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Development of Sharia and Legal Studies in Australia

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Abstract

The study of Islamic law in Australian law schools shows positive developments. From 1997 when the first course on Islamic law was taught in at Charles Darwin University in the Northern Territory, there are now up to ten Universities that provide courses in Islamic law. This is due to several reasons, namely: 1) global and national events that require new perspectives in university culture; 2) law schools have the responsibility to create citizens in maintaining a harmonious multicultural society; 3) economic, political, security, tourism, education and other interests with Muslim Southeast Asian countries including Indonesia; 4) the study of Islamic Law is very important for the legal profession, especially for lawyers who will practice in areas with a significant Muslim population, or the field of international trade involving Muslim countries and; 5) Disputes involving family relations, social security rights, discrimination and immigration issues also require references to Islamic law. Harmonization of Sharia and Legal Studies in learning at the law faculty is provided by, among others: 1) the study of Islamic law becomes a component in a general comparative law course where certain features of Islamic law are highlighted for comparison with other legal models; 2) a course that combines the thematics of Islamic law with other topics; 3) components of Islamic law are integrated into some, or all, of the legal courses taught so that the Islamic perspective becomes an inclusive part of legal education within the institution and; 4) Islamic law courses stand alone as elective courses at the Faculty of Law.

KEYWORDS: *Australian law schools; integration; Islamic law; legal studies*

Abstrak

Kajian hukum Islam di sekolah-sekolah hukum Australia menunjukkan perkembangan yang positif. Sejak tahun 1997 ketika kursus pertama tentang hukum Islam diajarkan di Universitas Charles Darwin di Northern Territory, sekarang ada sepuluh universitas yang menyediakan kursus hukum Islam. Hal ini disebabkan oleh beberapa hal, yaitu: 1) peristiwa global dan nasional yang membutuhkan cara pandang baru dalam kultur universitas; 2) sekolah hukum memiliki tanggung jawab menciptakan warga negara dalam menjaga masyarakat multikultural yang harmonis; 3) kepentingan ekonomi, politik, keamanan, pariwisata, pendidikan dan lainnya dengan negara-negara Muslim Asia Tenggara termasuk Indonesia; 4) kajian Hukum Islam sangat penting bagi profesi hukum, terutama bagi para ahli hukum yang akan berpraktik di daerah dengan populasi Muslim yang signifikan, atau bidang perdagangan internasional yang melibatkan negara-negara Muslim dan; 5) Perselisihan yang melibatkan hubungan keluarga, hak jaminan sosial, diskriminasi dan masalah keimigrasian juga memerlukan referensi hukum Islam. Harmonisasi Ilmu Hukum dan Syariah dalam pembelajaran di fakultas hukum antara lain dilakukan dengan cara: 1) kajian hukum Islam menjadi salah satu komponen dalam mata kuliah perbandingan hukum umum yang menonjolkan ciri-ciri tertentu hukum Islam untuk dibandingkan dengan model hukum lainnya; 2) mata kuliah yang menggabungkan tematik hukum Islam dengan topik lain; 3) komponen-komponen hukum Islam diintegrasikan ke dalam sebagian atau seluruh mata kuliah hukum yang diajarkan sehingga perspektif Islam menjadi bagian inklusif dari pendidikan hukum di dalam institusi dan; 4) Mata kuliah Hukum Islam berdiri sendiri sebagai mata kuliah pilihan di Fakultas Hukum.

KATA KUNCI: *Sekolah Hukum Australia; Integrasi; Hukum Islam; Ilmu Hukum*

Introduction

It may seem surprising that in several Australian law schools, including my own, law students studying to be common law lawyers, barristers, and judges, also study aspects of Sharia. There are elective courses generally named Islamic law, and other courses where components of Sharia are included.

I say surprising because Australia is a secular nation and so is the legal system. We do not have Sharia courts and Islamic law is not a recognised source of law. We are a multi-cultural, multi-lingual and multi-faith nation but have a single 'one law for all' common law legal system. Our constitution has a de-establishment clause. Section 116 of the *Constitution* provides for 'free exercise of any religion'[1] but de-establishment has meant that a separate system of religious courts for personal status matters is contrary to Australian practice and constitution. From inception, anti-sectarianism informed Australia's secularism. religious law, like religious practice, was to be voluntary, independent from government, and never contrary to secular law.

Surprising too perhaps because with a population of 25 million, Muslims comprised a small minority - with just 600,000 Muslims (roughly 2.5% of the population), with Christians in the majority followed by 30% stating 'no-religion'. Islam is now the second largest religion after the various forms of Christianity, closely followed by Buddhism, Sikhism, Judaism, and many forms of spiritualism, including our own Aboriginal Australian traditional beliefs. To analyze the issue, this study used qualitative research by a multidisciplinary approach, including historical approach, empirical approach, and conceptual approach; it also used a literature review method to synthesize research findings.

