

# ISLAMIC COMMUNITY PROCESSES IN AUSTRALIA: AN INTRODUCTION

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## I. Background and introduction

The Muslim community in Australia has a variety of community-based dispute resolution processes for dealing with family conflict (Black & Sadiq 2011; Black 2010; Hussain 2006). Often these practices are informal and unenforceable, with little interaction with the formal legal system (Armstrong 2010). We refer to such processes, where family disputes are resolved using *sharia* as well as other cultural non-legal norms as “Islamic community processes”. In recent years some in the Muslim community have called for the legal recognition of decisions and settlements reached in these community forums (Berkovic 2012). For instance, the submission by the Australian Federation of Islamic Councils (AFIC) to the Parliamentary Joint Standing Committee on Migration asks for “legal pluralism”, possibly suggesting greater recognition of Islamic decision-makers (Australian Federation of Islamic Councils 2011). At the same time, Australia has seen the emergence of government initiatives to enhance access to the legal system’s services for people from culturally and linguistically diverse backgrounds (Family Law Council 2012; Urbis 2007; Victoria Legal Aid 2011), including the development of culturally responsive models of dispute resolution for families from migrant background communities (e.g., Armstrong 2010; Family Law Council 2012).

Despite this growing recognition of the importance of an inclusive approach to family law service delivery, calls for the recognition of Islamic community processes have been deeply controversial. In 2006, Peter Costello (the then Treasurer of Australia) gave a speech in response to media reports that Australian Muslims were seeking recognition of aspects of Islamic family law. In this, he stated:

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 sharia law—Saudi Arabia and Iran come to mind. If a person wants to live under sharia law these are countries where they might feel at ease. But not Australia (Costello 2006).

In 2011, the then Federal Attorney-General, Robert McClelland, said “[t]here is no place for sharia law in Australian society and the government strongly rejects any proposal for its introduction” (Hole 2011), and that “[a]s our citizenship pledge makes

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clear, coming to Australia means obeying Australian laws and upholding Australia's values ... Indeed all applicants for citizenship swear a collective allegiance to the people of Australia and undertake to respect our customs and abide by our laws" (Karvelas 2011). The Joint Standing Committee on Migration does not think that the "legal recognition of Islamic practices is necessary or desirable" (Joint Standing Committee on Migration 2013; Karvelas 2013).

This rejection of Islamic community processes is accompanied by more extreme denunciations of "sharia law" and those who support it. For instance, Australian senator Jacqui Lambie describing supporters of sharia law in a recent speech to Parliament said, "these maniacs and depraved humans will not stop committing their cold blooded butchery and rapes until every woman in Australia wears a burka and is subservient to men" (Jennett 2014).

Despite these public reactions to Islamic community processes, little is presently known about the experiences of Muslim women who use community processes to resolve family disputes,<sup>2</sup> or about how the Australian family law system might go about responding to these processes in a way that supports Muslim women. As a recent literature review report conducted for the Australian Human Rights Commission found, "the research required to identify and analyse the patterns and dynamics of alternative dispute resolution related to family law matters in Islamic communities in Australia does not yet exist" (Schofield King Lawyers 2011). Following this report, Ghena Krayem conducted the only relevant empirical research on Islamic community processes in Australia to date, which documents how Australian Muslims deal with family disputes (see Krayem 2014).

Using empirical research methods that included interviewing sixty-five members of the Australian Muslim community, including imams, 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, this chapter offers an introduction to how Islamic community processes operate based on this ground-breaking research. Drawing on this research, Part II describes the operation of Islamic community processes, including the role of community organizations, Muslim women's organizations, the role of imams and concerns raised by participants about the role imams play in Islamic community processes. Part III addresses the way in which Islamic community processes interact with Australian law.

