SAANZ Conference

Section: Race and Ethnicity

"Ethnicity and the Family in the Context of the Australian Legal System."

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All 'law' in Australian society is constituted on the basis of the exclusive territorial sovereignty of the state. As in most modern states, the individual derives rights and obligations from the law and, as a citizen of the state, is regarded as equal before the law. However, although rights and obligations are defined in law their actual realisation depends on one's ability to translate a conflict of interest into a demand on the legal system in the form of a 'claim of right'.

It is the relationship between the legal theory of an individual's rights and duties and the practice of a demand made on the legal system that I want to investigate in this paper.

My focus is on the practice of family law as it relates to ethnic minorities in Australia.

My argument is that if we are to understand the practice of family law amongst different ethnic communities we must recognize:

1. the diversity of customary, religious and State legal systems which formerly regulated the family relationships of ethnic minorities before migration

2. that the concept 'family' is problematic and that the institution as conceived in the Family Law Act does not necessarily correspond to the 'family' as it exists in Australian society.

Moreover I will argue that the intervention of Australian legal institutions in the regulation of family conflicts represents only one aspect of the continuous arrangement and rearrangement of the family through its domestic cycle.

Comments about different legal cultures and the concept of 'family' will be restricted to the mediterranean area with case examples being drawn from my fieldwork amongst Lebanese Muslims in Sydney.

A common feature of countries such as Italy, Spain, Greece, Israel, Lebanon, Turkey and Egypt is the extent to which religious laws influence, directly or indirectly, the family law of these States. The family institution is regarded as a moral order, in the case of the Roman Catholic church a sacred entity.

It was only in 1970 that a civil divorce became possible in Italy, the Italian constitution stating the family to be a 'natural association' and indissoluble. The new Italian divorce law rests essentially on the concept of the breakdown of marriage. Divorce may be decreed if the emotional and physical community of the spouses can no longer be maintained or restored. According to statute, this is inferred when the parties have been separated for 5 years. Until 1975 a separation decree was still based on the principle of fault, the justification of the decree in a court being the declaration of one or both spouses to be guilty of a matrimonial offense. A decree of separation is now possible if life has become intolerable. But it remains to be seen on which grounds divorce will be granted; Italy remains a strong Catholic country and the Roman church still upholds the indissoluble nature of the 'family'.
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In Spain the position of family and inheritance laws is more complicated. The Codigo Civil (Civil Code) contains many indigenous legal institutions, especially those from the 'fuero system', as well as Roman Catholic canon law which directly controls the forms of marriage and the conditions of nullity and voidability. In the northern Spanish provinces of Catalonia and the Basque provinces the fueral laws take precedence to the Codigo Civil which is regarded as subsidiary. In these regions the fueral laws have only recently been identified and enacted in statutes. In fact article 6. Codigo civil still instructs a judge, in the absence of statutory provisions, to apply local customs.

In contrast to the Spanish Codigo Civil which tolerates legal pluralism in the area of family and inheritance law, the Turkish modified Swiss Code, adopted in 1926, recognizes only a secular family law. In order to effect a radical modernization of Turkish life, the legislator abolished Islamic legal practice which had been valid for centuries. However abolition at the centre did not signal the end of Islamic legal practice, especially in the countryside. The simplicity of a contractural declaration of marriage in front of witnesses and the male's prerogative of repudiation by 'talaq' were important features of an institution which was inter-twined in the religious, social and economic life of Turkish rural life. This conflict between centralized legal institutions and traditional religio-legal ones will be elaborated in my discussion of Lebanese Muslims in Sydney. For now it is sufficient to recognize that

a) the existence of a secular modern civil code doesn't guarantee that the legal regulation of family relationships will be in accordance with it.

b) the implementation of a secular family law can be qualified and mediated by many other institutions which bear on the family e.g.

- the nature of the family as a social and economic unit, customary legal practice, religious institutions and the traditional claims of authority to regulate the family as a moral and not merely social entity.

It is extremely difficult to generalize about mediterranean family organization, especially in its derivative form in Australian society. However we can indicate the diversity of the 'family' institution and the extent it departs from the nuclear ideal of husband, wife and children.

Firstly it must be recognized that the domestic or co-residential group does not necessarily correspond with the household. Co-residence does not define the limits of obligation. The household incorporates those members who still have obligations to their household of origin, e.g. men who marry before their sisters still have to meet their obligations to assist in marriage and dowry expenses incurred by their sisters. Therefore the existence of residentially nuclear domestic groups does not in itself indicate the existence of a household, nor who is regarded as the head of the household.

1. Until the nineteenth century the law of the Spanish kingdom was called the fuero-system: the 'compilaciones' of royal laws and ordinances had force everywhere, then there were the fueros or customary laws and finally the 'Las Siete Partidas' (Sweigert & Kotz: 1977: 99)
What Farsoun (1970) describes in Lebanon as "functionally extended families", Lineton (1971) regards in Greek families as the 'potential household'. These he regards as moral entities whose groups recognize common obligations to provide income, support, and dowry for their members who could re-assemble at any time. Lineton even conceives this 'potential household' as existing amongst household's fragmented by emigration.