So why do we have law courses on Sharia?

[1] Section 116: The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth

I would like to share with you the reasons why non-Muslim Australian law students are interested in learning about Islamic law and why academics like myself have established courses and research in the field of Islamic law. Whilst most academics who teach the courses are Muslim, other like me, are not. Non-Muslim include Professors Tim Lindsay, Simon Butt and Dr Kerstin Steiner with Muslim legal academics Professors Abdullah Saeed, Drs Nadir Hosen, Ghena Krayem, and Associate Professors Hossein Esmaeili and Salim Farrar recognised leaders in the field.

As a lawyer and legal academic my focus in this paper is on Australian law schools. Separate to law schools, are avenues for Australian tertiary students to study Sharia in Centres dedicated to this, such as the Centre for Islamic Studies and Civilisation at Charles Sturt University which caters predominately for Muslim students (98%) and federal-government funded National Centre of Excellence for Islamic Studies which is a consortium of three Universities (Australian National Griffith and Melbourne Universities) with the degrees, majors and individual courses on Islam within in humanities, social science, political science and theology disciplines A survey of our 43 Universities by Raine, Duderija & Mamone[2] found seven[3] had programs on Islam. Charles Sturt and Melbourne Universities had a strong focus on teaching classical Islamic studies whereas the other five had a social and political science -based approach with the methods categorised as philological, sociological historical, anthropological, political science/international relations, and religious studies.[4] Charles Sturt had the greatest number of courses – 53 across a Bachelor of Islamic Studies and two master's degree programs plus an Islamic studies research program. The researchers estimated that 4,000 students undertook Islamic studies courses in these suits and programs between 2015-2016.[5] Except for Charles Sturt (90% Muslim students) and University of Western Sydney (98% Muslim students) most students in the other five were non-Muslim.[6]

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2 Halim Raine, Adis Duderija & Jessica Mamone, 'Islamic Studies in Australia's Higher Sector' (2021) 6 *Australian Journal of Islamic Studies*, 1-31.

3 Australian National University (Centre for Arab and Islamic Studies in College of Arts and Social Sciences), Melbourne University, Charles Sturt University, Griffith University, University of Western Sydney, Monash University and University of New England.

4 Raine et al, 27.

5 Raine et al, 29.

6 *Ibid*, 19.

When I went through law school a course on Islamic law would have been an anomaly. It would have been deemed irrelevant and 'out of place' in law curricula. For a century, legal education in Australia had typically reflected its secular, English, common law origins. The aim has been the training of legal practitioners: skilled in the common law method and proficient in knowledge of national and state laws. Understanding other legal systems, other jurisprudences, and other concepts of law was traditionally viewed as either extraneous or, at best, to be lumped into a course on comparative law. But this has changed. The reasons for this are fuelled by global and national events which are necessitating new perspectives in the broader Australian society as well as within the culture of universities, specifically law schools. Courses introducing students to other legal systems are no longer rarities with offerings on European Union Law, Asian Legal Systems and courses tailored to the law of specific Asian nations: China, Japan, and Indonesia as well as the South Pacific. As the need for a more global perspective is now accepted by our government and the wider society, what we teach law students has correspondingly also broadened. From 1997 when the first course on Islamic law was taught in at Charles Darwin University in the Northern Territory, there are now up to ten Universities who do so.

The Case for Teaching Islamic Law in Australian Law Schools

Without courses on Islamic law, most law students and consequentially most lawyers will form their opinions on Muslims, on Islam and on Islamic law, from the same information sources as does the wider community. Attitudes and perceptions among mainstream Australians are heavily influenced by media portrayals and by popular conceptions and prejudices inherit in western societies generally. Each generation bequests their views and prejudices to the next unless there is a circuit breaker. Given that law schools attract some of highest academic achievers in the country and that these students will go on after graduation to be part of one of the more influential sectors in Australian public life, law schools should have a responsibility to break the circuit and to create informed and culturally literate citizens. This is important

to Australia's standing in the world and to maintaining a harmonious multicultural society across our continent. In addition, Southeast Asia is part of Australia's economic and political sphere, and we are inter-dependent in terms of trade, and for our security, on the Muslim nations of this region, as well as with those in the Middle East. Apart from the trade and economic imperatives, the shared border between Indonesia and Australia makes maritime security, migration, defence cooperation, Covid-19 management and reducing transnational crime a priority for both countries. Add in other exports including tourism and education makes Australia's relationship with neighbouring countries, and with the Middle East [7] of the utmost importance. There is therefore a need for education which will equip Australians to understand and not to fear the differences which lie between us and our neighbouring Muslim countries.

