

Window into shariah family law

Part 1—Aspects of marriage

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This paper provides a brief overview of key aspects of Islamic family law as it relates to marriage. A companion piece in the next edition of *Family Relationships Quarterly* will focus on aspects of shariah law as it relates to divorce. Both aim to provide contextual background information for practitioners working with Muslim families in the family relationship services sector. Box inserts appearing throughout outline and contrast family law as it applies in Australia, providing some insight into the gulf that Australian Muslims must navigate in regulating relationships within the context of a secular society.

Australia is home to about 340,000 Muslims (Australian Bureau of Statistics [ABS], 2008).¹ Approximately a third were born here, with the remainder having come as immigrants from more than 70 different nations. As the practice of Islamic law varies considerably between these nations, including those with majority Muslim populations, the diversity across the Muslim world is naturally reflected here in Australia.

It is beyond the scope of this paper to detail all the variants across the forty countries currently using the shariah² as the foundation for their family law. Most Muslims who have come to Australia will have been inculcated with the form of family law which occurred in their country of origin. Although these religious laws will be subordinate to Australia's statutory requirements, many Muslims will try to comply with both sets of laws in terms of marriage, divorce, financial support and responsibility for children.

Some background

The internal pluralism evident in Australian Muslim communities is in part brought about by the Sunni/Shia division and by national alignments with one of the sub-groups or schools of law, particularly within the Sunni tradition. In part it is a reflection of the cultural and ethnic diversity across Muslim states so

that law in an Arab region will reflect distinctive cultural features that differ from practices in Southeast Asia, Eastern Europe or North Africa. The diversity is also a consequence of colonisation—which imposed, in varying degrees, western notions of law onto Muslim colonial subjects—and of the adoption of western constructs of family law by Muslim nations themselves as part of modernisation programs. Pulling some nations in the other direction, is Islamisation, the process by which Muslim societies re-assert their Islamic credentials. Under Islamisation, western-derived laws are replaced by traditional Islamic ones. Finally, international instruments such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)³ have had an impact in bringing about greater conformity with western law, though many Muslim majority nations have entered reservations to the convention.

The significance of family law

Family law is of special significance to Muslims and is quite comprehensively covered in the Qur'an.⁴ As the Qur'an is believed to contain the direct word of God, transmitted to the Prophet through the Archangel Gabriel, Qur'anic laws pertaining to family matters are thus considered sacred and unable to be altered by human intervention.

Unlike shariah criminal law, family law has been in continuous operation, albeit in varying forms, since the 17th century.

Australian context: Laws regulating family life in Australia, and in most developed countries, have undergone momentous change in the last 100 years, in attempt to keep pace with dramatic societal change.

1 The precise numbers of Muslims is not known because many people do not declare their religious status in the national census. However, in 2006 the ABS said the numbers exceed 340,000, making Muslims the third largest religious group in Australia after Christians and Buddhists.

2 The law of Islam.

3 "The convention on the Elimination of All Forms of Discrimination against Women was adopted in 1979 by the UN General Assembly, and is often described as an international bill of rights for women. Consisting of a preamble and 30 articles, it defines what constitutes discrimination against women and sets up an agenda for national action to end such discrimination." From the UN website: <www.un.org/womenwatch/daw/cedaw/>

4 The Qur'an is written in Arabic and there are numerous translations into English. See Ali's (1989) *The Holy Qur'an: Text, Translation and Commentary*. For readers interested in comparing English translations see the website of the University of Southern California which has three online translations of the "Noble Qur'an" <www.usc.edu/dept/msa/quran/>

Shariah laws governing family life were generally not abolished by colonial powers but retained and modified. In sociological terms, family law embodies the “quintessential culture of a distinctive group” (Poulter, 1990) and so is important for reasons of identity, both at an individual and societal level. Linked to this is the observation that Muslims believe the best way to defend their families from what they see as “corrupting” western influences—prostitution, alcohol and drug use, pornography, child abuse, marital breakdown, extra-marital affairs, illegitimate children, same-sex relationships, neglect of the elderly—is to operate within the scale of values advocated in Islamic family law.

