of this process was its potential impact on Muslim women. Chapter 3 detailed Okin's arguments that multiculturalism is bad for women, in particular her argument that there is a conflict between "feminism" and 'multiculturalism'.<sup>1155</sup> Similarly Chapter 4 detailed similar arguments made in the context of the recognition of faith based arbitration in the UK and Canada. These ranged from the generalisation that Islam was inherently bad for women to the concern that community pressure would mean that Muslim women would be forced to partake in these processes. Whilst there were many who voiced these concerns, chapter 4 also demonstrated that there were many voices to the contrary, who challenged the assumption that Islamic principles of family dispute resolution were necessarily disadvantageous to Muslim women.

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<sup>1155</sup> Okin, above n27 at 10.

This is not to say that the current community processes, whether in the overseas jurisdictions examined in this research or the Australian context, do not have associated gender concerns, because that would be no more than wishful thinking. It would also be a disservice to the many women who shared their stories and experiences of frustration with this researcher, often told through tears. In fact the latter chapters of this thesis have attempted to highlight some of the difficulties that Muslim women have with the current community processes. For example, many expressed their concerns with the procedures of the community processes in securing a religious divorce, or the difficulties they faced when their husband refused to cooperate in the divorce process. Chapter 9 also demonstrated an urgent need for scholarly attention to be drawn to the issue of property settlement between the spouses, and in particular what a woman is entitled to receive upon divorce. Furthermore, the rather *ad hoc* nature of the community processes and the involvement of the *'imāms* were highlighted as a concern for women, who at times had difficulty in knowing where to go and who to talk to.

However, whilst there is no doubt that the gender concerns are a serious consideration in how the current informal community processes operate, this thesis has shown that Muslim women place value on adhering to Islamic principles in regards to marriage and divorce. The research has also demonstrated that women were far more likely than men to initiate the informal community processes of family dispute resolution, and their motivation for doing so varied from woman to woman. This thesis has also acknowledged the important role played by womens' community organisations in supporting women as they go through the community processes.

Thus a balanced approach needs to be taken in regard to addressing the gender concerns, an approach that has been seriously lacking in the public debates thus far. On the one hand it is necessary to move away from the approach that was ultimately adopted in the Canadian context of banning faith based arbitration because Islamic principles are somehow inherently bad for women. On the other hand, the Muslim community needs to accept that the existing community processes do indeed raise some serious gender concerns and demonstrate a willingness to address these. In short, change needs to occur.

Shachar's work offers a way forward by recognising that women of faith have a voice and they are not there as mere objects waiting to be exploited or in dire need of protection. Shachar calls for a:

More context-sensitive analysis that sees women's freedom and equality as partly *promoted* (rather than inhibited) by recognition of their "communal" identity. Such a vision can help inform creative paths for cooperation that begin to match the actual complexity of lived experience in our diverse societies.<sup>1156</sup>

As detailed in chapter 3, Shachar acknowledges what she terms 'the paradox of multicultural vulnerability' where policies of accommodation by the state may leave members of the minority groups (namely women) vulnerable to injustice.<sup>1157</sup>

However she argues that the one law for all approach which leaves no room for

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<sup>1156</sup> Shachar, above n291 at 579.

<sup>1157</sup> Ayelet Shachar, *Multicultural Jurisdictions – Cultural Differences and Women's Rights* (2001) at 3.

community processes assumes that 'women are not bearers of culture or religion, and that these identities are not worthy of public recognition.'<sup>1158</sup> Shachar goes to great lengths to emphasise the importance of religion and culture for some women, as she argues that women have a multiplicity of affiliations and to ignore this 'may be compatible with an abstract public/private divide, but it misses the mark for these embedded individuals.'<sup>1159</sup>

Shachar takes up the challenge of finding a way that secures the rights of women as citizens but also respects the fact that religion has an important part to play in their lives. She argues for a:

...grounded commitment towards respecting women's identity and membership interests as well as their dignity and equality. I then ask what is owed to those women whose legal dilemmas (at least in the family law arena) often arise from the fact that their lives are *already* affected by the interplay between overlapping systems of identification, authority and belief. I suggest that only recognition of their multiple legal affiliations, and the subtle interactions among them, can help resolve these dilemmas. The idea of recognizing the multiplicity of individuals' legal affiliations does not sit well with the traditional view of hermetically separated spheres divided along the presumably clear-cut axes of public/private, official/unofficial, secular/religious, positive law/traditional practice. Instead, recognition calls for greater access to, and coordination between, these multiple sources of law and identity. In this richer concept of citizenship, individuals and families should be afforded greater options to express both their citizenship and group

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<sup>1158</sup> Id at 605.