To some extent the idea of 'potential households' existing despite fragmentation by emigration is confirmed by my own field experience amongst the Lebanese. The obligations domestic groups accept in the form of remittances, assistance for emigration passages for 'eligible' family members, and the arrangement of marriage between brothers' and sisters' children all point to the persistence of the household over time.

However it is the domestic or co-residential group which is most important in this analysis of the arrangement and rearrangement of 'family' relationships because it forms a minimum economic unit and is the organizational unit where the performance of distinctive sex roles are most clearly delineated and enforced. Although traditionally in mediterranean communities the idea of the domestic group as an economic unit was associated with the utilization of family labour resources on the land, in the Australian context it refers to the recognition of the right of a head of the co-residential or domestic group to receive and redistribute the economic resources earned by its co-residential members. The contribution can be in the form of 'labour', where members do domestic work and/or work in a family business, or 'wages', where men and women contribute their wage labour earnings to a common domestic pool.

Both these kinds of economic arrangements are very common amongst first generation Lebanese families in Sydney. The extent to which it characterizes economic relationships of other mediterranean ethnic minorities in Sydney depends on their rural or urban backgrounds, vocational status and their first or second generation status as immigrants.

The way economic and labour resources are organized in a domestic group also reflects the sexual division of labour and the expectation of sex roles. The conflict between employing one's women as wage labour and the performance of their traditional domestic and mothering roles is probably the most significant cause of spouses falling out - i.e. seeking a solution in the Family Court.

Closely aligned with the performance of sex roles is the issue of regulation of the sexual behaviour of women, often characterized as the issue of family honour. However, although conflict between spouses may manifest itself in the form of accusations of infidelity or sexual transgressions, it is more significantly a conflict over the performance of sex roles and the future of the co-residential or domestic group.

1. The wider question arises as to what consequences divorce under the Australian Family Law Act, as a strategy of domestic group rearrangement, has for the persistence of the 'extended family' or 'potential household' amongst different ethnic minorities. This question will not be considered in this paper.
Honour is itself a principle of stratification in small scale Mediterranean communities, both rural and urban. Ranking is in accordance with the successful performance of sex roles, the ideal of which places women squarely in the domestic sphere.

Therefore migration from rural to urban centres in Mediterranean communities has both material and symbolic significance:

1. materially the ability to migrate indicates ones aspiring and often enhanced economic position, allowing one to withdraw women's labour from the land and employ them purely in a domestic sphere

2. symbolically it reinforces the ideal of women's domestic and motherhood roles with the consequence that man's honour is more vitally located in their women's sexual behaviour, i.e. their modesty.

Migration from communities which subscribe to honour systems of ranking into class societies such as Australian, brings a head on clash between the ideal performance of sex roles in honour and the individual right to sell one's labour on an open market.

I will now turn to a specific analysis of the conflict of personal status (family) law and the intervention of the Family Court.

The case I will examine in this paper is that of Lebanese Muslim migrants living in Sydney. My focus will be on Muslim Personal Status Law, the "Shari'a", the fact of its independent jurisdiction in the Lebanon and the issue of its relevance and the problem of its application in the Australian setting. The general legal question I am pursuing is:

"What happens when family relationships arranged and contracted under a particular 'Personal Status Law' find that they are subject to an entirely different system of 'Personal Status Law' which is contradictory in both its content and sources?"

In order to understand why Lebanese Muslim migrants might regard the Shari'a relevant to conducting their lives in Sydney we must consider firstly the importance of the Shari'a in the religious traditions of Islam, and secondly, the significance of the existence of independent jurisdiction of the Shari'a in the Lebanon.

The "Shahadah", the Muslim statement of faith pronounces: "There is no god but God and Muhammed is the apostle of God." But Muhammed was not just "rasul Allah" (the messenger of God), he was the seal of the prophets. The word of Islam was revealed in Arabic verse to him and recorded as the Qur'an. As the Will of God it is unalterable, prescribing behaviour in all religious, political, and social matters. The Qur'an and the Hadith (the example or way, "sunna", of the Prophet) are the essential sources of all Islamic theology and jurisprudence.

2. Davis (1975).
Islam is a complete ethical theism. Awareness of God is primarily awareness of obligation and accountability. Islam makes all life and activity the realm of God's authority and man's obedience. As such it makes of theology a Divine law or way, the right path of action both ritual and ethical. The general term embracing both law and religion is, Shari'a.

The Shari'a as sacred law was implicit in, and not a source of, the religious and legal traditions of Islam. The Shari'a was compiled in the early centuries of Islam by specialist jurists who systematically worked through the Qur'an and Hadith placing all human acts and relationships under the 5 ethical categories, the obligatory, recommended, indifferent, reprehensible and forbidden.