Value in Comparison

Australians too can better understand our legal system, its strengths and weakness, if there is a mode for comparison. In turning to Islamic law, one finds not only a base for comparison, but also direct intersections between the two systems. John Makdisi presents a thesis which holds that in the twelfth century the nascent common law was directly and indirectly influenced by Islamic law.[8] It is accepted that the Islamic trust, *waqf,* was the likely model for the development of the equitable common law trust[9] though many students in equity courses would be unaware of this. Professor Ahmad Ibrahim, the former Attorney-General of Singapore and Muslim jurist, has noted that some recent developments in family law in common law countries, for example, the new emphasis on mediation, have brought it much closer to principles in Islamic family law. Over many centuries, and in many and varied ways, knowledge of Islamic law hastened reform in the common law system. It could also continue to do so if there is renewed respect and knowledge for each other's system.

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[7] Details of our trade with the Middle East and Southeast Asia are available on the Australian Department of Foreign Affairs website and http://www.dfat.gov.au/geo/ .

[8] John Makdisi, 'The Islamic Origins of the Common Law' (1999) 77 *North Carolina Law Review*, 1717 – 1731.

[9] Henry Cattan, 'The Law of Waqf', in Majid Khadduri & Herbert J Liebesny, eds, *Law in the Middle East: Origin and Development of Islamic Law,* Vol 1 The Middle East Institute (1955) 203, 213-15.

In past centuries Islamic law and processes informed the nascent common law system, and by looking rationally, may find it offers different approaches and alternative solutions to problematic areas in our current law. Encountering broader perspectives through the opening other frames of reference helps students to make sense of law as an integral part of any society and aids students to make sense of events occurring in our world. Lastly, amongst the diverse law student body are Muslims for whom encountering Islamic law in their university courses can be important to their identity as Muslim Australians. Each of these reasons for including courses on Islamic law will be considered in more detail.

The legal profession

Few would disagree that lawyers can be among the most influential people in the Australian community. Some are opinion leaders in their local areas and within the legal profession, some will be elected to parliament making major decisions on behalf of the country, others will be captains of industry, judges, academics, or journalists. Their opinions are crucial in informing the national debate. Therefore, it is advantageous that potential members of this influential profession can gain an objective and factual education on issues related to Islam, Islamic law and Muslim Australians. This is equally important for those who are going to practise as lawyers in areas where there is a significant Muslim population, or in areas of international trade involving Muslim countries. On these grounds Islamic law has a claim for acceptance as a legitimate elective in our law schools.

There are also specific issues that arise where Australian lawyers need accurate information on Islamic law. Disputes involving family relationships, social security entitlements, discrimination and immigration issues may require reference to Islamic law.[10] One of the earlier reported cases in which Islamic law had to be considered by an Australian court was *Haque v Haque* (1962) 108 CLR 230. It involved a claim brought

[10] The author has given opinions at the request of legal practitioners for matters involving Muslim clients. Reported cases in discrimination include *Abo El Wafa v England & Kennedy Taylor (Qld) Pty Ltd* [1997] QADT 27; *Deen v Lamb* [2001] QADT 20; *Islamic Council of Victoria v Catch the Fire Ministries* [2004] VCAT 2510.

by two infant children and the widow of Muslim testator regarding the testator's will in which he appointed his brother executor and left him all property, subject to a wish that assets would be distributed according to Islamic law. The claim also involved consideration of a pre-marital agreement called a *nikanama* between the deceased & the widow prior to their marriage.[11] Other cases deal with immigration status. For example, a matter remitted by the High Court of Australia to the Federal Court[12] required the court to consider the effect and legal status of a *fatwa* issued in Bangladesh. This was to determine whether the applicant had a well-founded fear of persecution warranting the grant of an Australian protection visa. The *fatwa* ruling that his conversion to Hinduism made him an apostate from Islam, had been issued in applicant's village in Bangladesh. He argued that the severe traditional penalties for apostasy would be imposed if he returned to his village and his fear of this formed the basis of his persecution claim.[13]

There are a range of case brought by Muslims on grounds of discrimination. For example, in the case of *Mahommed v State of Queensland* [2006] QADT 21 (24 May 2006) the tribunal had to determine if it is discriminatory to provide tinned, rather than fresh halal food, to a Muslim (convicted of murder) in prison? The tribunal found it was and ordered fresh halal meat be served. Is it discriminatory to distribute pamphlet during a political campaign where the candidate running against a Muslim candidate set out negative views on the Quran? In *Deen v Lamb* [2001] QADT 20 the tribunal held it was acceptable as the views of all candidates during a political campaign need to be known, under freedom of political communication.