<sup>1159</sup> Shachar, above n291 at 577.

membership, rather than be forced to sacrifice one for the sake of the other.<sup>1160</sup>

In this way there is merit in what she terms a ‘joint governance’ approach which permits input from the two legal systems, ‘a group’s essential traditions and the state’s law – to resolve a single dispute’.<sup>1161</sup> This is because it is important to recognise that ‘both the secular and the religious aspects of divorce matter greatly to observant women if they are to enjoy gender equality, articulate their religious identity, enter new families after divorce, or rely on contractual private ordering just like any other citizen’.<sup>1162</sup> She argues that ‘the challenge and promise of this new approach lies in its capacity to create new structures of shared authority (joint governance)’.<sup>1163</sup>

Whilst Shachar writes about the Canadian context of faith based arbitration, this thesis argues that in the Australian context the joint governance approach can well apply to the Family Dispute Resolution (FDR) process, thus providing a structure that on the one hand comes within the existing legal framework and on the other has enough flexibility to accommodate the Islamic principles of family dispute resolution. Whilst it is clear that matters associated with the status of a relationship, that is marriage and divorce, will remain in the hands of *’imāms* because ultimately Muslims seek out a religious authority to resolve these issues, there is no reason why other matters cannot be resolved through an FDR process as described above.

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<sup>1160</sup> Id at 578.

<sup>1161</sup> Shachar, above n283 at 299.

<sup>1162</sup> Shachar, above n291 at 596.

<sup>1163</sup> Shachar, above n1157 at 89.

A key advantage to this approach is that it goes to the very heart of the main concern that Muslim women have with the existing community processes, that is, their procedural inadequacies. The FDR process, whilst being able to accommodate the religious needs of Muslim clients, also needs to comply with the procedural safeguards of the overarching official legal system. As Shachar notes:

These safeguards typically establish a “floor” of protection, above which significant room for variation is permitted. These basic protections were designed in the first place to address concerns about power and gender inequities in family relations, concerns that are not typically absent from religious communities, either. <sup>1164</sup>

This approach does not mean that all Muslim couples need to partake in this process, nor does it assume that it will suit every Muslim, but it ‘permits individuals with multiple affiliations to exercise choice and make their own determinations about which legal authority....will have jurisdiction over their personal affairs’, thus respecting individual agency.<sup>1165</sup> In this way Muslim women are not characterised as vulnerable and in need of protection, rather it is about enhancing their ability to exercise this agency.

## **6. Moving Forward within the FDR Framework**

The discussion above has paved a way for utilising the existing Family Dispute Resolution process as a way of accommodating the needs of Muslims attempting to

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<sup>1164</sup> Shachar, above n291 at 601.

<sup>1165</sup> Shachar, above n1157 at 103.

resolve their family law matters. Chapter 9 outlined the emphasis in the Family Law Act 1975 on keeping family disputes out of the court system by a process referred to in the act as Family Dispute Resolution (FDR), as a means of facilitating agreement between the parties. This process is offered by various organisations and service providers including many Family Relationship Centres established across the country. Family Dispute Resolution offers a flexible and adaptable mediation model for the resolution of family disputes, yet as discussed in chapter 9 the community leaders interviewed for this research project indicated that Muslims did not access these mainstream services for dispute resolution because the process was not sensitive to their particular religious needs. This is supported by the recent research project conducted by Dr Susan Armstrong<sup>1166</sup> which recognises that families from culturally and linguistically diverse (CALD) backgrounds are not using Family Dispute Resolution at a rate proportionate to their presence in the Australian community.<sup>1167</sup> Armstrong suggests that this may be for the same reasons that men and women from CALD backgrounds are discouraged from seeking help from other mainstream services.<sup>1168</sup> In addition it may also be due to:

- Lack of understanding about services
- Socio-cultural norms discouraging mainstream help-seeking
- Lack of trust in mainstream mediation services
- Uncertainty that services would be culturally sensitive
- Uncertainty that services would be culturally appropriate
- Preference to deal with family breakdown within family or community processes

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<sup>1166</sup> Armstrong, Bruce & Butler, above n1013.

<sup>1167</sup> Ibid at 4.

<sup>1168</sup> Ibid at 8-9.

