AUSTRALIAN MUSLIMS: THE ROLE OF ISLAMIC LAW AND INTEGRATION OF MUSLIMS INTO AUSTRALIAN SOCIETY

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I   INTRODUCTION

The significant increase in the number of Muslims[1] in Australia, along with notable national and international events involving Muslims,[2] raises questions about the inclusion and exclusion of Muslims in mainstream Australian society, and the role of Shariah

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[1]   According to the 2011 Census of Population and Housing, there are now 476,291 Muslims (2.2% of the population), which is up 40% since the 2006 Census. The population of Australian Muslims has grown tenfold since 1976. See Susannah Moran, 'Islam Defies the Slow Loss of Faith', *The Australian*, 22 June 2012; Australian Bureau of Statistics, *Cultural Diversity of Australia: Stories from the 2011 Census, 2012-2013* (16 April 2013) < http://www.law.unimelb.edu.au/files/dmfile/FinalOnlinePDF-2012Reprint.pdf >.

[2]   These international events include the Arab-Israeli Conflict (at least since 1967); the Salman Rushdie affair (1989); the Gulf War (1991); the September 11 attacks (2001); the advent of the Taliban (1996); the occupation of Afghanistan (2001); the occupation of Iraq (also referred to as the Iraq War, 2003); the Bali bombings (2002); the London and Madrid bombings (2004 and 2005); the Boko Haram Insurgency in Nigeria (2009); and the emergence of the Islamic State in Iraq and Syria (ISIS, 2013). National events include the Tampa Crisis (2001); the unauthorised arrival of boat people (since 2001); the Sydney Gang Rapes (2000); the Cronulla Riots (2005); the Sydney Lindt Café Hostage Crisis (2014); the enactment of anti-terrorism legislation and charging certain individual Muslims under this legislation (since 2004); and ISIS-related incidents and media news (since 2013).

law. While many Muslim communities are flourishing in Australia, some are in isolated suburbs on the fringes of Australia's major cities facing high unemployment and other barriers that prevent full participation in Australian society.[3]

Similar to other migrants,[4] Muslims may have experienced disadvantages in relation to Australia's courts and legal institutions. Muslims seeking access to the Australian justice system encounter significant obstacles. Many reasons have been provided for this fundamental disconnect. Muslims often come from countries where the common law is not the legal system, and they are therefore unfamiliar with Australia's very different legal concepts and administration of justice.[5] The number of Muslims involved in the judiciary and legal profession in Australia is very small.[6] A third factor is that the principles of Shariah law, the 'dominant normative force in the lives of many Australian Muslims',[7] are not recognised in Australia; as a result, Shariah law is mainly practised covertly in

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[3]   Unemployment rates among Muslims is significantly higher than those for non-Muslim Australians, according to a 2011 study: see Sally Neighbour, 'Our High Profile Muslim Majority', *The Australian* (online), 18 February 2011 < http://www.theaustralian.com.au/news/features/our-high-profile-muslim-min ority/story-e6frg6z6-1226007821201>; see also, Riaz Hassan, 'Social and Economic Conditions of Australia Muslims: Implications for Social Inclusion' (Paper presented at the NCEIS International Conference: *Challenges to Social Inclusion in Australia: The Muslim Experience*, Melbourne University, 19-20 November 2008).

[4]   See Jelena Popovic, 'Magistrates' Courts' in Greta Bird (ed), *Law in a Multicultural Australia* (National Centre for Cross-cultural Studies in Law, 1991) 42-3.

[5]   Jamila Hussain, *Islam: Its Law and Society* (Federation Press, 3rd ed, 2011) 255-6.

[6]   According to a study of the Australian judiciary concerning the religion of Australian judges, Islam would come within the 'Other' category which represents 2% of judges. See Kathy Mack and Sharyn Roach Anleu, 'The National Survey of Australian Judges: An overview of findings' (2008) 18 *Journal of Judicial Administration* 5, 11-2.

[7]   Ann Black, 'Accommodating Shariah Law in Australia's Legal System' (2008) 33(4) *Alternative Law Journal* 214, 217.

this country.[8] According to Hussain, 'since Muslims are bound to obey Islamic religious law as well as the laws of the country they live in, it is possible that Muslims may sometimes be put in a position of conflict'.[9]

Generally, there are two contradictory views of the status and future of Muslim communities in Australia. The extreme anti-Muslim position is that the nature of Islam is incompatible with Western culture.[10] This view considers that an inherent incompatibility exists between Western and Islamic views and ways of life.[11] The other view is that Islamic culture is compatible with other systems, but racism and prejudice account for the existing tension between Muslim communities and the wider Australian community.[12] For example, the stereotypical negative views of Islam, adverse media coverage (particularly the surge of Islamophobia on social media) and misunderstandings of Islamic culture by the wider Australian community are the reasons for the non-acceptance of

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[8]   Ibid.

[9]   Hussain, above n 5, 256.

[10] John Stone, 'The Muslim Problem and What to Do About It' (2006) 9 *Quadrant* 11, 13.

[11] This is discussed in Rachel Woodlock, 'Being an Aussie Mossie: Muslim and Australian Identity Among Australian-born Muslims' (2011) 22(4) *Islam and Muslim Relations* 391; Kevin M Dunn, 'Representations of Islam in the Politics of Mosque Development in Sydney' (2001) 92(3) *Tijdschrift voor Economische en Sociale Geografie* 291; Ghassan Hage, 'Multiculturalism and the Islamic Question' (2009) *Public Lecture Series* <http://www.nceis.unimelb.edu.au/event/multiculturalism-and-islamic-question>; Christina Ho, 'Muslim New Defenders: Women's Rights, Nationalism and Islamophobia in Contemporary Australia' (2007) 30 *Women's Studies International Forum* 290.

[12] See, eg, Kevin Dunn, Natascha Klocker and Tanya Salabay, 'Contemporary racism and Islamaphobia in Australia, Racializing Religion' (2007) 7(4) *Ethnicities* 564; Michael Humphrey, 'Culturalising the Abject: Islam, Law and Moral Panic in the West' (2007) 42(1) *Australian Journal of Social Issues* 9; Fethi Mansouri, 'Local Governance, Intellectual Tension and the Racialisation of Muslims in the West' in Samina Yasmeen (ed), *Muslims in Australia, The Dynamics of Exclusion and Inclusion* (Melbourne University Press, 2010) 250.