The case of *Mohamed v Mohamed* [2012] NSWSC 852 illustrates the complexity when there is interplay between Sharia and Australian law. Faced with paying *mahr*, after a divorce from his wife, the appellant husband argued from an Australian law perspective that the Sharia marriage contract (contracted in Australia) was contrary to

[11] Other issues in the distribution of that estate were considered in *Haque v Haque* (No 2) (1965) 114 CLR 98.

[12] See Applicant S76 of 2003 v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCAFC 120. 4 July 2005 (Unreported)

[13] The Court dismissed the appeal on the basis that the Bangladeshi High Court had held in 2001 that fatwas issued at village level by *salishes* (conservative rural clergy villages in Pakistan and Bangladesh) were not to be enforced, together with the factual finding that the impact of such fatwa was quite limited outside one's own village, that the appellant would not be at risk of persecution were he to return to another part of Bangladesh.

Australian law on public policy grounds, and conversely that the issues involved the applicability of Islamic law which could only be determined by an Islamic law. His wife had made a claim in the state court for return of her *mahr* to the state court on the ground that her husband initiated the separation and divorce when he said: "You are divorced". He disputed this. On appeal to the Supreme Court of New South Wales, Harrison AsJ upheld the lower court's finding that Sharia law was not required to properly interpret the marriage contract. The case is significant because it set a precedent for a *mahr* clause being legally enforced by the state court. Second, although the Muslim couple were only married under Islamic law, the contract was decided by applying Australian contract law not Islamic law. The husband's submission that the Australian court lacked jurisdiction for matters involving Sharia law failed, thereby signalling that Australian courts will not cede jurisdiction because a religious dimension is involved. As well, the wife said in an interview after the decision that it is important for Muslim women to fight for their rights.

Commercial matters also transect Islamic law and common law applications with encounters, and at times clashes, between the two sets of norms occurring. This is in part because of the expansion of global and international trade in recent decades[14] and because of the growth in the number of Islamic banks and financial institutions in western, as well as in Muslim countries like Malaysia, Bruni and Indonesia and parts of the Middle East. The constitutive basis of these banks and institutions is to carry out business in accordance with Islamic principles and Islamic law. In compliance with these objectives banks and many businesses adopt contracts that allude to Islamic banking and commercial principles and employ the terms and concepts explicit in Islamic commercial, financial and contract law. [15] Two significant English decisions,[16] dealing with choice of law clauses stipulating 'sharia law as the applicable law' are analysed by Geoffrey Fisher.[17]

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[14] Faisal Kutty, 'The Shari'a Law Factor in International Commercial Arbitration' (2006) 28 *Loyola International and Comparative law Review*, 565.

[15] Geoffrey Fisher, 'Sharia Law and Choice of Law Clauses in International Contracts', (2005) *LAWASIA Journal*, 69.

[16] *Islamic Investment Company of the Gulf (Bahamas) Ltd v Symphony Gems NV* (Unreported, Queens Bench Division, Commercial Court, 13 February, 2002) and *Beximco Pharmaceuticals Ltd v Shamil Bank of Bahrain EC* [2003] EWHC 2118 (Comm) (Queen's Bench Division); 2 Lloyd's Rep 1.

[17] Fisher, *supra*, note 13, 69-82.

Criminal law also encounters aspects of Sharia. In *R v Raad, Fayed, Cifci and Coskun* (Sydney 2003) Four Muslim men were convicted of assault occasioning actual bodily harm. They had used an electrical cable, to whip a Muslim convert, Christian Martinez, 40 times for drinking alcohol. They argued they were practicing Sharia in accordance with their own interpretations which were in keeping with literal and puritanical Salafi movement in Islam. The argument was rejected by the court.