Thus in Islam the Shari'a emerged as a system of law thoroughly incorporated into the system of religious duties. Religious and moral considerations were essential to its systematic structure. Although the legal notions of valid and invalid existed they were often pushed into the background by the religious concepts of forbidden and allowed. As Schacht observes "the aim of Islamic law is to provide concrete and material standards and not to impose formal rules in the play of contending interests which is the aim of secular laws" (Schacht; 1964:203).

The classical theory of Islamic law was essentially derived from the Shafi'i school, one of the four schools of law that developed as a result of orthodox scholars differing interpretations of the Qur'an and Hadith and also arguments about the authoritativeness of one source over the other. The Shafi'i school recognized 4 principles or roots of Islamic law: the Qur'an, the Sunna of the Prophet, the consensus (ijma) of the scholars of the orthodox community and the method of reasoning by analogy (kiyas).

Derived from these sources the Shari'a developed as an extreme example of jurists law. It was created by legal and religious scholars and not by the state acting as a legislator. It possessed a pronounced private and individualistic character which identified it as an objective law; one which guaranteed the subjective rights of individuals and in the last resort was "the sum total of the personal privileges and duties of all individuals" Schacht; 1964:4).

However the Shari'a as an ideal formulation of juristic and objective law only ever succeeded in imposing itself as practice in but a few legal areas. Political authorities took over the administration of criminal justice at an early period. In the area of the law of contracts and obligations customary legal practice was often recognized. As far as these legal areas were concerned the formal recognition of the Shari'a as a religious ideal sufficed. The Shari'a could not abandon its claim to exclusive theoretical validity and recognize the existence of an autonomous customary law.

It is in the area of personal status law (i.e. marriage, divorce and family relationships), inheritance and pious foundations (awqaf) that theory most closely coincided with practice.
The recognition of personal status law as an area of religious jurisdiction was evident in the political and administrative structure of the Ottoman rule in the middle East. All Ottoman citizens were divided into "millets" on the basis of religion. Until the reign of Suleiman I, the Ottoman government recognized four "millets": the Muslim, Greek Orthodox, Armenian Gregorian, and Jewish. The head of the Muslim millet was the Sheikh al Islam appointed by the Sultan while the religious leader of each non-Muslim community represented the interests of his community vis-a-vis the Ottoman empire. Each religious group enjoyed cultural, religious and legal (in matters of personal status) autonomy.

The personal rather than territorial basis of these religious jurisdictions was emphasised by the recognition of a fifth "millet" by Suleiman I in 1536. It was largely a product of the first treaty of the Capitulations which provided French citizens with the privilege of exemption from Shari'a law. For reasons of religious consistency the fifth "millet" was regarded as essentially Catholic. Eventually most European powers extracted similar privileges under the Capitulations for their own nationals living in countries subject to Ottoman rule. The significance of the "millet" system for the position of personal status law can be summarised in the following points:

1. that the tension between Islamic political and religious ideals and their practice was institutionally recognized in the "millet" system by the formal separation of political and religious authority.

2. that religious jurisdiction was recognized in matters of personal status law in each community.

3. that the basis of the jurisdiction for each millet, including the European fifth millet, was personal rather than territorial.

4. that the millet system provided the basis of the formal political system of confessionalism as it exists today in the Lebanon.

The general thrust of the millet system was to restrict the political significance of religious law.

The effect of the practice of the Shari'a as the law regulating personal status, inheritance, pious foundations (awqaf), ritual and religious duties was to emphasise those theological prescriptions which had been most precisely formulated in the Shari'a --- the area of law known as "al mahakim al-shari'a". Areas such as criminal law were the province of the government whose aim was to observe the spirit of the Shari'a --- a balancing act which involved much political casuistry.

The result of such a division and association of laws was to give a ritual act such as ablutions before prayer the same religious and moral importance as that of observing the payment of dowry in the marriage contract. As theological prescriptions refined and precisely formulated in the Shari'a, both acts were equally obligatory. Sanctions were imposed within the community by the "qadi" (the Islamic judge) or the sheikh (a respected religious man). If the community failed to exact the prescribed punishment on an individual the final inescapable sanction
awaited every Muslim on Judgement Day.

In 1917, in accordance with moves to establish political and legal institutions along European lines, the Ottoman government modified the existing Hanafi codes relating to personal status. The code produced was the "Ottoman Law of Family Rights". It was compiled by an eclectic process of selecting provisions from each of the four schools of law; the Hanafi, Maliki, Hanbali and Shaf'i schools. Although Turkey rejected this code in 1926 it remains the basis of the code recognized by Sunni Muslims in Israel and the Lebanon.

In the contemporary state of the Lebanon personal status law has the same independent jurisdiction that it had under the Ottoman millet system. However the political environment in which it is practiced is very different.