## **II. The operation of Islamic community processes**

The Australian Muslim community is a diverse community, so much so that some commentators write about communities rather than community. This diversity is not limited to cultural backgrounds and languages spoken, but also extends to the general 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

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<sup>2</sup> There has been some work on this on other jurisdictions – e.g. Samia Bano, *Muslim women and Shariah Councils: Transcending the boundaries of Community and Law* (Palgrave MacMillan December 2012)

(Krayem, 2014, 58). According to the latest 2011 census figures the Muslim population in Australia 2.2% of the total population or 476 000 people, with 61.5% of that population born overseas (Krayem, 2014, 58). The most frequently cited country of birth for Australian Muslims is Australia at 38% of them being born in Australia. In terms of cultural background, 42% of the Muslim community claim Lebanese heritage, 28% claim Turkish ancestry and a growing number claim African ancestry, including 5% Somali with the rest of the community being drawn from all over the world (Krayem, 2014, 58). The cultural diversity was reflected in the interviewees who participated in the study as they came from Lebanese, Egyptian, Syrian, Fijian, Indian, Palestinian, South African, Bosnian, Turkish, Jordanian, Iraqi, Iranian, Bangladeshi, Pakistani and Algerian (Krayem, 2014, xii).

The imams, community leaders and the community members interviewed were of the view that significant numbers of Muslims in Australia rely on Islamic community processes to resolve their family law matters (Krayem 2014, 86). But Islamic community processes in Australia do not centre around bodies which work like “Shariah Councils” in the United Kingdom (Krayem 2014, 29). Instead informal, non-permanent groupings of imams work together towards dispute settlement in particular cases, even though they may sometimes call themselves Shariah councils or Imam Boards (Krayem 2014, 85).

Family members often play an important role in Islamic community processes, at least initially. Several interviewees discussed the role that family members, particularly older family members, played in resolving conflicts (Krayem 2014, 94-95). One interviewee 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 imam (Community member, interview by Ghena Krayem, July 2, 2008, quoted in Krayem 2014, 187).

Because of the vital role played by family, for Muslims with no extended family in Australia, dealing with marital problems can be particularly difficult (Krayem 2014, 95). For many in the community, community leaders or community organisations were the next port of call where the conflict could not be addressed satisfactorily by the family. One interviewee suggests that the community leader was a more effective counsellor than the couple’s family would have been:

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 (Community member, interview by Ghena Krayem, February 1, 2008, quoted in Krayem 2014, 187).

One imam explains the community’s response to requests for help with family conflicts:

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 (Religious leader, interview by Ghena Krayem, January 25, 2003, quoted in Krayem 2014, 95).

### **A. Role of community organisations**

After families, community organisations play a very important role. The services they provide are evident from these remarks from a participant from such an organisation noting that:

They come into our office and ask to speak to an imam, 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 imam (Community worker, interview by Ghena Krayem, March 15, 2003, quoted in Krayem 2014, 96).

One of the key roles played by these organisations is their referral role; that is, even if they themselves cannot 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 ... [as] 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 then becomes an Islamic law issue—the community workers will then help if there is a fall-out (Community leader, interview by Ghena Krayem, June 5, 2006 and July 23, 2008, quoted in Krayem 2014, 96-97).

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 (Community worker, interview by Ghena Krayem, June 10, 2003 and July 4, 2008, quoted in Krayem 2014, 96-97).

All the organisations interviewed indicated that unless there were exceptional circumstances such as violence, they 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 and referring couples to services that can meet their needs. They also indicated that if the couple or at least one party chooses to divorce, then the matter would be referred to an imam. This was described by several interviewees in the following way:

Many women come to our organisation for assistance and our staff refer them to the appropriate people or services. Most assessments are done at the community organisation 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 (Community leader, interview by Ghena Krayem, June 5, 2006 and July 23, 2008, quoted in Krayem 2014, 189).

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 (Community worker, interview by Ghena Krayem, September 2, 2006, quoted in Krayem 2014, 189).

Thus it can be seen that families, respected community members, leaders and community organisations all play an important role in helping couples to resolve their dispute. However, if matters cannot be resolved, then one of the parties will seek the intervention of an imam, a religious figure that is respected by both parties.