Muslims into the Australian community.[13] According to this view, all or most of the problems associated with Muslim communities in Australia result from factors external to the Muslim communities.

A third, and more balanced approach, is taken in this article, arguing that while external factors such as negative and stereotypical views of Islam fuel some tensions between Muslim communities and the wider Australian society, Muslims themselves may also have a role and responsibility. Some Muslims themselves may partially contribute to their isolation from the Australian community and the justice system because of their interpretation and approach to Islamic law and practice.

The disconnection between some Muslims and other parts of Australian society[14] may arise partly from some Muslims denying the legitimacy of Australia's secular Western legal system and referring to Shariah law instead. Muslim scholars and leaders in Australia need to acknowledge the role they play in encouraging this disengagement with Western law.

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[13] Recent protests organised by 'Reclaim Australia' and the related growth of groups opposing halal food certification reveal some of this misunderstanding and fear: see John Elder and Natalie O'Brien, 'Anti-Islamic protests around the country spark ugly stand-offs', *Sydney Morning Herald*, 8 April 2015.

[14] Riaz Hassan outlines different social and economic factors that can lead to the disconnection of Australian Muslims from Australian society. For example, the employment rates of Muslim Australians is lower than those of non-Muslim Australians, as well as the unemployment rate being significantly higher in comparison: see Riaz Hassan, 'Social and Economic Conditions of Australia Muslims: Implications for Social Inclusion' (Paper presented at the NCEIS International Conference: *Challenges to Social Inclusion in Australia: The Muslim Experience*, Melbourne University, 19-20 November 2008); see also Michael Humphrey, 'Islam, Immigrants and the State: Religion and Cultural Politics in Australia' (1991) 1(2) *Journal of Islam and Muslim-Christian Relations* 208.

This article will first briefly discuss the ability or otherwise of the Australian legal system to accommodate other legal traditions and cultures. Next, the relationship between law and religion, and the possible impact on Muslim communities in Australia will be analysed. Then, the categorisation of human conduct under Shariah law and the doctrine of *Kofr* (rejection of the authority of non-Muslim over Muslims) and their implications for Muslims and the Australian legal system will be examined. It is submitted that beside external factors, the approach taken by some Australian Muslims, albeit a small minority, towards Sharia, may contribute in creating tension in Australian Muslim communities.

II   AUSTRALIA'S LEGAL SYSTEM AND APPLICATION OF SHARIAH

The Australian legal system is based on the western legal tradition. Australia's legal and political institutions were introduced at the time of British colonisation, and are based on British common law and statute law. Unlike the United States, where there was a more marked break from the British legal heritage, Australia retained close ties with Britain and the legal system can be characterised as developing as the result of evolution, not revolution.[15] Australia's unified and secular legal system exists despite the reality of a pluralistic society with a variety of cultures, religions and ethnicities.[16]

Unlike some Commonwealth countries, such as India, Malaysia, Papua New Guinea and even New Zealand, where British colonial policy recognised the laws of different ethnic groups, Australian law has always been strictly monocultural.[17] The monocultural (i.e. British) basis of Australian law is applied irrespective of an

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[15]   Patrick Parkinson, *Tradition and Change in Australian Law* (Thomson Reuters, 4th ed, 2010) 3.
[16]   Ibid 7.
[17]   Ibid.

individual's or a community's religious affiliations or ethnic background. Rights of indigenous populations of Australia were only recognised in recent years. In 1967, Australian Aboriginals were granted the constitutional right to vote by a referendum and were given limited rights over their traditional lands in 1992 — initially by the judicial interpretation of the High Court of Australia[18] and then by legislation in 1993.

A secular and universal legal system, which is indifferent to religion, may work well provided it reflects the composition and diversity of the population. Australia's common law system was developed at the time when its population was more culturally and ethnically homogenous than now: when men of Anglo-Celtic descent dominated public life. Common law systems evolve, but it may take considerable time for Australia's legal system to become more accessible to and inclusive of its increasingly culturally diverse population.[19]

While many Muslims in Australia do not support the introduction of Shariah law in Australia[20] (or elsewhere), many Australian Muslims follow certain Shariah legal principles as part of their religious observances. These include matters which ordinarily are legal issues in Australia, such as inheritance law, wills, paying special taxes (zakat), marriage and divorce, and matters relating to personal property, banking and finance. There are an increasing number of cases in Australian courts where, as a matter of fact, Muslims apply Shariah principles in their personal relationships, as

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[18] *Mabo v Queensland (No2)* (1992) 175 CLR 1.
[19] For a case study of Australian Muslims and legal pluralism, see Ann Black and Kerrie Sadiq, 'Good and Bad Sharia: Australia's Mixed Response to Islamic Law' (2011) 34(1) *UNSW Law Journal* 383.
[20] Abdullah Saeed, 'Reflections on the Establishment of Shari'a Courts in Australia' in Rex Ahdar and Nicholas Aroney (eds), *Sharia in the West* (Oxford University Press, 2010) 231.

part of their religious observance.[21] For example, in *Wold v Kleppir*[22] and *Oltman v Harper*,[23] the issue of validity of marriage of Muslim couples according to Shariah was raised. In both cases, the court found the marriages to be valid under Australian law.[24] Indeed in those cases Islamic law formalities in marriage was accepted for the purpose of the *Marriage Act 1961* (Cth) insofar as they were consistent with Australian family law.