- Communication barriers<sup>1169</sup>

This thesis has demonstrated that many of these factors accurately explain why many Australian Muslims do not use current mainstream family dispute resolution services. However this certainly does not exclude the possibility that the FDR model can be made more relevant to the way that Muslims resolve their family disputes upon separation. Rather, I would strongly argue that FDR finds common ground with Islamic dispute resolution principles, and thus paves the way for providing a path that can harmonise the informal community processes that have been documented in this thesis within the existing legal framework. There is no doubt that for this to occur more research would need to be undertaken to explore the ways that the FDR model could be used to meet the needs of the Muslim community. Armstrong suggests in her research several principles that could be used to better engage CALD communities in the FDR process, and these certainly provide a good starting point in this regard.<sup>1170</sup> Some of these principles include:

- Respond to CALD communities' needs and contexts
- Engage CALD service providers and community leaders
- Develop partnerships and contribute to building community capacity<sup>1171</sup>

Furthermore, in November 2010 the Australian Law Reform Commission (ALRC) and the NSW Law Reform Commission launched their joint report *Family Violence – A National Legal Response*, in which they explore the issue of culturally responsive

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<sup>1169</sup> Id at 9-10.

<sup>1170</sup> Ibid at 11-12.

<sup>1171</sup> Ibid.



family dispute resolution processes.<sup>1172</sup> Whilst the report focused on the issue of family violence, it also addressed the role of family dispute resolution processes. They note that ‘more culturally responsive models of non-judicial dispute resolution are being developed to accommodate the cultural contexts, values and needs of parties involved in or affected by disputes’.<sup>1173</sup>

Indeed in recent months (the latter half of 2010) several key initiatives have commenced with the objective of making FDR processes more sensitive and relevant to the needs of separating Muslim couples. These include an initiative by a Family Relationship Centre to partner with a Muslim organisation in a joint venture project to provide assistance to Muslim clients attending the centre. This initiative also involved the secondment of a local *imām* who is also a practising solicitor as Family Liaison Officer at the Centre.<sup>1174</sup>

The ALRC report also makes mention of an important initiative by Legal Aid NSW:

Legal Aid NSW noted that the KPMG report identified that legal aid commissions’ responses to people from diverse backgrounds were largely *ad hoc*, and that there was a need for formal protocols for delivering culturally and religiously appropriate FDR services. In response, Legal Aid NSW noted that it has developed more culturally appropriate dispute resolution processes for Indigenous clients, offering cadetships to Indigenous people to be trained as FDR practitioners, and offering all Indigenous clients an Indigenous FDR practitioner. FDR traineeships have also been

<sup>1172</sup> Australian Law Reform Commission & NSW Law Reform Commission, *Family Violence – A National Legal Response*, Report No 114 (2010).

<sup>1173</sup> *Ibid* at para 21.107.

<sup>1174</sup> Catholic Social Services Australia, ‘CatholicCare and Lebanese Muslim Association join together in support of Families in South West Sydney’, *Network News – The Newsletter for Members of Catholic Social Services Australia*, July 2010 at 1-2  
<<http://www.maristyc.com.au/MYC/images/pdf/networknewsjuly10.pdf?phpMyAdmin=hVzuuGFHJS7nK8SZSj47gKM9EVb>> accessed 2 December 2010.

offered to suitably qualified candidates from diverse cultural backgrounds with extensive understanding of the cultural practices, beliefs and experiences of their community. Legal Aid NSW told the Commissions about initiatives to develop a training and professional development framework for FDR practitioners, conference organisers and family lawyers, and other measures to ensure that FDR processes are culturally appropriate. Legal Aid NSW also told the Commissions about pilots in culturally responsive ADR in child protection.<sup>1175</sup>

By December 2010 Legal Aid NSW had supported the training of several legally trained Muslim Family Dispute Resolution Practitioners, and these people are in the process of becoming accredited Family Dispute Resolution Practitioners (FDRPs). It is hoped that these FDRPs will help to foster greater participation by Muslim clients in the FDR process currently offered by Legal Aid.

Whilst it is early days for these initiatives, they certainly indicate the beginnings of a path worth exploring, a path that may prove to be a useful tool for Australian Muslims in their navigation and negotiation through two legal settings. Indeed, as noted by the Australian Law Commission, in its view ‘FDR offers significant promise for processes that can accommodate - in so far as is appropriate, practicable and within the limits of the law-the cultural, religious and social values and practices of CALD and Indigenous communities’.<sup>1176</sup>

As acknowledged earlier, whilst more research and community consultation needs to be conducted to ascertain how the FDR process could incorporate or fit into the existing community processes used by Muslim couples, this process certainly seems

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<sup>1175</sup> Australian Law Reform Commission, above n1172 at para 21.113.