The communal basis of the Lebanese polity was incorporated into the formal structure of the Lebanese political system in 1932, during the period of the French mandate of Syria and the Lebanon. Extending the principle of communal autonomy to its logical limits, the French granted the minority Muslim sects (the Shi'a Mutawila and Ism'ili sects and the Nusayris and Druze) independent communal status; something the orthodox Sunni Ottoman government never conceded. The recognition of communal or confessional groups which included Sunni, Shi'a, Druze, Maronite, Greek Orthodox, and Jews was much more significant politically than under the millet system. The whole structure of political representation in the government of the new Lebanese state was on the basis of proportional sectarian representation. In 1932 the proportion of 6 Christians for every 5 Muslims was established as the basis of political representation. This ratio still survives today and so does the reluctance of the Lebanese government to conduct any census of the population.

The confessional system created under the mandate was unique in the Middle East because of the Christian majority, at least in 1932, of the new national state of the Lebanon. Under Ottoman rule communalism was a concession to religious minorities in the vast sea of the orthodox Sunni Muslim majority. Suddenly communalism was the basis of political representation and competition in a new independent state. The office of Presidency was to be reserved for a person of Maronite Christian confessional status, that of Premier for a Sunni, and that of Deputy Premier for a Shi'a. The limits of political power for each confessional group were formally constituted in the Structure of government.

As the confessional system developed it emphasised the differential access sects had to the economic and political resources. The traditional political institution of the "za'im" or "leader" became the means of political action. If an individual wanted to be successful in dealing with government institutions, gaining employment or in getting children admitted to a "good" school they needed a patron who could deliver the goods. This system known as "wastah" created ties of dependence and obligation between patrons and clients.

As a result of the introduction of the confessional system legal and religious authority were thrust into a new competitive political arena.
Confessionalism emphasised sectarian and family attributes as the basis of an individual's inclusion and participation in any community. What were the formal legal and religious structures that existed in the Lebanese Sunni Muslim communities and in what way were they influenced by the confessional political structure?

In the Lebanon, religious and legal authority are located in the formally constituted confessional system. The Supreme Islamic Council of the Lebanon and the National Directorate of the Awqaf are the highest institutional authorities in matters of theology, Shari'a (read Muslim personal status law) and religious foundations in the Lebanon. However in Australia, because of the absence of a church organization in Islam, the fact that personal status law is part of state civil law and that the sectarian identity in the system of political representation is irrelevant, the question of religious and legal authority for Muslims is extremely problematic.

Lebanese migration to Australia has been going on since the late 19th century but this has been mainly Maronite Christian. Muslim migration has been much more recent. Sunni Muslims have been arriving since the early 1960's while Shi'a Muslims have only come in any significant numbers in the last 9 years. The great majority of these Lebanese Muslims have settled in Sydney suburban areas.

There are approximately 25,000 Lebanese Muslims in Sydney and an estimated total of 120,000 Lebanese living in Australia.

The circumstances under which Muslim Lebanese have migrated to Australia vary considerably. They have been accepted as immigrants mainly under the "Unskilled" classification but 17,530 were accepted as "quasi refugees" during the 1975-76 Lebanese civil war. The majority have come from rural villages and the rest from the working class suburbs of Tripoli and Beirut. There were virtually no professionals amongst them at all. There were no medical, legal (religious, civil or criminal) or religious specialists in a population whose language was Arabic and some basic French.

In this migration context the most fundamental institution for Lebanese Muslims both economically and socially has been the nuclear and extended family. Therefore the issue of family relationships and the question of who has the moral and legal right to interfere with the arrangement and rearrangement of these relationships is highly relevant for understanding Lebanese Muslim attitudes towards the decisions made in the Australian Family Court.


2. Those accepted during the civil war had family in Australia who undertook to sponsor them. When they arrived in Australia they were immediately accommodated by their families and not taken to migrant hostels.
The question about the practice of personal status law in Sydney hinges on whether or not the Shari'a has religious and legal authority within the Lebanese Muslim community and, if so,

: what legal and religious institutions exist to uphold and enforce the Shari'a in Australia?

: what are these legal and religious institutions' relationships to the Australian legal system?

I will firstly consider the question of Islamic religious authority and secondly that of Islamic legal authority.

The position of religious and legal specialists in Islam is that of "functionaries" rather than "authorities". This is because in orthodox theology no-one is allowed to claim a greater knowledge of God or the Divine; people can only know more about religious matters. Although there are knowledgeable men in theology ('ulama) and in the law (qadi) the tendency has always been for these religious and legal functions to be carried out within the Muslim village or urban community by members of the community. Thus the Imam, the leader of the prayer in the mosque, could be anyone. Similarly the Sheikh, a man considered to be pious and knowledgeable in religious affairs, was not usually a man of high religious learning.

This idea of the individual believer's integrity and competence in practising his or her religion is present in the legal notion of evidence. Traditionally the most important evidence (bayyiya) was the testimony (shadada) of witnesses. Written documents were regarded as merely aids to memory. Two men or one man and two women who possessed the quality of "good character" (adl*) were required as witnesses in law suits and most legal transactions.