Recognising certain personal Muslim laws such as those dealing with marriage, divorce, wills and inheritance, banking and business, may help Muslims to access Australia's justice system more effectively and realise that the Australian legal system can accommodate certain Shariah practices by Muslims. The government has at times explored greater recognition of certain personal Muslim laws and whether this would improve social inclusion. The Australian Law Reform Commission (ALRC) has considered Islamic law and culture in a number of its reports and background papers on multiculturalism, sedition law and cross-cultural issues.[25] For example, in the final report of *Multiculturalism and the Law* in 1992, the ALRC discussed the practice of polygamous marriages in Muslim communities in Australia and recommended that Australian law should not change to allow for recognition of any kind of

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[21] In *Omari and Omari v Omari*, a Muslim woman who had three sons and five daughters, divided her property into eleven equal shares, with each son to receive two shares and each daughter to receive one. This was done in accordance with Shariah law, which provides that a son inherits twice as much as a daughter from the parents. One daughter challenged the case in the Australian Supreme Court: see *Omari and Omari v Omari* [2012] ACTSC 33 (9 March 2012).

[22] [2009] FammCA 178.

[23] [2009] Famm CA 1360.

[24] See generally Jenny Richards and Hossein Esmaeili, 'The Position of Australian Women in Polygamous Relationships Under the Family Law Act 1975 (Cth): Still 'Taking Multiculturalism Seriously'?' (2012) 26 *Australian Journal of Family Law* 142.

[25] Australian Law Reform Commission, *Multiculturalism and the Law*, Report No 57 (1992); Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia*, Report No 104 (2006).

polygamous marriage in Australia.[26] Also, the Australian government in 2005 developed the National Action Plan to Build on Social Cohesion, Harmony and Security.[27] The plan intended to reinforce 'social cohesion, harmony and support the national security imperative in Australia … (and to) address issues of concern to the Australian community and to support Australian Muslims to participate effectively in the broader community'.[28]

Although the monocultural nature of Australian law may present religious difficulties for Muslims in certain areas, such as recognition of their personal law in matters including wills, inheritance and divorce, Jamila Hussain rightly notes that overall, there are very few areas where Muslim personal law conflicts directly with the Australian secular legal system.[29] The major reason for the alienation of Muslims from Australia's legal and judicial system may therefore not be due solely to its secular and monocultural nature, but may stem, in part, from attitudes encouraged by some Muslim-based institutions and the views and conduct of certain Muslim leaders and individuals themselves.

The following sections examine a number of possible factors present in Australian law and under Islamic law which may fuel tensions within Muslim communities in Australia. These are: the religious, rather than legal, mentality of Muslims; classification of all human conduct (including moral behaviors under Shariah); the concept of Ummah (community) consciousness of Muslims instead

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[26] Australian Law Reform Commission, above n 25, 86-7. For further discussion on the accommodation of Islamic family law in Australia, see Ghena Krayem, *Islamic Family Law in Australia* (Melbourne University Press, 2014), 83-126.

[27] Australian Government, *National Action Plan to Build on Social Cohesion, Harmony and Security — community engagement* <http://www.immi. gov.au/about/reports/annual/2007-08/html/outcome2/administered 2-6.htm>.

[28] Australian Government, *National Action Plan to Build on Social Cohesion, Harmony and Security: Final Evaluation Report* (September 2005 to June 2010) <http://www.crc.nsw.gov.au/__data/assets/pdf_file /0010/19729/2012_ National_Action_Plan_Final_Evaluation.pdf>.

[29] Jamila Hussain, above n 5, 256.

of individualism; and a special doctrine (rejecting any authority of non-Muslims over Muslims) among the main reasons for some inconsistency of Shariah and Muslim conduct in Western societies and in particular in Australia.

III   LEGAL VERSUS RELIGIOUS MENTALITY IN WESTERN AND ISLAMIC TRADITIONS

In Western cultures, the law is central in the society. The law, according to Patrick Parkinson, is an autonomous discipline and distinct from concepts such as custom, religion and politics and is 'a primary means of social control'.[30] One of the most significant features of the Western legal tradition, particularly in Australia, is the moral authority accorded the law whereby people feel a deep positive obligation to obey and respect the law, rather than simply being afraid of sanctions if they do not.[31] In general, Australians are law-abiding citizens. As Parkinson notes, the law 'derives authority and respect from a deep sense within the community that the law ought to be obeyed, not merely for fear of sanction, but from a feeling of positive obligation'.[32] It should be noted that Australia's secular-based legal system tolerates and accommodates various religious practices as long as it does not contravene Australian legal principles.[33]

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[30]   Parkinson, above n 15, 25-7.
[31]   Ibid 27.
[32]   Ibid.
[33]   It is notable that in almost all Muslim countries where the majority of Muslims in Australia come from, as well as a number of non-Muslims countries, such as India, Thailand and Israel, where there is a sizeable Muslim population, Muslims have autonomy in regulating their personal relationships, such as marriage, divorce, and inheritance according to Islamic law. However, in Australia, the legal system does not make any distinction between public law and private/personal law.

In most Muslim societies, religion, not the secular law, is accorded sacred authority and provides guidelines for what one ought to do morally as well as legally. In many Muslim countries, the law is seen merely as a set of controls imposed by corrupt, unelected, dictatorial authorities and therefore has no legitimacy or authority in the consciousness of many people. Obviously, the legal system may still function and settle the disputes of citizens, but the conformity with these rules is largely due to fear of sanctions rather than based on a deep sense of respect. Historical events have further helped shape this attitude. Muslim peoples' low level of respect for secular law can be traced to colonisation and events following the collapse of the Ottoman Empire, when Western legal codes were imposed without popular consultation or demand. As a result, a culture of civil disobedience to state-based law exists in many Muslim societies. On the other hand, Shariah is deeply rooted in the consciousness of many Muslim societies, and in some Muslim countries, many Muslims regard it as the only true authority.[34]

In traditional Islamic societies, the law and religion are indivisible and legal rules and rituals merge. According to one commentator:

> Islam is a faith in the realm of the public. Shariah, the sacred law of Islam, regulates religious practice with a view to maintaining the individual's well-being through his or her social well-being. Hence, its comprehensive system deals with the obligations that humans perform as part of their relationship with the Divine Being and duties they