Female circumcision known as FGM (female genital mutilation) is a criminal offence in all states of Australia. Under Queensland's *Criminal Code* the maximum penalty is 14 years imprisonment. In a recent case a mother took her two young daughters (9 & 12) to Africa for female genital mutilation. The jury found her guilty in the District Court on two counts of removing a child from the state for FGM and sentenced her to four years in prison (to serve 8 months). Judge Clare noted this 'particular type of violence is not born of anger or aggression, but a commitment to tradition, but the journey was made with intention for mutilation and with knowledge if was "illegal" in the state'. The one law for all rule applied: 'No matter where a family may come from, whether it be Somalia, India or Ashgrove, it makes no difference, that children in this state have equal protection under the law…to treat the adherence to tradition as mitigation would dilute the protection of the law for those children in most need of it'. In New South Wales 2019 in NSW, three individuals (girl's mother, nurse, and Muslim community leader) were convicted by a jury. Their conviction was overturned on appeal as the court accepted that the Khatna ceremony was only ritualistic and small damage done as to mutilate means causing 'imperfection or irreparable damage'. The Prosecution brought an appeal to High Court of Australia arguing the actions of the three had still breached the NSW law. Majority held that the NSW Court of Criminal Appeal erred when it quashed the convictions, saying the phrase 'otherwise mutilates' does encompass someone simply cutting or nicking a girl's clitoris.[18]

Sharia is also raised at times in the court when a Muslim party rejects the procedures and process used on the basis these are secular not Islamic courts. In several cases the question arose as to if it is contempt of court when a Muslim woman or man is

[18] The Queen v. A2; The Queen *v.* Magennis and The Queen *v.* Vaziri: S43/2019, S44/2019 and S45/2019

a party or a witness in a case and refuses to stand for the judge? The case of Moutia El-Zahad attract media attention when she brought a lawsuit against the NSW and Federal Police, claiming she was assaulted during a counter terror raid at her home. Even though she brought the claim for monetary compensation, she refused to stand for the judge (which is legally required as a sign of respect for the judge and the law). Her barrister told the court his client 'won't stand for anyone except Allah'. She was not charged with contempt but with the lesser offence of disrespectful behaviour for refusing to stand. She was convicted. The NSW Supreme Court rejected her appeal against both sentence and conviction asserting there is need for the maintenance of respect for the judicial process. An Islamic opinion was brought to court by the Australian National Imam Council (ANIC) which submitted there was no prohibition or restraint on a Muslim standing up for the Magistrate or Judge as a sign of respect. Signs of similar respect ANIC noted are in several hadith including one of a funeral procession which passed before the Prophet and when he saw it, he stood up (showing respect). Then it was said, it is a funeral of a non-believer. The Prophet replied, "Isn't it a soul?" The Lebanese Muslim Association also submitted that 'we should, as Australian Muslim citizens, respect the law of the land'. Similarly issues also arise when giving evidence in court whilst refusing to remove face coverings (niqab).

What to cover in course on Islamic law?

There is a wide range of views amongst Islamic scholars and a course on Islamic law in a nation like Australia should reflect this. Students need to appreciate why many views can exist both orthodox and modern. It is especially important in the Australian context where a distinguishing feature is Muslim heterogeneity. The 100 different nations from which Muslims have immigrated include mono-cultural and multicultural societies; ones that operate under Shari'a law, apply only secular law, or are legally pluralistic. Australia is home to Muslims from Sunni and Shia traditions each with their own sub-groupings and because of the dynamic nature of ijtihad they hold wide-ranging views on legal, theological, and doctrinal matters - sufi to salafi. The term 'Islams' rather than 'Islam' and Muslim communities rather than community have been coined to

capture this intra-plurality. Most are Muslim by birth, but there is a growing number of converts; conversely, others who were born Muslim have either left the faith as apostates, or are now non-practicing, or identify themselves as 'secular Muslims'. Sixty-two percent of Australian Muslims were born overseas and hold different attachments to their countries of origin, cultural practices, and traditions. This diversity needs to be captured, I believe, in any course on Islamic law in Australia.

Highlighting difference between the views of modern moderate Muslim intellectuals and conservative traditionalists is useful in a democracy. It allows for Sharia to be seen as compatible with democracy and Muslims can be good practising Muslims who are at the same time, good citizens of their own country, whether it be a western democracy such as Australia, the US, Britain or France, or in a progressive Asian country such as Malaysia or Indonesia. This conference draws on this spirit of moderation and compatibility. Indonesian, now Australian Muslim academic, Dr Nadir Hosen highlights these varied approaches in his book Sharia and Constitutional Reform in Indonesia.[19] Sudanese Abdullahi An-Na'im,[20] inspired by the Sudanese scholar, Ustadh Mahmoud Mohamed Taha who sought to reinterpret the Quran to ground it in human rights and equality, also sets out an Islamic basis for human rights, democracy, and constitutional government, including religious freedom and full equality of citizenship for Muslims and non-Muslims and for men and women. An-Na'im goes further to posit an Islamic justification for the secular state[21] explaining the state needs to be secular [neutral to religion] 'so I can be the best Muslim I can be. As soon as the state imposes their view, I am not free to choose to be Muslim I believe I should be".[22] However, there are other views such as of Abdul Rashid Moten, which need to be presented so that students appreciate that the human understanding of Sharia is not fixed.