Aspects of family law are also important as a living historical record of the affirmation of women’s rights that occurred in the reforms Islam brought to Arabia and then spread across the Muslim world. Islam gave women many unprecedented legal entitlements long before women in the West, including the right to own property in her own name (Qur’an 4:32); to retain for her exclusive use money and property given by her husband at the time of marriage (Qur’an 4:4); to retain her name and own identity after marriage; to be maintained by her husband together with her children (Qur’an 4:34); to inherit in her own right (Qur’an 4:7); and to be able to divorce her husband (Qur’an 4:130). The introduction of an Islamic law also restricted the practice of polygyny,⁵ limiting the number of wives which a man could marry to four, previously unlimited (Qur’an 4:3).

Aspects of marriage

In Islam, marriage is seen as very important and highly desirable.

Australian context: Marriage has traditionally been valued more highly than informal or de facto relationships, both at a societal level and via the benefits bestowed by legal recognition. However recent changes to laws impacting on de facto and same-sex couples have further closed an ever-decreasing gap in relationship status.

Celibacy is regarded as unnatural and does not equate with devotion to God as it does in some other faiths. Sexual relations outside of marriage are

⁵ As polygamy is technically a generic term for more than one marital (and/or sexual) partner, it is more correct to use polygyny when referring to a man who has more than one wife. The rare situation where a wife has more than one husband is polyandry.

a serious crime (*zina*) with some nations imposing severe penalties for *zina*.

Australian context: Under Australian family law there are no longer any legal consequences, civil or criminal, flowing from either adultery or from sex outside marriage.

The Qur’an endorses marriage (30:21) and the Prophet Mohammad himself married, on most accounts, 12 times. Marriage is between a man and a woman. Homosexual relationships are seen as sinful. In some countries today, such as Iran, sodomy remains a capital offence.

Australian context: Marriage, defined as “the union of a man and a woman”, is currently exclusively a heterosexual institution, though there are increasing calls for the recognition of same-sex marriage. Same-sex relationships in Australia are lawful, and while there are a number of jurisdictions in Australia that allow for the official recognition of same-sex and de facto relationships, the law does not recognise civil marriage between same-sex couples.

Marriage in Islam is a contract and not a sacrament⁶ though the wedding ceremony will have cultural and religious features.

Australian context: Marriage is a secular institution in Australia, but both civil and religious ceremonies are recognised under Australian law.

The essential requirements are offer and acceptance, and in some schools of law (and thus in some countries) the acceptance can be by the bride’s *wali* (or marriage guardian, usually her father—see “Consent to marriage” below). The contract must specify a payment of value (*mabr*) to the bride which becomes her own property. *Mabr* can be a sum of money, material goods, investments or a positive commitment (e.g., to teach her a skill, or go on a special holiday), and today is usually a combination of many things. *Mabr* can be deferred or paid in full at the time of the contract. As it is deemed to be the property of the wife, any deferred *mabr* is payable if the marriage should end, through divorce or death.

The contract, which should be in writing, can contain certain conditions. These might include that husband cannot take a second wife or cannot do so without the wife’s permission; that the couple live in a particular location; that the wife will receive regular specified amounts of money; or that the

⁶ Any of various Christian symbolic ceremonies.

wife will be excluded from performing certain tasks. Some countries, such as Iran, have a proforma contract which enables the bride to tick boxes showing which of the conditions listed will apply in her marriage, or it can be a tailor-made conditional contract. Breach of one of these conditions by the husband is a ground for divorce, known as *ta'liq* (termination by breach). Aggrieved spouses also have the option of applying to the shariah courts for the enforcement of marriage conditions, as under contract law.

Australian context: Australian law does not allow for legally enforceable conditions to form part of the marriage contract. Financial agreements entered into before or during marriage in Australia are optional.

Marriageable age

The shariah allows marriage when puberty has been attained. Puberty is to be determined by physical maturation signs or by the presumption of 9 years for a girl and 12 years for a boy. In the past, marriage at a young age was common but most countries today have legislated an age when marriage is lawful which ranges from 16 years for a girl in the Sudan to 22 years in Tunisia. Despite the legislative protection against child marriage, it does still occur in some rural and less developed regions such as in Bangladesh.