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[34] According to a 2006 Gallup Poll, in some Muslim countries, such as Jordan, Egypt, Pakistan, and Afghanistan, the majority of people that participated in the survey want *Shariah* as the only source of legislation: see John Esposito and Dalia Mogahed, *Who Speaks for Islam? What a Billion Muslims Really Think* (Gallup Press, 2006) 48. The recent Pew Poll, which surveyed 38,000 Muslims from across Europe, Asia, the Middle East and Africa, found that there was significant support for the use of Shariah as the official law by Muslims in particular countries, such as Afghanistan, Pakistan, Bangladesh, Iraq, Palestine, Morocco, Egypt, Jordan, Niger Djibouti, Democratic Republic of Congo, Nigeria, Uganda, Malaysia, Thailand, and Indonesia: see The Pew Forum on Religion & Public Life, *The World's Muslims: Religion, Politics and Society* (30 April 2013) <http://www.pewforum.org/Muslim/the-worlds-muslims-religion-politics-society-beliefs-about-sharia.aspx#all>.

perform as part of their interpersonal responsibility. Public order must be maintained in worship, in the market place, and all other arenas of human interaction'.[35]

Seyyed Hossein Nasr elaborated that, 'religion to a Muslim is essentially the Divine Law'.[36] According to Joseph Schacht, 'the central feature that makes Islamic religious law what it is, that guarantees its unity in all its diversity, is the assessing of all human acts and relationship, including those which we call legal, from the point of view of the concepts 'obligatory/recommended/indifferent/reprehensible/forbidden'.[37]

In many Muslim societies, the dominant legal culture looks to and is based on religious authority and this mentality exists even in Iran, a theocratic Islamic State in the contemporary world. According to the Iranian Constitution:

All civil, penal financial, economic, administrative, cultural, military, political, and other laws and regulations must be based on the principles of Islam. This applies absolutely and generally to all parts of the Constitution as well as to all other laws and regulations, and the Islamic Jurists of the Guardian Council have authorities to determine compatibilities of the any law with Islamic principles.[38]

However, in Iran and in Saudi Arabia (another traditional Islamic society), even though state laws are based on Islamic principles, there is still a recognised distinction between religious law and state law. It is not uncommon for devoted Muslims not to pay tax to the state but pay their *Zakat* to religious leaders instead. One of the most

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[35] Abdulaziz Sachedina, 'Theology, Law and the Self-Governance of Religious Communities: Guidance or Governance? A Muslim Conception of "Two-Cities"' (2000) 68 *George Washington Law Review* 1079, 1079.

[36] Seyyed Hossein Nasr, *Ideals and Realities of Islam* (Praeger, 1966) 95.

[37] Joseph Schacht, *An Introduction to Islamic Law* (Clarendon Paperbacks, 1964) 200.

[38] Constitution of Islamic Republic of Iran, adopted 1979, as amended 1989, art 4.

influential religious leaders in Qom, Iran, noted this recently, and he stated 'laws made by the Parliament in Iran must be considered similar to the principles of religion in order to facilitate justice'.[39] The point is that for many individual Muslims, principles of Shariah are legitimate, and hence have moral and ethical and legal authority. State-made law may not have the same authority.

An empirical study by Riaz Hassan in a number of Muslim countries, including Iran, Pakistan and Indonesia, revealed a deep conviction by many 'Muslims in the self-sufficiency of Islamic texts'.[40] A recent Australian study showed that 73 percent of Muslims in the study trusted Islamic religious institutions in Australia; in comparison 29 percent trusted Australia's political system and 49 percent trusted the Australian judiciary.[41] Further, many Muslims in Australia regard themselves at least morally bound by Islamic law.[42] Therefore, a tendency exists among some Muslims that secular state-made law may not have moral or legitimate authority under Shariah and Muslims may have no obligation to respect or obey such laws, except as a matter of necessity or to escape sanctions. Given that Australian culture is based firmly on the rule of law and legal principles, this attitude substantially limits the inclusion of some Muslims into Australia's legal and political systems. By following a separate legal culture, this Muslim minority may actively contribute to their exclusion from the Australian justice system.

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[39] Ayatollah Mesbah Yazdi, 'Ahkam Hokoumati Manand Wajebat Sharei wajeboletaa ast [State Laws are Mandatory]', *Shargh Newspaper*, Tehran, No 1238, 4 May 2011, 2.

[40] Riaz Hassan, *Inside Muslim Minds* (Melbourne University Press, 2010) 60.

[41] Halim Rane, Mahmood Nathie, Ben Isakhan and Mohamad Abdalla, 'Towards Understanding What Australian Muslims really think' (2011) 47 *Journal of Sociology* 1, 11.

[42] Jamila Hussain, 'Family Law and Muslim Communities' in Abdullah Saeed and Shahram Akbarzadeh, *Muslim Communities in Australia* (University of New South Wales Press, 2001) 161, 176.

IV   CLASSIFICATION OF ALL HUMAN CONDUCT UNDER ISLAMIC LAW

A significant feature Islam, unlike most other major religions of the world, is that Islam regulates all human conduct. This may extend to matters which, from a secular perspective, would be considered simply moral, ethical, or at least morally neutral. This means that traditionally, Islam is not a religion confined to rituals and personal relationship with a supreme being but is a comprehensive system that regulates all aspects of life and even death for humans. Although some modern Muslim reformists try to confine the core message of Islam to rituals and they believe that Islam denotes an approach to religion that can be limited to a personal relationship between God and individuals,[43] the traditional Islamic literature suggest otherwise.[44] What is known as Shariah in the West, and is generally translated to Islamic law, is indeed the whole philosophy, legal theory, ideology, value system and legal system of Islam. It would be problematic to view Shariah in a simplistic way which correlated exactly to Western understandings of law and its relationship to the state.

Many of the perceived difficulties and fears associated with recognising Shariah may stem more from problems of language,

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[43] On this approach, see, eg, Khaled Abou El Fadl, *The Great Theft, Wrestling Islam from Extremists* (Harper, 2005); Abdullahi Ahmed An Na'im, *Islam and the Secular State: Negotiating the Future of Shari'a* (Harvard University Press, 2008); Allama Muhammad Iqbal, *The Reconstruction of Religious Thought in Islam* (Iqbal Academy Pakistan and Institute of Islamic Culture, 1989); Abdolkarim Soroush, *Bast-e Tajrobeh-yi Nabavi [The Expansion of Prophetic Experience]* (Serat, 2006): see also Forough Jahanbakhsh (ed), *The Expansion of Prophetic Experience, (*Nilou Mobasser trans, Brill, 2009); Mehdi Bazargan, *Akherat wa Khoda, Hadaf Besat Anbia [Hereafter and God: the Mission of the Prophets]* (Khadamat Farhangi Rasa, 1998) 79-80; Muhammad al-Ghazali, *The Socio-Political Thought of Shah Wali Allah* (International Institute of Islamic Thought and Islamic Research Institute, 2001).