For some Muslim Australians, the views of liberal Islamic thinkers which are opposed by conservatives may not have been generally disseminated through their communities. When only conservative interpretations of the law have been presented,

[19] ISEAS Series on Islam, 2007.
[20] Abdullahi An-Na'im, *Toward An Islamic Reformation : Civil Liberties, Human Rights, And International Law* (1990).
[21] Abdullahi An-Na'im, *Islam and the Secular State: Negotiating the Future of Shari'a*
[22] https://www.youtube.com/watch?v=fbvzat5vMyk

awareness of other alternatives is limited. For other Muslims the converse may be true. Inevitably in secular societies some Muslim students will have been so influenced by media images they are almost as likely to hold negative views of Islamic law as do non-Muslim students. Thus, in a multi-cultural society in which there is a diversity in the views on contemporary applications of Islamic law, the young Muslim in Australia needs to acquire knowledge of the varieties of opinion which exist to be able to judge for himself, or herself, and to be able to reject views which do not appear to be compatible with his, or her, life in Australia. Courses on Islamic law give such students the opportunity to learn of the existence of progressive liberal scholars as well as those expositions of orthodox and more traditional interpretations.

Hudud penalties are one such example. Abdullahi An-Na'im,[23] and Mohammed Hashim Kamali,[24] an Afghan scholar from the International Islamic University in Malaysia, both argue that the imposition of the hudud punishments of cutting off the hand for theft, stoning to death for adultery, and the death penalty for apostasy should not be imposed in today. On the other hand, Muslim nations such as Brunei have brought in statue law Sharia criminal law with these penalties, whether imposed in practice or not. The Taliban back in power in Afghanistan, maintain that these punishments are a compulsory part of Islamic law and must be applied in any truly Islamic state. The views of the latter are widely disseminated in the mass media in western countries, while the views of moderate thinkers are heard less frequently. The result is that Islamic law is popularly believed to represent only the most conservative and 'fundamentalist' attitudes, such as those of the Taliban or the hard-line clerics in Iran.

Understanding our world

Law students seek relevance in their law courses. As they try to make sense of their world, many want their university education to go beyond the local Australian law. This

[23] Abdullahi An-Na'im, *Toward An Islamic Reformation : Civil Liberties, Human Rights, And International Law* (1990).

[24] Mohammed Hashim Kamali, *Freedom of expression in Islam* (1997) *Principles of Islamic Jurisprudence* (2003).

becomes evident when students are asked the reasons why they elected to do a course on Islamic law. A survey of 100 of my law students which asked what motivated them to do a course on Islamic law found the dominant reason was the relevance of the subject matter in light of world events. Students read about the legal changes in Afghanistan where Muslim women are being disempowered and then see reform of the guardianship (wali) rules in Saudi Arabia increasing autonomy and decision-making for Arabian women. They want to understand how such different directions can be legitimised by Sharia.

Meeting the needs of Muslim students

In addition to encountering the diversity of perspectives amongst Islamic scholars within the international and Australian communities (as outlined earlier) offering a course on Islamic law enables Muslim students brought up in Australia to have recognition of their Muslim culture and religious background. This can be an affirming experience, given the evidence that many young Australian Muslims suffer from discrimination and prejudice, particularly in some parts of Sydney.[25] Those who have some knowledge of Islamic law are able to argue with more confidence against the misconceptions they may encounter. They can factor in how illiteracy, ignorance and poverty can distort Sharia and the difference between cultural practices and ones sanctioned by Islam.

The Muslim students who are now coming to Australian law schools are predominantly young and born or brought up in Australia. Thirty-six percent of the Muslim population are Australian born. They are exposed to the religious beliefs and culture of their parents and extended family but may have limited knowledge of wider dimensions of Islamic law or, for that matter of Islamic history, art, architecture, and culture. Most mosques include a weekend or after school hours madrasa for the children of their community. The curriculum usually includes instruction in Arabic, mostly for the purpose of being able to read the Quran in its authentic language, some teaching in

[25] Greg Noble & Paul Tabar, 'On being Lebanese Australian' in Ghassan Hage (ed), *Arab Australians Today: Citizenship and Belonging* (2002) 138.

the principles of Islam and study of hadith but time is necessarily limited. Arabic language is difficult, especially for the majority who do not have it as their mother-tongue or primary language spoken at home, and thus the amount of time the madrasa must devote to Arabic, severely limits the amount of instruction which can be given on other topics. Not all Muslim children attend Islamic schools,[26] because of cost, location, and the capacity of the schools. Consequentially, whether Islamic knowledge is available varies.