## **B. Role of Muslim women's organisations**

Women's organisations such as the Muslim Women's Association (MWA) in New South Wales play a particularly important role in Islamic community processes in Australia (Krayem 2014, 97). When a woman with family difficulties walks into the front door of an organisation like the Muslim Women's Association, she will be interviewed, a case plan will be made for her, and, depending on her individual circumstances, this can involve counselling, dealing with social security issues, immigration issues, housing (particularly when women may be escaping situations of domestic violence), separation and divorce processes. The MWA in particular manages the only Muslim women's refuge in Australia, and has been doing so for over twenty five years. It provides emergency accommodation and assistance to women, many of whom are fleeing because of domestic violence or marital discord. It also plays a pivotal role in supporting many Muslim women through the resolution of family law issues (Krayem 2014, 97). As one of its 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, and also try to reason with the imam ... We talk to the imam, debate with him about the rights and wrongs of the situation (Community worker, interview by Ghena Krayem, August 18, 2007, quoted in Krayem 2014, 97).

While some organisations, such as the Muslim Women's Association, are able to offer assistance directly to the community members, others refer them to other services. For example, the importance of their work can also be seen from the responses of some of their clients who commented that they 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 (Krayem 2014, 97):

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 (Community member, interview by Ghena Krayem, March 6, 2006, quoted in Krayem 2014, 98).

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 (Community member, interview by Ghena Krayem, October 11, 2006, quoted in Krayem 2014, 98).

These responses illustrate the important and pivotal role that the women's organisations play in the community, a role that quite often is not recognised (Krayem 2014, 98). There is a strong emphasis on supporting women to make decisions for themselves. Some community workers from this organisation commented on the criticism that such organisations face because of their support for women's choices:

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 (Community worker, interview by Ghena Krayem, June 6, 2003 and October 7, 2008, quoted in Krayem 2014, 188).

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 (Community leader, interview by Ghena Krayem, June 5, 2006 and July 23, 2008, quoted in Krayem 2014, 188).

### **C. Role of Imams**

As the previous interview extracts indicate, community leaders and community organisations often refer family conflicts to Imams or Shaykhs where a divorce has been decided on, or where they are unable to resolve the conflict. In general each imam sought by couples is usually associated with a particular mosque (Krayem 2014, 98). What then do these religious leaders do when faced with a couple with family law issues? One imam noted that: "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" (Religious leader, interview by Ghena Krayem, January 23, 2003, quoted in Krayem 2014, 99). Another said that he helped them reach an agreement, then advised them to go to a solicitor to make the agreement legal (Religious leader, interview by Ghena Krayem, February 18, 2008, quoted in Krayem 2014, 99). Others drew on specific religious texts and Islamic principles:

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 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 (Community leader, interview by Ghena Krayem, March 10, 2003 and July 11, 2008, quoted in Krayem 2014, 99).

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 (Religious leader, interview by Ghena Krayem, January 25, 2003, quoted in Krayem 2014, 99-100).

While Imams play an important role in family disputes in general, they play a particularly important role in the facilitation of divorces and the settlement of property disputes. We focus in what follows on property disputes as this is where Imams play an important mediating role between the parties. Parties to a marriage in Australia can apply to the Family Court for orders settling their property, and according to section 79(1) of the *Family Law Act 1975* (Cth), a wide discretion is granted to the court which “may make such order as it considers appropriate”, and thereby alter the interests of parties in the property.” In exercising its discretion, the court must take into account a list of factors set out in section 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 (ss 79(4)(a)-(c)). This assessment is a retrospective exercise, which takes into account both the financial (s 79(4)(a)) and non-financial (s 79(4)(b)) contributions of both parties to their property. This assessment also takes into account contributions to the welfare of the family (s 79(4)(c)), which the court often finds difficult to value and assess (Fehlberg and Behrens 2008, 510). Ultimately, the court must ensure that any orders that are made are just and equitable in all the circumstances (s 79(2)).