[44] Bernard Weiss, *The Spirit of Islamic Law* (University of Georgia Press, 2006) 3-4; See also Sayyed Hossein Nasr, *The Heart of Islam: Enduring Values for Humanity* (HarperOne, 2002) 117-9.

translation and definitions as much as concerns about incompatibility. Generally, the term 'Islam', and the religion of Islam, have various interpretations and definitions in literature and in practice. Islam, as a religion, can be divided into puritan Islam (which is based on the Qur'an and the written tradition of the Prophet), the understanding of Muslims of Islamic practice and law (*fiqh*) and historical Islam (the development of Islamic civilisation during the last fifteen centuries). In addition, *fiqh* or understandings and interpretations of Muslims from scripture and the tradition of the Prophet can be divided into categories such as traditional, fundamentalist, and modernist versions of Islam. Also, Islam can be divided into other classifications such as Shariah-oriented Islam, philosophical Islam (*hikmat*), mystical Islam (*sufisn*), and theological Islam (*kalam*). A developing approach to the understanding of Islam is secular Islam, or secular Muslims who advocate religion as a personal matter in the life of Muslims.[45]

The four fundamental terms (Islam, Islamic jurisprudence, Shariah, and Islamic law) used in English to explain Islam and its legal system have different meanings. The term 'Islam' refers to the entire religion, including beliefs, rituals, morality, ethics, law, and the history of Muslim societies. 'Islamic jurisprudence' (*fiqh*) is the study of Islamic sources of law, conduct, and religious principles, which led to a body of juristic doctrines, developed over centuries. Shariah, which literally means 'a path to water', is translated in English as Islamic law. However, it has a broader meaning than the legal system of Islam, and in Islamic literature, it is divided into four categories: principles of beliefs (*aqayid*), human transactions and interactions (*muamilat*), rituals (*ibadat*) and punishments (*uqubat*). The latter three categories are also known as Islamic law. This means that Islam consists of a belief system, and Shariah, which includes all aspects of life. Indeed, Shariah is a system of religious values and norms, which includes many legal elements from cultures, tribal systems, and moral and ethical norms of various Muslim societies from Morocco to Indonesia. This means that the modern concept of

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[45]   An Na'im, above n 43.

law in Islam may not be exactly the same as the traditional Shariah or Islamic law. There could be also different definitions of Islam, and its legal system, according to various juristic schools of law. Nonetheless, one can identify a body of diverse legal principles that originated with the advance of the religion of Islam, applicable, at least in parts, in various Muslim societies. For the majority of Muslims in the world, whether a minority group in the West, or as a majority in over 50 countries, Shariah defines the beliefs, ritual, ethical values, and personal law (marriage, divorce, inheritance, charitable trusts, etc). The public aspects of Shariah law (punishments, constitutional law, and international relations), are implemented in a few countries such as Iran, Saudi Arabia, parts of Indonesia, Malaysia and Burma.[46]

In the West, Christian law was never the legal system of Europe and the Roman Empire.[47] When in the fourth century Christianity finally became the dominant religion of the Roman Empire, an established secular legal system already existed which became the foundation of modern European civil law systems.[48] In contrast, in the Islamic history, Islam itself established a new legal system and replaced the existing Arab Bedouin tradition and cultures, though it kept a large part of the existing pre-Islamic Arab traditions. To understand the role of Shariah in the life of Muslims a number of terms used in English needs to be understood.

The legal system of Islam classifies all human behaviour into five categories: those that are obligatory (*wajib*); recommended

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[46]   For further discussion of the nature and development of law in Islam, see Hossein Esmaeili, 'The Nature and Development of Law in Islam and the Rule of Law Challenge in the Middle East and Muslim World' (2011) 26(2) *Connecticut Journal of International Law* 329.

[47]   But historically there was canon law (controlled and managed by the church which had jurisdiction over certain specified matters). See generally Gillian Evans, *Law and Theology in the Middle Ages* (Routledge, 2002).

[48]   Bernard Weiss, *The Spirit of Islamic Law* (University of Georgia Press, 2006) 4.

(*mustahabb* or *mandoub*); permitted (*mubah*); disliked (*makruh*) and forbidden (*haram*).[49] In legal terms, committing forbidden acts or failure to conduct obligatory duties may merit legal sanctions. This means that even the omission of rituals *(wajib)* may be punishable[50] under Islamic traditional law in an Islamic State by a category of punishment known as *tazir*.[51] The second, third and fourth categories fall within the realm of religion and are rewarded or disapproved but not sanctioned. According to Joseph Schacht, 'the central feature that makes Islamic religious law what it is, that guarantees its unity in all its diversity, is the assessing of all human acts and relationship, including those which we call legal, from the point of view of the concepts obligatory/recommended/indifferent/ reprehensible'.[52]

Many practising Muslims, from almost all cultural backgrounds, evaluate their conduct according to Shariah principles and not the law, regardless of whether this is the law of Islamic States (e.g. Iran or Pakistan) or secular jurisdictions (e.g. Australia or France). For example, paying *zakat* (special Islamic tax) is *wajib* (obligatory) but paying tax to the government may not be mandatory, as obligations

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[49] Al Amidi, Seif al Din Abi al Hassan Ali Ibn Abi Ali Ibn Mohammad, *Al Ahkam fi Usul al Akham* [The Principles of Islamic Rules], (2005) vol 1, 85.

[50] Ibn Rushd, Abu al Walid, Muhammad Ib Ahmed Ibn Muhammad Ibn Ahmed, *Bedyat al Mujtahid wa Nihayat al Muqtasid* [The Beginning of Jurisprudence] (1988) vol 1, 5; Duncan B McDonald, *Development of Muslim Theology, Jurisprudence and Constitutional Theory* (Russell & Russell, 1965) 73; Wael Hallaq, *A History of Islamic Legal Theories*, (Cambridge University Press, 1997); Reuben Levy, *The Social Structure of Islam* (Cambridge University Press, 1969) 202-3.