In the area of personal status law, the religious and legal competence of an individual believer acting as a witness was, and remains, very important. The act of marriage is a contract of civil law. It is concluded in the presence of free witnesses, two men or one man and two women, which has the dual aim of providing proof of the marriage and disproving unchastity. The act of divorce, traditionally virtually the exclusive prerogative of the male, was effected by the triple repudiation (talaq) in front of two witnesses. Today in the Lebanon these conditions must still be fulfilled, but marriages must also be registered at, and divorce must proceed through, the Shari'a courts.

Because there are no sociological analyses of the operation of the Shari'a courts in the Lebanon it is impossible to say just what position a legal specialist (e.g. a qadi) holds in any confessional community. Questions about the legal and religious authority of qadi vis-a-vis a locally recognized sheikh are very difficult to answer. However, despite this analytical gap the situation which prevails in matters of personal status amongst Muslim confessional communities in the Lebanon differs

1. The qadi must be present at the residence of one of the parties to the marriage or one of his authorised deputies (e.g. a sheikh or Imam) must attend the marriage and register it (Mahmood; 1972:41).
in one very important respect from the situation in which Lebanese Muslims find themselves in Australia. In the Lebanon religious and legal (in matters of personal status) authority are formally constituted with a hierarchically ordered administrative structure of qualified religious and legal specialists under the Supreme Islamic Council of the Lebanon. The sanctions laid down in the Shari'a can be enforced and muftis can hand down "informed opinions" (fatwa) on theological matters. In Australia there are no legal specialists, only one qualified religious specialist and no Islamic church organization.

With the absence of any formally constituted religious or legal authority in Australia does the Shari'a have any practical significance for Lebanese Muslims living in Australia?

This question is not merely one about Muslim devoutness, the strength or influence of religious scholars (ulama) in any particular community, or the significance of the observance of Shari'a law as an aspect of maintaining Muslim identity in Australian society. All these aspects must be considered, but the question essentially concerns Islam as a practical religion. If Islam is to survive within the Australian context with no church organization then, unless it becomes a very individualistic "Protestantism" where religion becomes the experience of the individual believer guided by his/her understanding of the Islamic traditions (especially the Qur'an and Hadith), Islam must support the individual believer in the economic, social, and religious problems experienced in the migration situation. It must support those institutions which will enable it to survive and develop, those institutions in which it has traditionally sought to regulate group and individual behaviour in the Lebanon. Those institutional spheres it sought to regulate were religious and ritual duties, family relationships, the mosque and religious foundations (awqaf).

We will now consider the way the Lebanese Muslim community seeks to preserve its authority in these areas of individual and group behaviour in Sydney.

Until recently there were no qualified religious specialists in the Australian Muslim community, let alone the Lebanese Muslim community in Sydney. The individuals who performed "priestly" functions at marriages and funerals, and give sermons on Fridays (khutbah) and on the important dates of the religious calendar (e.g. Mohammed's birthday, Id al-Fitr) have all emerged as religious functionaries and leaders from within the Lebanese Muslim community itself. They have been given the honorific title of "imam" or "sheikh", a title given only to those who have demonstrated extreme religious piety and diligence in learning about Islam from the Books.

Recently sheikh's with qualifications from Al-Azhar in Cairo and Najaf in Iraq have been accepted by the Sunni and Shi'a Muslim communities as their respective spiritual leaders. But just as the original imam's recognition was based on community support and not respect of an office, these Sheikh's must seek their religious authority and their material welfare in the different Muslim communities.

One of the most important religious functions carried out by the Sheikhs is the marriage of their followers. Recognition as marriage celebrants by the federal
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Attorney General has achieved three things for the Sheikhs:–

1. It entitled them to act as marriage celebrants under the territorially defined jurisdiction of the Australian Civil Law.

2. It authorized them to act as a qadi's deputy under the personally defined Shari'a Law of the Lebanon to witness and register marriages by Muslims.

3. It legitimated their position as religious leaders in the Australian Muslim community by having the secular legal status of marriage celebrants a legal status recognized as just a religious status by Lebanese Muslims, conferred on them by the Federal Attorney General.

The "grass roots" community recognition of the Imam is quite in keeping with Islamic religious traditions, as has already been indicated. But in Australia the act of conferring legal and religious authority on the Imam does not create commensurate "rights" guaranteed by the Shari'a.

A consideration of those points at which the legal provisions of the jurisdictions of Australian Family Law and the Shari'a conflict in marriage and divorce will reveal just how problematic the arrangement and rearrangement of family relationships can be for Lebanese Muslims living in Sydney.

As an Australian marriage celebrant the Imam is required to comply with the Marriage Act in the following matters:

1. that the Marriage Act must not be contravened with respect to the age of consent e.g. under certain conditions minors require parental consent

2. that they must not be married

3. that they must not be married within prohibited degrees.