An additional reason which prompts some Muslim students studying law to include a course on Islamic law is the desire to know about Islamic family law. Most Australian Muslims or their parents come from countries where Islamic law governs family and personal relationships, and they continue to abide by Islamic rules regardless of the secular family law system in Australia.[27] Fortunately, Australian law is broad enough to allow Australian Muslims to marry according to Islamic rites and rules,[28] but they must adhere to domestic laws criminalising underage-marriages, polygamous marriages contracted in Australia, and ones which are 'forced or servile' marriages. Muslim couples can comply with both Australian marriage law and Sharia marriage (*nikkah*) requirements.

When a marriage ends in divorce, there are significant differences. Religious divorce is not recognised in the Australian system, and this leaves women, whose husbands refuse to grant them a religious divorce unable to marry within their own communities.[29] Islamic rules of custody and guardianship do not apply. Under the Family Law Act, Australia courts use 'best interests of the child' test and preference equal parenting orders.

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[26] Irene Donohoue Clyne, 'Educating Muslim Children in Australia', in Abdullah Saeed & Shahram Akbarzadeh (eds), *Muslim Communities in Australia* (2001) 117.

[27] Ann Black, 'Can there be a compromise? Australia's state of confusion regarding Shari'a family law' in Elisa Giunchi (ed) *Muslim Family Law in the Western courts: experiences from Europe, Australia and North America,* Routledge, 2013, 149-167.

[28] Australia's *Marriage Act 1961* (Cth) is accommodating of Islamic marriages. It enables Islamic marriage ceremonies to be performed and registered by an authorised marriage celebrant, which, for Muslims, will usually be an Imam from their mosque. If the requirements of the Act are adhered to, and the Imam is authorised, then the Islamic marriage can be valid under both sets of laws. The marriage can be registered with the relevant State government office for Births, Deaths and Marriages.

[29] Ann Black, 'Adaptations of Islamic family law for the Australian Context' for (2017) 30 *Australian Family Law Journal*, 159-179.

Polygamous marriages exist, performed according to religious law, although the second marriage is classed as a de facto relationship by the Australian legal system. Lawyers working in family law with Muslim clients need to be aware of these realities, and knowledge of Islamic law puts them in a better position to sort out fact from fiction, or cultural habits. Students often have a concern from their own personal point to view to know what is allowed and what is forbidden by the Sharia so that they do not unwittingly transgress. Living in a multi-cultural society brings them in contact with non-Muslims and issues arising from the possibility of marriage to a non-Muslim recur. Inter-religious marriages are lawful under Australian law.

Lastly, many Muslim law students in Australia are receptive to a forum in which Islamic law can be the subject of academic evaluation and criticism. In Islamic universities in some Muslim countries, critical assessment of Islamic law may not be possible and lecturers who present perspectives other than the orthodox or who facilitate debate and analysis by their students may be accused of innovation (bid'a). None of these constraints apply in Australian law schools. A course conducted within an Australian law school will inevitably cover contentious issues such as inequality in inheritance and the weighting ascribed to evidence given by women. An opportunity to engage in the primary textual material, to review past jurisprudence, and to consider the diverse contemporary scholarship on such issues facilitates clearer understanding. Students who are primarily interested in religion would more likely study at Islamic centres and colleges which offer religious courses.

Ways to teach

In a law degree, there are four main ways for incorporating aspects of Sharia. The first is when Islamic law is a component in a general comparative law course where selected features of Islamic law are highlighted for comparison with other legal models. The second is when a course combines Islamic law thematically with other topics, such as courses on Law and Religion, or courses focusing on an Islamic country or region, such as Law and Society in Southeast Asia, Middle Eastern Legal Institutions, and the Commercial Law of Asia. The third way is when components of Islamic law are

integrated into some, or all, law courses taught so that an Islamic perspective becomes an inclusive part of legal education within that institution. Some comparativists, including Ugo Mattei[30] and Mathias Reimann[31] advocate that the comparative perspective should be part of the everyday educational experience within any course of law. In this way a course on trusts would include an outline and description of the Islamic waqf (trust), a course on succession law would give an overview of the Islamic rules of inheritance, and in family law the Islamic rules on marriage, divorce and custody would be explained. Lastly, there is the stand-alone course on Islamic law such as the one I teach along with several other law Schools.

Who can teach a course on Islamic law? The subtext: does the teacher have to be male, Muslim and an Islamic jurist?