When it comes to property settlements under Islamic community processes, although principles of Islamic law are strictly followed in regards to the divorce process, imams indicated that they were far more flexible in negotiating agreements between the parties about matters to do with property. They indicated that this was largely because they were aware of the existence and availability of the court system (Haisam Farache, solicitor and imam, interview by Ghena Krayem, Sydney, NSW, April 14, 2011). So, in a rather ad hoc way, imams are taking on the role of assisting the couple to reach a negotiated agreement concerning their financial affairs. In fact, this is seen as a desirable approach because of the emphasis in Islam on resolving disputes (particularly family disputes) in an amicable way, and on the general principle that husbands should be generous to their wives upon divorce.

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 they think they would get according to Australian law, and then choose how they want to proceed (Religious leader, interview by Ghena Krayem, January 25, 2003, quoted in Krayem 2014, 205).

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 (Religious leader, interview by Ghena Krayem, June 2, 2006, quoted in Krayem 2014, 205).

The imams 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: “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 halal and what is *hara<sup>ˆ</sup>m*, and then it is up to them” (Religious leader, interview by Ghena Krayem, April 17, 2006, quoted in Krayem 2014, 206).

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 (Religious leader, interview by Ghena Krayem, January 25, 2003, quoted in Krayem 2014, 206).

#### **D. Concerns about Imams’ role and processes**

Despite attempts by the imams 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 processes, which can differ depending on which imam one goes to see. Also, while acknowledging the existence of religious knowledge held by the imams, there was concern by community members about their lack of skills and know-how to deal with some problems in a practical way (Community leader, interview by Ghena Krayem, December 5, 2007, quoted in Krayem 2014, 100). Issues raised included that of personal allegiances, and the need for guaranteed consistencies so that both partners are told the same things (Community member, interview by Ghena Krayem, March 11, 2007, quoted in Krayem 2014, 100). These observations raise some concerns about the way some of the current community dispute resolution processes are conducted. As can be seen, there is no uniformity among the practices of the imams, and clearly some adhere to procedural rules more closely than others. It is often this ad hoc nature that frustrates women participants most.

Several of the interviewees questioned whether the imams currently had all the skills required to resolve family law disputes and if the mosque committees were reviewing the qualification of the imams they appoint carefully enough. While many acknowledged the imams’ extensive religious knowledge, they also said that this was not enough and that there was a need for dispute resolution skills as well. Many went further to say that there was a need for further training for imams who dealt with these issues in particular, stating that the imams should undertake specific training prior to becoming marriage celebrants and training in family law procedures and on how family law operates in Australia. They also need specific training in divorce issues so that they understand the rules and regulations of family law processes, so as to educate the community about these matters (Community leader, interview by Ghena Krayem, March 10, 2003 and July 11, 2008, quoted in Krayem 2014, 101). Some questioned whether it should be the role of the imams to have so much of their time devoted to resolving family law issues as they felt that imams were overworked in this area. There was a suggestion that perhaps imams should be part of the process in resolving family law issues but that qualified professionals should undertake the actual dispute resolution role (Community leader, interview by Ghena Krayem, March 11, 2003 and April 28, 2008, quoted in Krayem 2014, 101). Many of those interviewed expressed a desire to see change in this area from within the community, particularly in having the imams working more closely together and in a more consistent way. A common response was the expressed need for the imams to be more professional including the need to examine the legitimacy, the qualifications and the



length of service of imams (Community member, interview by Ghena Krayem, March 11, 2007, quoted in Krayem 2014, 101).

The gender issue within the divorce and dispute resolution processes is an area that many interviewees highlighted and appears to generate the most concern and perceived need for improvement. Many commentators argue that these dispute resolution processes are not in the best interests of women, who are framed as being vulnerable to community pressure that forces them to be part of these processes. There is no doubt 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. Some women appeared to be frustrated by feelings of not being heard in a male dominated process:

In the negotiations, 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! (Community member, interview by Ghena Krayem, March 11, 2007, quoted in Krayem 2014, 102)

Yet it appears that in most cases it is the men who are called before the imams, as it is the women who are more likely to go to the imam first. As one imam said, “each day I have more than ten calls from women asking about their rights [and] I push and support them all the way ...” (Religious leader, interview by Ghena Krayem, August 6, 2006, quoted in Krayem 2014, 103). And 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” (Religious leader, interview by Ghena Krayem, January 23, 2003, quoted in Krayem 2014, 103). It is clear that the impact of these community processes on women is a crucial consideration in any evaluation of their effectiveness.