[51] *Tazir* is a category of punishment, for conduct where no specific punishment (*hadd*) has been provided by the Quran or Sunna and is defined as 'punishment imposed by the judge (*qadi*) or the state (*hakim*) for a crime or a sin where no punishment is provided by *shariah*'. See Seyyed al Sabiq, *Fiq al Sunna* [The Sunni Jurisprudence] (Darelfkr, Beirut, 1998) vol 3, 393. Failing to follow rituals such as praying (without legitimate cause) is a sin in Islam. In practice this was only applied by the Taliban government in Afghanistan. Although in certain areas of Saudi Arabia, such as in Mecca and Medina, the religious police enforces proper religious rituals according to the state edict and prohibit any rituals inconsistent with Islamic teachings.

[52] Schacht, above n 37, 200.

imposed by a secular system may, at best, be only recommended (*mandoub*) under traditional Shariah. However, this does not mean that many Muslims do not pay taxes to secular governments.

The classification of all types of human conduct raises a frequent question as to whether it is permissible for Muslims living in western countries to work in government institutions, including legal institutions. An Iranian Ayatollah was asked a similar question: Does Shariah permit a Muslim citizen of Canada or the United States to work in that country's army, police force, public services and local governments? The Ayatollah answered: '[t]here is no prohibition as long as there is no corruption involved, and the employee does not commit any *haram* (prohibited) act or omit any *wajib* (mandatory) conduct under Shariah'.[53]

In a reasoned interpretation of Shariah, legitimate employment in the West, or anywhere else, may not raise any inconsistencies with principles of Islamic law. This means that Muslims, practicing or not, may be appointed to important legal, military or political positions in Australia or overseas, without breaching fundamental Shariah principles. However, this may not accord with the views of some Muslim individuals or institutions in the West. The fact that this question is asked is a clear example of attitudes within segments of Muslim communities in the West, that working in a secular legal and political system may not be allowed under Shariah.

Similar debates occur in other western countries. A group of Muslim women in the Netherlands connected to the Hofstad Network (a member of the Hofstad Network murdered the Dutch director Theo van Gogh) asked an Imam if they were allowed to testify in a

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[53]   Ayatollah Sayyed Ali Khamenei, *Resalah, Ajwabato al-Esteftaat* [A Collection of Fatwas] (Al-Hoda International Publisher, 2001) vol 2, 97.

Dutch court. The Imam granted them permission.[54] The women seemed to assume that Muslims were not allowed to participate in a legal system other than one based on Islamic principles.

The key to such problematic situations is a literal understanding of Islam and its legal system. A broader, contextual approach reveals that there is little or no conflict between Muslim codes of conduct and Australian law. If one takes a superficial and literal approach, however, it is possible to perceive significant barriers between Shariah and working in a non-Islamic environment.

V   *UMMAH* CONSCIOUSNESS V INDIVIDUALISM IN ISLAMIC TRADITION

Where Western societies promote the concept of individualism, some Muslims tend to have a collective view of society: *ummah* (the community of Muslims), tribes (in countries such as Iraq and Saudi Arabia), extended families (such as in Lebanon and Egypt) and the family (common in all other Muslim countries and among European Muslims). This has the potential to create tensions between different segments of Muslim communities and shape their relationship to the broader Australian community. It is customary for Westerners to divide countries into religions and ethnicity, whereas Muslims, according to Bernard Lewis, 'tend to see not a nation subdivided into religious groups but a religion subdivided into nations'.[55] This view is true, at least for many Muslims, who see religion as the only true approach to life.

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54   Christopher Caldwell, *Reflections on the Revolution in Europe, Immigration, Islam, and the West* (Doubleday, 2009) 166.
55   Bernard Lewis, *The Crises of Islam, Holy War and Unholy Terror* (Modern Library, 2003) xx.

The doctrine of *ummah* is referred in the Quran, in over 50 verses, and in the Hadith.[56] According to the Quran, Muslims are the best of all communities and are bound by common belief and obligations to God; they are required to assist people to be good.[57] The first treaty in Islam was drafted by the Prophet Muhammad and constituted a formal agreement between Muhammad and all the tribes and families of Medina, including Jews, Muslims, Christians and pagans. In it the Muslim community was defined as 'an *ummah* in distinction from the rest of the people'.[58] According to a commentator, *ummah* is 'the most enduring and influential Quranic idea and ideal of community', and 'flexible' in its application in 'specific social, religious and political terms'.[59]

The term *ummah* once referred to a community of Muslim believers, but in recent times it has come to be seen by many Muslims as a vast multicultural collective with well-defined cultural features.[60] Riaz Hassan found that the notion of *ummah*

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[56] Sayings of the Prophet Mohammad. While in modern major legal systems of the world, including civil law and common law, the State is the sovereign law maker through the Parliament or case law. In Islamic law, there is a pyramid of sources, and the Quran is the apex. The process of establishing legal rules in Islamic law is very complex. However, most Islamic law textbooks in English, and even in Arabic, generally state that there are four major sources of Islamic law. These include the Quran, the Sunnah (sayings and traditions of Prophet Mohammad), *Qiyas* (analogical reasoning), and *Ijma* (consensus of opinion). In practice in the contemporary world, Muslim scholars cite more than 12 sources for Islamic law, including *Istihsan* (Islamic law's version of equity), *Masaleh mursalah* (consideration of public interests), *Urf* (custom and usage), and *Ijtihad* (personal reasoning of Muslim scholars): see Hossein Esmaeili, 'The Nature and Development of Law in Islam and the Rule of Law Challenge in the Middle East and the Muslim World' (2011) 26 *Connecticut Journal of International Law* 2.

[57] The Quran, 3:104, 110.

[58] For a translation of the text of this treaty see Majid Khadduri, *War and Peace in the Law of Islam* (John Hopkins Press, 1955) 206-9; See also Frederick M Denny, '*Ummah* in the Constitution of Medina' (1977) 36(1) *Journal of Near Eastern Studies* 39.