These Australian legal requirements conflict with the practice of the Shari'a in the following ways:

a. Although the Shari'a allows marriage between consenting couples, in practice, it is extremely difficult to marry without parents permission. This is particularly true for the girl who, if she were to act independently in choosing a marriage partner, would be open to the potentially damaging charge of immodesty. Since male honour is so intimately tied up with female modesty and strictly controlled sexuality, the family's honour is symbolically located in women's moral behaviour. Therefore the issue of parental permission to marry is not so much associated with the juvenile status of their children but with the family's honour. Consequently in the Lebanon, it is not uncommon for a bride to be only 12 years old with the full agreement of her parents.

b. Under Shari'a law polygamous marriage of up to 4 wives is permitted. Although polygamy is quite unusual in the Lebanon these days mainly for economic reasons, it can occur in Australia when dissolution is being sought in the Australian Family Court. During the 12 months
12. The separation period a Muslim male may seek to remarry by proxy under Shari'a law effecting a de facto polygamous marriage even though he has not remarried under Australian Family Law. The reason why a Muslim male bothers to marry when he could just as easily engage in an extra-marital relationship is because extra-marital sex is regarded as illicit sex (zina), and is prohibited under Shari'a Law. While a male can remarry, whether or not he has declared the 'talaq' the woman must be divorced under Shari'a law for her to be considered a religiously lawful bride.

c. A common marriage amongst Lebanese Muslims is that of parallel or cross-cousin marriage, i.e first cousin marriage. Although this is frowned upon in Australian society it is not illegal since it is a fourth degree relationship. But most significant is the Muslims' belief that it is illegal under Australian Family Law with the consequence of active discouragement of any admission about degrees of consanguinity by prospective marriage partners.

When the Imam is wearing the cap of the 'marriage celebrant' he is acutely aware of having to fulfill these above three requirements. But when he comes to fulfilling the requirements of Shari'a marriage he changes his cap for that of the Imam, the qadi's deputy. It is at this point that the existence of conflicting jurisdictions becomes most apparent. Unlike most other religious marriages the Imam is not performing a purely ritual function but witnessing a contract which has requirements that are more than the Marriage Act allows.

As has been described above, the conditions of the legal capacity to marry under Shari'a law differ from those of Australian Family Law with respect to age, consent, polygamy and, as the Muslims understand it, prohibited degrees of marriage. The Shari'a marriage contract also requires the payment of a dowry from the groom to the bride.

The dowry (al mahr) forms part of the negotiated contract of marriage between two families and is announced during the marriage (nikkah) ceremony by the officiating Imam. Traditionally the dowry is paid in two parts. The first payment is given to the bride by the groom and is generally used to buy furnishings or household appliances and sometimes personal jewellery. The second payment, which is by far the greater part of the dowry, falls due at the divorce.

1. The issue of the Family Court requiring a husband to perform a religious divorce in order for his wife to be able to remarry under religious law was raised in the matter of Shulsinger v. Shulsinger (2 FLR, 11,611). The opinion expressed re the court issuing a mandatory injunction ordering the husband to issue a "gett" (i.e. the requirement for religious divorce) was that such an injunction would not "increase the legal capacity which both parties have by virtue of the decree absolute of validly contracting another marriage" (2 FLR.11,613) under the Family Law Act. It would only remove a social barrier and not a legal one since no religious law has jurisdiction in family law matters in Australia.

2. Brideprice is a more accurate term since the payment is made by the groom's family to the bride. However it does not represent a conventional brideprice because of its divided and delayed character.
of the wife by the husband or at the husband's death. The dowry therefore provides a degree of financial security for the wife against the husband's traditionally unilateral right of repudiation.

Payment of the dowry is still part of the Shari'a marriage contract witnessed by Imams conducting marriage ceremonies in Sydney. The amount paid can be merely token or run into thousands of dollars. The reason why a large dowry is paid can be for the status derived from the display of wealth but it is often because of the traditional concern for the security of the wife. The formation of a co-residential group by migration to Australia does not guarantee its future existence. When a father gives his daughter in marriage he recognises that she becomes part of a 'potential household' whose members are internationally mobile and consequently not always subject to the sanctions of Australian Family Law.

There is also a general feeling amongst Lebanese Muslims in Sydney that dissolution under the Family Law Act provides little security for the wife. Maintenance is difficult to secure or enforce. This aspect of security is also reflected in the relationship between the affinity and consanguinity of the prospective marriage partners and the size of the dowry contracted. The closer the families and therefore the ties and obligations that already exist, the smaller the dowry is likely to be. Marrying a stranger is more risky with few channels through which to mediate should difficulties in the marriage arise.

Because the dowry agreement contracted in a Shari'a marriage cannot be legally enforced except in the Lebanon or in those countries which recognize the jurisdiction of Shari'a law, Lebanese Muslims resort to a remedy under Australian law. The groom writes a note of indebtedness to the bride payable under specific conditions. This is witnessed by a solicitor and held in trust. In this way people who contract a marriage under Shari'a and Australian Family Law can enforce payment of a dowry in both Australia and the Lebanon.

Marriage involves the arrangement of new family relationships while divorce is the breakdown of a marriage relationship in which mediation by members of the couple's families or by influential and respected men within the Lebanese Muslim community has failed.