To return to the question of property settlement post-divorce, some Imams could be criticised for their approach as to what a wife is entitled to post-divorce. While the Imams interviewed all made efforts to secure a woman her *mahr* or dowry, for many imams in Australia, the concept of *mutat-a-talaq* or post-divorce financial entitlement for women is not one that they rely upon when advising couples. Some imams, 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 are 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 (Religious leader, interview by Ghena Krayem, April 17, 2006, quoted in Krayem 2014, 206).

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 longer married, the responsibility of her maintenance goes back to her father, her brother, etc (Religious leader, interview by Ghena Krayem, September 4, 2007, quoted in Krayem 2014, 206).

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 imams 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 imams 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 (Community leader, interview by Ghena Krayem, November 4, 2007, quoted in Krayem 2014, 207).

When these imams 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 foregoes 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 (Religious leader, interview by Ghena Krayem, April 17, 2006, quoted in Krayem 2014, 207).

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 that supported women through the divorce process were quick to point out, such a view was flawed because: "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" (Community leader, interview by Ghena Krayem, June 17, 2008, quoted in Krayem 2014, 207).

Other imams 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" (Religious leader, interview by Ghena Krayem, January 23, 2003, quoted in Krayem 2014, 207); "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" (Religious leader, interview by Ghena Krayem, July 7, 2008, quoted in Krayem 2014, 207-8); "It is wrong and unjust to claim that a wife is not to be compensated for her financial contributions" (Religious leader, interview by Ghena Krayem, May 7, 2006 and August 17, 2008, quoted in Krayem 2014, 208).

While the comments above from the interviewees demonstrates that there can be a significant difference in how the imams 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 imams are becoming aware of its importance:

I feel that we have come a long way in the twenty years that I have been working in the community ... I don't think that we are all the way there, but I think that most of the imams that deal with the majority of divorce cases are aware of the need to do justice to women (Community leader, interview by Ghena Krayem, December 5, 2007, quoted in Krayem 2014, 208).

With the women that come to seek our assistance we try and get the involvement of an imam that understands the needs of women, and we have a relationship of trust with

these imams, and we tell them that sometimes they need to reconsider their decision when it is unfair (Community worker, interview by Ghena Krayem, August 18, 2007, quoted in Krayem 2014, 208).

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 imams are realising this (Community worker, interview by Ghena Krayem, June 10, 2003 and July 4, 2008, quoted in Krayem 2014, 208-9).

The imams are realising that applying Islamic law in Australia is not like applying it in Lebanon or Egypt or Pakistan; here we do not 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 (Community member, interview by Ghena Krayem, March 11, 2007, quoted in Krayem 2014, 209).

It should also be mentioned that some imams interviewed recognised the need to compensate the wife for her non-financial contributions to the marriage as well:

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 per cent ... this is halal for her (Religious leader, interview by Ghena Krayem, January 25, 2003, quoted in Krayem 2014, 209).

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 (Religious leader, interview by Ghena Krayem, December 11, 2003, June 2, 2006 and September 17, 2008, quoted in Krayem 2014, 209).

More generally, the community leaders interviewed all accepted that, while there were these difficulties with the current processes, they played a very important and valuable role in how Muslims resolved their family law affairs:

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 imams to do what they are doing (Community leader, interview by Ghena Krayem, March 11, 2003 and April 28, 2008, quoted in Krayem 2014, 214).

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 (Community leader, interview by Ghena Krayem, August 18, 2007, quoted in Krayem 2014, 214).