Australian context: Under the *Marriage Act 1961* (Cth) the minimum marriageable age is 18 years. At least one member of the couple must be over the age of 18, that is, two people under the age of 18 cannot marry each other. A person under the age of 16 cannot marry at all, no matter what the circumstances. A person aged 16 to 18 years who wishes to marry must, in all cases, apply for a court order permitting them to marry an individual who is 18 or older. The granting of the order is at the discretion of the judge who must be satisfied that the circumstances are so "exceptional and unusual" as to justify the granting of the order. A person under the age of 18 must also obtain the permission of parents or guardians in addition to the court order. If permission is denied, the person may apply to the court for that permission in place of the person whose consent has been refused.

Consent to marriage

As noted above, consent of both parties is needed, though in several schools of law this may be given by the *wali* (father or paternal grandfather). Usually

this is done to ensure the bride has made a sound choice in her marriage partner. To prevent misuse of this power, some Muslim countries now allow cases alleging unreasonable refusal to consent by a *wali* to be brought to the shariah court for determination.

Australian context: Marriage in Australia requires the consent of both parties and must be voluntarily entered into.



Restrictions on marriage

One significant restriction on marriage found in the Qur'an and still enforced today is that a Muslim woman must marry a Muslim man. (Qur'an 2:221). A Muslim man can lawfully marry a Christian or Jewish woman, as did the Prophet Mohammad, as these are considered "women of the book" (*kitabiyah*).⁷ However, it is generally regarded as undesirable and some countries have made any inter-religious marriage unlawful. The social justification is that marriage between Muslims is the best way to keep Islam as the guiding force in family life.

Australian context: There are no legal restrictions on inter-faith marriage.

Marriage between ascendants, descendants and siblings is also prohibited, including relationships involving fostering (Qur'an 4:23).

Australian context: Marriage between ascendants and descendants, and siblings is prohibited, including such relationships established through adoption.

Polygyny

In Islamic law, a wife can lawfully have only one husband while the Qur'an (4:3) specifies that a man may be married to up to four wives at any one time. The traditional view is polygyny is permitted provided the husband can afford to support all his wives adequately and treat them equally in every respect. However reliance on another verse in the Qur'an has led some Islamic jurists to support the view that polygyny is not allowed in Islam.⁸ Tunisia, for example has made polygyny a criminal offence. In some countries that allow polygyny, the practice is discouraged and occurs rarely, as is the case in Indonesia. In others, such as Saudi Arabia and some African countries, it remains commonplace. Many other nations take a middle path allowing polygyny in certain circumstances, for example, when the husband has court permission to do so, has obtained the consent of an existing wife or wives, or has accepta-

7 Islam, Judaism and Christianity are monotheistic faiths in the tradition of Abraham as they recognise the same God, the role of Prophets and share many scriptural texts (the book). For this reason, Jewish and Christian women are accorded a special status in terms of marriage to Muslim men.

8 The verse reads "you are never able to be fair and just as between women" (Qur'an 4:129).

ble reasons for taking another wife (such as infirmity or infertility of an existing wife).

The Australian context: Marriage under Australian law is to be "to the exclusion of all others". The marriage is deemed void where one party is already married, whether or not that party is a member of a community in which polygamy is seen as a legitimate practice. Bigamy is an offence under section 94 of the Marriage Act. Polygamous marriages entered into *outside* Australia, while not considered valid in Australia, are deemed to be marriages for the purposes of proceedings under the *Family Law Act 1975 (Cwth)*.

Conclusion

This paper has highlighted features of Islamic family law. Many Muslims in Australia have become skilful in their navigation through two sets of laws—one religious and the other secular—and see no need for there to be change to the Australian system. Others advocate a legally pluralistic approach by which a shariah court or arbitration board could be established to make determinations for Muslim Australians in accordance with Islamic family law (Black, 2008). The decisions of these bodies would be given legal recognition and enforced by our courts. Whether this happens will be the subject of considerable debate for Muslims and non-Muslims in the years ahead.

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