<sup>1176</sup> Ibid at para 21.117.

to be a promising way to move forward. It provides a previously unexplored avenue to meet many of the needs of the Muslim community that have in the past led some community leaders to suggest that recognition or accommodation of *Shari'ah* is needed. It also provides a way of addressing these needs within the existing legal framework, thus putting to rest the notion that accommodating the needs of Muslims requires substantive legislative change or the establishment of a separate legal process. This would mean that the debate would no longer be about the question of recognition of *Shari'ah*, but about how the existing legal framework can be more effectively used by Australian Muslims in resolving their family law matters.

There is no doubt that developing such an FDR process requires further consultation and research as the Law Reform Commissions acknowledge that 'culturally responsive approaches should be developed and implemented in a comprehensive, strategic and holistic way, rather than on an *ad hoc* basis'.<sup>1177</sup> However, this thesis has demonstrated that there is sufficient commonality between Islamic principles of family dispute resolution and family dispute resolution processes within Australian family law to allow the development of an FDR process that encompasses both. It would need to be a process that made Muslim couples feel comfortable and supported in their attempt at resolving their dispute. This may mean that a structure similar to the existing Family Relationship Centres could be adapted to the particular needs of Muslim clients.

Without limiting the various options that such an approach may yield, some possible ideas based on the present research include the possibility that such a centre could be

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<sup>1177</sup> Id at para 21.118.

a one stop shop that encompassed several services to support Muslim families, ranging from pre-marital counselling right through to post divorce support and counselling. In this way, these services could address many issues highlighted in chapter 7 associated with marriage and alleviate the problems that arise upon divorce, particularly for women. For example, by educating and raising awareness of the importance of having a marriage contract, women could be placed in a far more empowered position in the event of divorce. Such a centre may also encourage Muslim couples to seek advice and counselling throughout marriage, and in this way be a place that people know they can access when going through marriage problems. It could also be a place of referral, whether to religious leaders to deal with matters of divorce where and when relevant, or to other services required by the clients. Ultimately it would offer a dispute resolution process that overcomes the issues articulated by Armstrong, above, as reasons why people from CALD communities are reluctant to participate in mainstream FDR processes, by understanding the particular needs of Muslim clients.

This is not just an issue of relevance to the Muslim community, as demonstrated by the very recent request made by the Commonwealth Attorney General to the Family Law Council to consider the following issues in relation to Indigenous and Culturally and Linguistically Diverse clients of the family law system<sup>1178</sup>. The system needs to consider:

- ways in which the family law system (Courts, legal assistance and family relationship services) meets client needs.

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<sup>1178</sup> Commonwealth Attorney General's Department, *Family Law Council – Terms of Reference – Indigenous and Culturally and Linguistically Diverse Clients in the Family Law System*, 8 November 2010 <[http://www.ag.gov.au/www/agd/agd.nsf/Page/FamilyLawCouncil\\_FamilyLawCouncil-TermsOfReference](http://www.ag.gov.au/www/agd/agd.nsf/Page/FamilyLawCouncil_FamilyLawCouncil-TermsOfReference)> accessed 1 December 2010.

- whether there are ways the family law system can better meet client needs including ways of engaging these clients in the family law system.
- what considerations are taken into account when applying the Family Law Act to clients of these communities.<sup>1179</sup>

These proposals and discussions seem to more accurately address the needs of the Australian Muslim community than the often repeated question of whether *Shari'ah* should be recognised in Australia. These questions reflect an understanding that beyond the sensationalised public debates and news headlines about *Shari'ah*, there is a valid question to ask about how the Australian family law system can better serve its diverse population, including the Australian Muslim community.

As has been discussed throughout this thesis, the emphasis on amicable dispute resolution processes within Islam and the flexible FDR process under the Family Law Act 1975 (Cth) means that the way forward in the Australian context is to explore this common ground. Something that is necessary before launching into a debate about recognition of *Shari'ah*. In fact, as this chapter has outlined, this often ignored or at least downplayed commonality offers an exciting challenge for multicultural accommodation.

There is no doubt that this not an easy task, but the recent initiatives discussed above indicate that policy makers, family dispute resolution service providers and Muslim Community leaders are all interested in exploring family dispute resolution processes that can address the needs of Muslims within the existing legal framework. Therein lies the hope that future discussions in Australia involving Muslims and family law

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<sup>1179</sup> Id.

will go beyond the question of recognition of *Shari'ah* in Australia, which in the current context is not all that relevant. The question is not about setting communities apart with parallel legal structures but rather using policies of multicultural accommodation to allow the official legal structure to be more inclusive of all communities. If this path is not taken, then, as Shachar argues 'We might witness the operation of a dual-status system with no communication between the two branches.'<sup>1180</sup>

This would be the very outcome that nobody wants to have.

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<sup>1180</sup> Shachar, above n291 at 607.

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**3. Legislation**

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