These same leaders spoke of the need to evaluate these community processes, and accept that if these processes are to be accommodated or recognised 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 Islamic community processes are dynamic and based on an appreciation of the time and place that it is to be applied in. This means there is willingness by

community leaders to consider ways of improving the current processes to address some of the concerns raised in this research.

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, with one noting that “if we identify our weaknesses then we can improve” (Religious leader, interview by Ghena Krayem, December 11, 2003, June 2, 2006 and September 17, 2008, quoted in Krayem 2014, 102). While another commented that “the Shariah is flexible ... you can’t apply a law from the desert thousands of years ago to a city life now without contextualising it” (Community leader, interview by Ghena Krayem, April 3, 2003, quoted in Krayem 2014, 102). Some interviewees said:

It is sometimes hard to criticise 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 (Community leader, interview by Ghena Krayem, June 17, 2008, quoted in Krayem 2014, 214).

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 (Community leader, interview by Ghena Krayem, June 5, 2006 and July 23, 2008, quoted in Krayem 2014, 214-15).

These comments show 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.

### **III. Interaction between Islamic community processes and Australian law**

#### **A. Potential for Islamic community processes to be recognised as Family Dispute Resolution**

The fact that Islamic community processes might constitute a form of Alternative Dispute settlement recognised by the *Family Law Act* is one point of contact between Islamic community processes and Australian law. Recent changes to the *Family Law Act*, particularly with the introduction of Family Relationship Centres (FRCs) across Australia, 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* provides that the parties must “make a genuine effort to resolve that dispute by family dispute resolution” (s 60I(1)). FDR 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 (s 10F).

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 inconsistent with the traditional mediation model such as the legislative requirement that advisers are to suggest particular outcomes to clients” (Fehlberg and Behrens 2008, 334, quoted in Krayem 2014, 186). However, in principle, Islamic community processes could constitute FDR under the terms of the Act, obviously by complying with the requirements of the Act and being conducted by a registered Family Dispute Resolution Practitioner.

## **B. Legal Enforcement of outcomes of Islamic community processes**

As indicated previously, when dealing with property settlements, when agreement is reached, the couple is encouraged to seek legal advice to formalise the agreement and ensure its enforceability. 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, although they are still subject to scrutiny by the courts, which must be satisfied that the orders they make are “just and equitable” (*Family Law Act* s 79(2)). The court usually makes a decision quickly, without any consideration of the factors in section 79(4) and section 79(2) referred to above (Fehlberg and Behrens 2008, 559). If proceedings have not commenced, then the couple can turn their agreement into a “binding financial agreement,” as Part VIIIA of the *Family Law Act* allows couples to enter into a financial agreement before marriage (s 90B), during marriage (s 90C), or after divorce (s 90D). A binding financial agreement may cover property and financial matters, spousal maintenance and other “incidental and ancillary” matters; a phrase that Fehlberg and Behrens argue is currently untested (Fehlberg and Behrens 2008, 560). Again, this is part of a wider trend in Australian family law towards private agreements and the resolution of disputes away from the court. There are formal requirements that need to be satisfied: 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 (s 90DA(1); Dickey 2007, 655). The emphasis is on financial matters, although such agreements may also cover other matters (ss 90B(3), 90C(3), 90D(3)). Essentially, the agreement is a contract and subject to the laws concerning contracts (Dickey 2007, 658). Most importantly, if an agreement is binding, the court is prevented from dealing with matters covered by that agreement, except in certain circumstances.

Binding financial agreements are relevant not only at times of divorce, but also at times of marriage. Commonly referred to as “prenuptial agreements”, these can be used to formalise the Islamic marriage contract, which all couples currently sign when entering into a marriage. Anecdotal evidence suggests that most Muslims are unaware that they are signing such a document at the time of the Islamic marriage ceremony (Haisam Farache, solicitor and imam, interview by Ghena Krayem, Sydney, NSW, April 14, 2011), and encouraging a greater understanding and promoting the use of marriage contracts in the form of binding financial agreements or otherwise can assist Muslim women to safeguard many rights and entitlements that they have under

Islamic law that are currently unenforceable under the official legal system. Furthermore, as mentioned above, specifying clearly a right to divorce can help deal with the difficulties that some women face in securing a religious divorce in the absence of a religious court authority. In fact, the use of a marriage contract can be an important and legally sanctioned way for Muslim women to exercise agency and protect their interests while simultaneously meeting the requirements of both Islamic and Australian law.