The important aspect of the process of mediation which occurs prior to any divorce is that the role of mediators is by no means the exclusive perogative of the Imam. While in the traditional village situation difficulties experienced in a marriage would normally be resolved by the heads of the respective couple's families, in Australia there is not such extensive family support. Where one party may have some members to support his or her claims the other party may have none and therefore need to seek the assistance of a respected and influential man. It may be the Imam, but it is just as likely to be a leader from one of the numerous religious, political, or welfare associations.

Firstly I will consider the role of the Imam in the process of mediation and then I will consider the relationship between the Imam and other influential men. By analysing the competitive process of mediation in the area of divorce I will demonstrate the institution context in which
religious authority and legal authority must be established.

Because of the ambiguous religious and legal status of an Imam in the minds of Lebanese Muslims in Sydney he will often receive requests to perform divorce. If a man has been married by an Imam, surely that Imam can divorce him? The Imam is caught in a dilemma; under Australian Law he must declare he has no powers to grant a divorce.

Dissolution effected under the Family Law Act is one of the most radical challenges a head of family can experience. Not only does it challenge the existing family relationships but it also deprives the Muslim male of his privileged rights under Shari'a law. In the Lebanon the unilateral right of divorce has been balanced by only a few conditions under which a wife can be granted a judicial divorce and the right of custody of male children after the age of 7 and female children after the age of 9 years remains that of the father's.

Not only is the Muslim father's authority challenged by court decisions under the Family Law Act but his whole status and honour can be badly damaged by the procedure of dissolution in the Family Law courts which requires a period of 12 months separation as sufficient grounds for divorce.

If a wife were to leave home with her children or if a husband believed his wife had committed adultery a husband could not exercise his traditional paternal rights by immediate repudiation (i.e. declaring the 'talak') or by applying the final solution. What he would regard as 'natural religious' rights would be denied him by the Family court and if custody, maintenance and property arrangements were contested they would be subject to laws formulated on secular and religious lines.

When such situations occur the Imam is approached to see that justice is done under Shari'a law. But all an Imam can do is to grant a Shari'a divorce by proxy as a means of maintaining some prestige for the male. The Imam cannot settle matters of property, maintenance or custody, he can only direct people to 'good' solicitors.

At present I do not have a broad enough sample to assess the significance of settlements arrived at in the Family Law courts for Lebanese Muslim families, but the increasing tendency of Family Law judges to grant custody to suitable fathers means that even the family courts may appear to give judgments in accordance with Shari'a justice.

The best way to resolve difficulties in a marriage is to arrive at a solution through mediation. If the dispute between parties does not fundamentally challenge the honour of the male then divorce is not necessary. The honour of the family can be preserved rather than just the honour of the individual. However if dissolution under the Australian Family Law act is sought then it is much more prestigious for a mediator to have settled the issues of the division of property, maintenance and custody before it arrives in court. In other words, to have the case presented as uncontested in the Family Law court.

Although mutually agreed settlements are consistent with the philosophy of the Family Law Act their legal basis generally goes against the 'individual right' emphasis of Australian family law. Children's
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interests are more likely to be subordinated to parental rights, as formulated in the Shari'a, in order to preserve the Islamic religious and moral status of the patrilineal family.

The Imam does not necessarily play the role of mediator in every case, although he must be called in to formally dissolve the marriage under Shari'a law. This is most essential not for the husband but for the wife, because she would be regarded as a religiously prohibited wife if she were not divorced under Shari'a law. In order for the mediator to be successful his prestige and standing in the community must be sufficient to impose a compromise solution on any dispute, whether it is between members of a family or between members of the community.

As has already been pointed out, the Imam's authority and influence are not guaranteed by his religious office. New Imam's can emerge, one's with superior qualifications and greater access to funds for community welfare or mosque building. In the religious sphere they might have greater support in the only national Muslim organization, The Australian Federation of Islamic Councils. Nevertheless all are competing for community support, just as leaders in all other voluntary associations based on family, welfare, religious or political interests. Therefore, although the Imam is recognized as having knowledge about religious matters, if he is to compete as a leader he must be available to help his supporters with all their problems whether they involve divorce, conflicts over sending teenage daughters to coeducational high schools, claims for sickness benefits, situations needing an interpreter, difficulties with police, knowing how to go about making a successful application for migration on the basis of family reunion to the Department of Immigration on securing employment.