[59] Frederick M Denny, 'Community and Society in the Quran' in J D McAuliffe (ed), *Encyclopedia of the Quran* (Laden, 2001) vol1, 379.

[60] Hassan, above n 40, 223-31.

consciousness among Muslims in most Muslim countries such as Indonesia, Malaysia, Pakistan, Egypt, Kazakhstan, Iran and Turkey was strong compared to that of modern Muslims living elsewhere.[61] Hassan concluded that 'strong religious piety [was] reinforcing the traditionalistic self-image of Islam in Muslim countries'. 'This is producing', he stated, 'a kind of cultural conditioning that is not conductive to the pursuit of rational, objective and critical scholarship because of the ideological control imposed by the traditionalistic self-image of Islam'.[62] The unified concept of *ummah* is also emerging, at least as an idea amongst some Muslim communities in the West, including in Europe, and in the United States.[63]

Muslim identity and support for the concept of *ummah* is present amongst Muslims in Australia and often can serve a positive, social purpose in much the same way that Jewish, Greek and Lebanese Maronites derive strength and support from their distinctive cultural communities. However, when the *ummah* is controlled or influenced by a restrictive ideology, it may serve to isolate Muslims from Australian society. Also, the *ummah* approach can encourage tribal and nationalistic attitudes that may prevent a rational approach to social requirements of a modern society such as Australia.

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[61] Ibid 232.
[62] Ibid 232-3.
[63] See Paul D Numrich, 'Emergence of the Rhetoric of a Unified *Ummah* among American Muslims: The Case of Metropolitan Chicago' (2012) 32(4) *Journal of Muslim Minority Affairs* 450.

VI THE DOCTRINES OF *KOFR* (BELIEVERS V NON-BELIEVERS) AND THE *NAFYE SABIL* (REJECTING AUTHORITY OF NON-MUSLIMS OVER MUSLIMS)

One of the doctrines of Sharia which may potentially cause tensions in the relationship between Muslims and non-Muslims is the doctrine of *kofr* which makes a division between believers and non-believers. This doctrine and its associated principle of *nafye Sabil,* which rejects the authority of non-believers over Muslims, are legal and complicated principles in Islamic jurisprudence. The doctrine of *kofr* has various meanings and applications.

The Quran uses the term *kofr* and associated terms over 500 times. However, its exact meaning, particularly in legal terms, is not clear.[64] The literal meaning of *kofr* is 'covering' and is taken to mean 'denying the truth'. In the Quran, the term has been used to refer to denying principles of Islam,[65] denying monotheism,[66] failing to appreciate God's gifts,[67] and not practising Islam.[68] In Islamic theology, the doctrine has a number of meanings, including rejecting the principles of Islam in a belligerent way (*kofr inad*). This meant that in the early stages of Islam, some unbelievers rejected Islam with arrogance in order to fight the Islamic State, and to destroy it for their own personal and unjustifiable interests.[69] As a result, the Quran and the Prophet provided that Muslims should not socialise with those non-believers who reject Islam based on their arrogance and in order to create a status of war with Muslims. A number of verses in the Quran composed during the conflict with non-believers in Medina (613-623AD), ordered Muslims not to socialise or become

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[64] An-Naim, above n 43, 120.
[65] The Quran 2:28.
[66] The Quran 5:72-3, 5:17.
[67] The Quran 14:7.
[68] The Quran 2:84-5.
[69] The Quran 77:11-25.

friends with non-believers of Mecca.[70] Later, in Islamic jurisprudence (*fiqh*), the doctrine of *kofr* found a legal dimension. In legal terms *kofr* means the rejection of Islam (denying the existence of God or the prophetic mission of the Prophet of Islam). People who reject God, and/or the Prophetic mission of Prophet Muhammad, are labelled as *kuffar* (plural of *kafir*) and are distinct from the community of believers. Non-believers can be either People of the Book (Jews, Christians, and Zoroastrians), or other non-Muslims. This doctrine has been the subject of scholarly discussion in various areas of Islamic literature, including in Islamic jurisprudence (*fiqh*), *kalam* (Islamic theology), *tafsir* (interpretation of the Quran), and *siyar* (Islamic international relations). One aspect of the doctrine of *kofr* (and the concept of *ummah*, discussed above) is the traditional concept of the division of the world into two or three divisions. These include the territory of Islam (the *dar al-Islam*) which comprised the territories under sovereignty of the Islamic State, and the territory of war (*dar al-harb*), which consisted of all other territories that did not fall within the sovereignty of the Islamic State.[71] The concept of a world division which favoured the Islamic State was gradually decentralised from around the 10th century. Nevertheless, the principle existed and was practised sporadically by Muslim states until the early 20th century, where the modern international concept of a nation state became the dominant practice in international relations worldwide.

Some Islamic principles, such as the doctrine of *kofr*, were revealed, developed, and applied 15 centuries ago and later were reformed and adopted by later Muslim societies and Muslim jurists. Many of these principles no longer apply or have changed substantially. Although divine in origin, the knowledge and experience of scholars and individuals over the centuries have developed these Islamic principles. It is unfortunate therefore, that

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[70] See, eg, The Quran 4:143, 8:72, 9:28.
[71] For further discussion of the traditional Islamic concept of world order, see Shaybani Siyar, *The Islamic Law of Nations* (The John Hopkins Press, 1966) 10-22.

people who take a literal approach to the principles of *Shariah* breed negative views of other communities, despite many Muslims living free and happy lives in societies such as Australia. A superficial interpretation of this edict could lead some to understanding that Muslims should not be involved in public affairs in non-Muslim societies. As an example, in 2002, an Imam of a mosque in Roubaix, France, refused to meet the mayor of Lille, in the area surrounding the mosque because, he said, it was Muslim territory and it was prohibited (*haram*) in Islam to welcome her.[72]

One associated doctrine relating to the doctrine of *kofr* is the principle of *nafy sabil,* which means rejection of authority of non-believers over Muslims. This principle is predominantly based on Verse 140 of Nisa Chapter (surah) of the Quran, which states:

> (These are) the ones who wait and watch about you: if ye do gain a victory from Allah, they say: "Were we not with you"? But if the unbelievers gain a success, they say (to them): "Did we not gain an advantage over you, and did we not guard you from the believers?" But Allah will judge betwixt you on the Day of Judgment. And never will Allah grant to the unbelievers a way [to triumph or gain authority] over the believers.[73]

This verse of the Quran was specifically revealed to denounce members of the Medina community who were disloyal to the Islamic State of Medina yet still demanded their share of the booty.[74] Based on the last part of this verse 'and never will Allah grant to the unbelievers a way (to triumph or gain authority) over the believers',

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[72] Caldwell, above n 54, 133.