### **C. Forum shopping between Australian law and Islamic community processes**

As some of the interviewee comments so far indicated, many of the women interviewed for this research were aware of their options under Australian family law. Particularly in cases where there is substantial property that needs to be divided, some women, after finalising their religious divorce, sought a property settlement in the Family Courts. Some imams saw this as wrong, while other imams and community leaders accepted this as an option for women when they felt dissatisfied with the community processes: “In general people like to follow Shariah. but when they feel they don’t get what they want they go to the Australian legal system” (Community leader, interview by Ghena Krayem, February 1, 2007, quoted in Krayem 2014, 210); “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” (Community leader, interview by Ghena Krayem, March 10, 2003 and July 11, 2008, quoted in Krayem 2014, 210). Some imams 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” (Religious leader, interview by Ghena Krayem, January 23, 2003, quoted in Krayem 2014, 210-11).

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, 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. The choice of forum reflects an often ignored aspect of these processes, namely the agency that may be exercised by women as they navigate their way through the legal and community processes. It is often assumed that the danger of informal community processes is that women are coerced into participating in these forums. Yet the reality is that the research demonstrates that ‘women were far more likely than men to initiate the informal community processes’ (Krayem, 2014, 236). This is not to dismiss that there are many ways in which these processes can be improved to better meet the needs of Muslim women, particularly in a procedural sense, but it recognises the value that many Muslim women place on their faith and the importance of this in family law matters.

Finally, many imams 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 recognises the right of the husband and wife to reach an amicable agreement. 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.

There is also insight into the difficulties facing Muslims in Australia with one imam stating:

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. 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 (Community leader, interview by Ghena Krayem, March 10, 2003 and July 11, 2008, quoted in Krayem 2014, 86).

Despite these difficulties there is also an acceptance of the dual system of law operating in Australia with comments such as: “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” (Community leader, interview by Ghena Krayem, August 18, 2007, quoted in Krayem 2014, 86).

#### **IV. Conclusion**

This chapter, based on empirical research, provides an account of how Islamic Community processes in Australia often take the form of informal, non-permanent groupings of imams working together. It highlighted the role of family members, community organisations and Muslim women’s organisations in Islamic community processes. Its observations raised some concerns about the way some of the current community dispute resolution processes are conducted. It considered the potential for Islamic community processes to be recognised as Family Dispute Resolution and the potential for legal enforcement of the outcomes of Islamic community processes.

But there is a need for much more empirical work on the question. From 2015-2018 a team of researchers from the Universities of Melbourne and Sydney will carry out research funded by the Australian Research Council to provide a reliable evidence base for evaluating how Australia’s family law system might best respond to Islamic dispute resolution processes with a particular focus on the position of Muslim women and propose the best response of a legal system such as Australia’s to Islamic community processes based on rigorous empirical and normative research. Using insights from interviews with Imams; community leaders; community workers and service providers; Muslim men and women with experience of community processes; youth leaders; Muslim family law professionals, including psychologists and social workers; and representatives from key Muslim women’s organisations, the research team will consider how Islamic community processes affect the religious freedom of women; affect cultural inclusivity of women; benefit or harm women in the decision-making outcome (are they materially better or worse off than if they had used the general Australian family law system?); benefit or harm women in the decision-

making process (was the process used open, fair and respectful of the autonomy of these women?); affect the openness of the Islamic community process (e.g. encourage transparency as opposed to drive them 'underground'). It is hoped that this research will represent a step in a much-needed conversation about Islamic community processes in Australia.



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