In Sydney most leaders or mediators are associated with and have been instrumental in developing and recruiting support for a wide range of voluntary associations. The functions of these associations which are a distinctive feature of the confessional political structure in the Lebanon, especially in cities like Beirut and Tripoli (Farsoun, 1970; Khalaf, 1971; Gulick, 1967; Khuri, 1975; Khuri, 1976), are to provide a wide variety of services for individuals on the basis of family, locality, and sect. Their orientation may be family, welfare, religious or political but their general focus is on providing personal aid, credit, advice and employment. The leaders provide services to gain political support. But while in the Lebanese confessional political system one needs someone to act as a mediator "in order not to be cheated in the market place, in locating and acquiring a job, in resolving conflict and legal litigation, in winning a court case, and in finding a bride" (Farsoun, 1970: 259) it is not essential in the Australian migration context. Nevertheless if one is to be successful in interacting with Australian government agencies and departments, especially in matters of welfare and immigration, and in gaining employment a mediator can facilitate what might otherwise be a hazardous venture. Also the concerns of the head of family are not wholly circumscribed by the Australian urban experience. Anxiety about other family members living under extremely hazardous and uncertain conditions in the Lebanon reinforce obligations both in the form of remittances and in immigration
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applications and fares. The head of the family is often the head of a tightly controlled collective economic unit,

If leaders are to remain popular they must perform their chosen roles successfully and deliver the goods. Therefore a political propagandist must successfully articulate the appropriate ideology, and 'ethnic worker' must demonstrate his community interest by securing tangible benefits for his supporters in the form of facilities such as child care or migrant reception centres for the teaching of English, and an Imam must demonstrate his religious expertise and authority by performing appropriate ritual and giving advice on all matters concerning the way a Muslim should conduct his/her life in Australia. But also, because their positions are not dependent solely on an office from which they derive their authority, they must respond to the everyday needs of their supporters. The expectation is that they will be able to 'fix it', things will get done to their supporters satisfaction.

The example of the Imam acting in his religious and legal capacities differs from other leaders in the area of expertise claimed, but not in the way he seeks to maintain his authority. In the position of Imam he must respond to the needs of his supporters in the same way as a leader in a political or some other kind of association. His influence in the Lebanese Muslim community is dependent on his reputation as a person who will unhedgingly intercede successfully on a supporter’s behalf.

In the area of personal status law the Imam is expected to respond to situations requiring the arrangement and rearrangement of family relationships within the scope of both Shari’ a and Australian Family Law jurisdictions. If an individual assumes the status of an Imam then the rights conferred on him by virtue of his election must be exercised, even if they are contradictory. Qur’anic theological prescriptions and Shari’ a legal rules must be considered alongside Lebanese cultural notions of family honour and Australian legal requirements. An equitable legal arrangement is the product of all these religious, legal, and moral considerations, having fulfilled the 'legal' requirements of both Shari’ a and Australian Family Law, but having satisfied neither fully.

The reasons why the Shari’ a is relevant to Lebanese Muslims in Australia and is enforced to varying degrees is because it constitutes a coherent prescriptive religious ideology concerned with family relationships within an immigrant community whose transposed social, religious and political institutions still have as their major focus family, locality, sect. Therefore as a system of personal status law the Shari’a finds itself being enforced not simply because of religious devoutness or sanctions but because it is an integral part of an individual's identity vis-a-vis the Australian society and vis-a-vis other Lebanese communities in Sydney. And also because the individual Lebanese Muslim shares religious and social values with a family whose members are part of a 'potential household' that can be international.
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Conclusion

In this analysis of the practice of personal status law in Sydney I chose to consider the intervention of the Australian Family Court in the regulation of 'family relationships' as being only one aspect of the continuous arrangement and rearrangement of domestic groups with reference to a wider "potential household." My intention was not to analyse legal process as a body of enforced and enforceable legal rules and thereby attempt to arrive at a definitive statement about the legal rules that are relevant to the Lebanese Muslim community in Sydney. The situation I am researching is much too fluid for that. My aim was to show how notions of legal 'right' influenced and guided the process of legal settlement in the area of personal status law.

In the case of Muslim personal status law, the Shari'a, the ideas of legal 'right' are intimately associated with religious ethical precepts. However the continuing historical problem faced by Islam is its inability to assert religious authority in areas where it claims to define legal 'right'. In the Lebanon this analogy in ecclesiastical jurisdiction has been resolved by formally relegating jurisdiction in matters of personal status to religious courts and judiciary. Therefore in the Lebanon each person is endowed with both public and private right. The public right is located in the law of the state where if an individual commits an infraction of the law it is against the state, whether it affects another individual or not. The private right is located in customary law, in this case religious law, and allows a person to take up proceedings of a personal nature against someone who has harmed him/her.

In the immigration context this distinction of 'right' no longer exists, all 'right' emanates from the law of the state. Because private 'right' is derived from an area of law which is defined personally its basis of authority in Sydney is extremely tenuous. Instead of having courts and judicial personnel to enforce its provisions it has individual religious leaders whose authority rests on their ability to preserve the area of private 'right' by ensuring that all matters of personal status settled in Sydney are in accordance with Shari'a law and on their ability to mediate successfully in situations which affect the interests of their supporters.

Therefore in matters of personal status law the Australian Family Law court assumes an adjudicating role in the last instance, after the Imam has successfully or unsuccessfully mediated and tried to get the parties to settle their differences within the provisions of Shari'a law. The Family court is a court of last resort, but as with all matters of personal status in Australia it has the ultimate power to adjudicate in the personal conflict of rights under its jurisdiction.
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References


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