[73] Yusuf Ali's translation: Abdulla Yusuf Ali, *The Meaning of the Holy Quran*, (Amana Publiction, 11th ed, 2006). I have inserted the word 'authority' in translation of the Arabic word '*Sabila*' which is translated by Yusuf Ali as 'a way (to triumphs)'.

[74] There is extensive literature on the history of Islam, particularly during the 23 year Prophetic Mission of the Prophet Mohammad in Mecca and Medina: see, eg, Muhammad Hamidullah, *The Emergence of Islam*, (Islamic Research Institute, 2002); see also Bernard Ellis Lewis and Buntzie Ellis Churchill, *Islam: The Religion and the People* (Pearson Prentice Hall, 2008).

Muslim jurists have developed certain legal principles which imply that some Muslims should avoid certain relations with non-Muslims and that the Quran does not allow unbelievers to have authority over believers.

However, this presumption is historically, logically and practically wrong. The Quran states that the non-believers of Mecca would not triumph over believers; Muslims did indeed triumph in Medina, and later in Mecca, over non-Muslims. However, this statement cannot be interpreted as a universal principle. It referred to a specific situation where *monafiqin* (hypocrites) in Medina expected to obtain a share of the spoils as a result of triumphing over the non-believers in Medina. Indeed, in many other verses in the Quran, the tradition of the Prophet Muhammad and the practice of Muslim societies from the advent of Islam to the present day shows that it was considered legal and logical by principles of Islam for Muslims to interact with non-Muslims in various ways, including living in territories where the legal system was not based on Shariah. Principles of Islamic law do not suggest that Muslims are prohibited from following the laws of a country that is not ruled by Shariah. Only a few Muslim states claim Shariah authority in their law-making procedures and ironically, many Muslims who have recently migrated to Australia have escaped from those states.[75] A practical consequence of such an interpretation may result in lack of respect for the law for Muslim migrants in the West, including in Australia.

A general interpretation of the last part of the Quranic verse ('no authority triumphs of non-Muslims over believers …') can be seen in the development of legal principles in Islamic jurisprudence (*fiqh*). For example, according to some Muslim jurists,[76] the rationale for

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[75]   For example, the majority of Afghan refugees fled the Taliban rules (1996-2001) or insurgency (2004-present).

[76]   See, eg, Al-Sayyed Al-Sabiq, *Fiqh al-Sunnah* [Sunni Jurisprudence] vol 2, 73.

prohibiting a Muslim woman from marrying a non-Muslim man is to prevent non-Muslims having authority over believers.[77]

Under Australian law, marriage is a union between two equal people and one has no authority over the other.[78] To date there has been no attempt by Muslim scholars and authorities in Australia to reconsider and re-interpret the Islamic prohibition in light of this equality-based understanding of marriage.[79]

For the most part, Muslims are neither narrow-minded nor extremists but family and community oriented people. Islam is a pluralistic culture and accommodates various legal schools, sects and cultures. However, some Islamic concepts, such as the doctrine of

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[77] See Sheik Sayyed Sabea, *Fiq Al Sunnah* [The Sunni Jurisprudence] 1998, Darelfkr, Beirout, vol 2, 73. Muslim jurists also refer to another verse of the Quran, which provides that 'O, you who believe! When the believing Women come to you as Emigrants, Examine them regarding their Faith; Allah is the Knower of the state of their Faith, then if you made it clear that Their emigration is out of their believe [Not out of personal motivations such as family problems] then do not send them back to the disbelievers: They are not Lawful for the disbelievers, nor The disbelievers are lawful husbands for The Muslim women; but give The disbelievers the amount of money which they have spent on them, and There will be no sin on you to marry Then after you have paid their marriage Portion to them. Also do not keep The disbelieving women as wives by [if Your wives turned to disbelief] ask for The amount which you have spent on Them; and also be prepared for paying Back the amount which the disbelieving Men have spent. This is Allah's Decree: He judges between you people and Allah is the Knowing Decreer'. Obviously this prohibition of Muslim women and Muslim men was specifically related to those women who were escaping from non-believers in Mecca, and migrating to the Muslim city of Medina. There was a state of war and conflict between the two cities, and these protective measures by the Quran were provided to save the newly-established Muslim community in Medina.

[78] Under s 5(1) of the *Marriage Act 1961* (Cth), '"marriage" means the union of a man and a woman to the exclusion of all others, voluntarily entered into for life'.

[79] On Australian family law, see Patrick Parkinson, *Australian Family Law in Context: Commentary and Materials* (Thomson Reuters, 4th ed, 2009).

kofr, if understood literally, may detach Muslims from the rest of the community.

VII   CONCLUSION

Australia's secular and monocultural legal system is based historically on British common law and may not reflect the diversity of its present population. As a result some Muslim immigrants may find it hard to adapt to the idea of 'one law for all' in Australia.

One of the most important features of the Western legal tradition is the central role the law holds in Western societies and the moral authority, almost sacredness, it exerts on peoples' consciousness. Many Muslims, whether they are living in the West or in Muslim countries, regard religious law, not secular law, as the only legitimate authority. Some Muslims in Australia determine questions of right and wrong according to Shariah and its five categories of conduct, rather than the secular laws of this country.

While various external, national and international factors have contributed to the isolation and exclusion of Muslims in Australia, it is arguable that a narrow-minded mentality and superficial interpretations of certain traditional Shariah may play an important part in Muslims excluding themselves from wider Australian society, particularly the justice and judicial systems.