There are some conservative Muslims and Islamic scholars who would answer in the affirmative. The teaching of Islamic law can be seen as the domain of male Islamic jurists. This would be in keeping with the views expressed in a 'fatwa' distributed in Sydney forbidding Muslim women from studying at University.[32] However, these are not majority views, nor absolutes, as evidenced by this ruling being immediately and widely condemned by other Muslim scholars , including the most senior Muslim cleric, at the time, Sheik Tajuddin al-Hilali[33], as well as by other religious and legal commentators.[34] However conservative views exist and it can be one of the challenges for teachers of Islamic law who are either female or non-Muslim.

By way of illustration, a decade ago I co-wrote paper on teaching Islamic law in Australia with Jamila Hussain who was a pioneer in the teaching of Islamic law to law

[30] Ugo Mattei, Some Realism about Comparativism: Comparative Law Teaching in the Hegemonic Jurisdiction, (2002) 50 *American Journal of Comparative Law,* 87.

[31] Mathias Reimann, The End of Comparative law as an Autonomous Subject (1996) 11 *Tulane European and Civil Law Forum*, 49.

[32] Trudy Harris, 'Anti-West Fatwas Hit Australia' *The Australian,* July 21, 2005.

[33] Known in some sectors at the time as the Mufti of Australia.

[34] Jamila Hussain, in her capacity as a spokeswoman for the Muslim Women's National Network of Australia, was interviewed for her views on this fatwa, see Trudy Harris, 'Muslim women reject fatwa that bans study', *The Weekend Australian,* 23-24 July, 2005.

students. She was the author of a popular textbook, Islamic law and Society, published by Federation Press. As a white, female convert to Islam with Anglo-Irish heritage she did not conform to the accepted traditional image of a person holding an ijaza or certificate to teach Sharia, although she has post-graduate qualifications from the International Islamic University in Malaysia. At one stage an opinion leader in one university's Muslim Students' Associations advised students against enrolling in her course on Islamic law, on the grounds that the lecturer's photo on the University website revealed she did not wear hijab. The inference was that a woman who did not wear hijab is not be a proper person to teach Islamic law. Other students admitted that they carefully checked the content of each topic with their local Sheikh. Although there were no reports of inaccuracy in the course materials or content, some of the sheikhs objected to what they saw as undue emphasis on women's rights in the text and in the course. As Jamila Hussain argued the position of women in Islamic law is one of the most misunderstood areas both by Muslims and non-Muslims making it a topic that needs to be addressed.

I have found advantages and disadvantages in not being Muslim. Personal experiences and knowledge of what it is to be Muslim are never firsthand. Nor can the realities of being part of the 'other', as a distinctive religious minority in a secular society, be imparted with the same veracity. But whilst the credibility that being Muslim brings to a course is missing, the opposite contribution, that of a neutral observer, can be given. The detachment of an outsider brings its own validity. The course is approached by a legal academic employing a comparative law methodology with the aim of promoting accurate knowledge of Sharia law; awareness of the legal methodology, fiqh; why and how legitimate difference in interpretation can arise; and the main issues currently being addressed by Muslim scholars and Islamic leaders thorough the world. There is not one approach given but students become aware of the range of views – orthodox and modernist - that are prevalent in contemporary Islamic discourse. The second advantage for a non-Muslim lecturer, especially if known to students from compulsory 'black-letter' courses, is the strong message that it sends to the student body that Islamic law is a mainstream and an important area of legal knowledge. As a result, the course is less likely to be seen as doctrinaire, 'fringe' or only for Muslims.

In answering the question who can teach Islamic law, the context of the course and for whom it has been designed becomes all important. When it is an elective course offered within a common law degree program designed to introduce Australian law students to another major legal system of the world which intersects directly, and indirectly, with their lives as Australians, the focus must be quite different from courses designed for Muslims training to be jurists and Islamic lawyers within an Islamic legal system. Qualifications in Shariah law for legal or judicial practice, as taught in universities across Indonesia, Malaysia, and Brunei Darussalam, are comparable to a degree program in law. The introductory courses on offer to Australian law students are akin to a concentrated form of comparative law and as such the same academic qualifications as apply to teaching other comparative and international courses are most relevant attributes.

Throughout the world, Islamic law is widely studied, taught, and researched by women, non-Muslims and non-jurists making it a rich and rewarding academic endeavour. To gain expertise in this area of law is no different from how expertise is gained for teaching in other areas of law. It can come from practice and experience as a Sharia lawyer or jurist; or from the holding of an ijaza or certificate to teach Sharia; it can come from studying and attaining other academic qualifications from an Islamic university or a western university offering Islamic studies, or can come from scholarly research, where research and writing of theses and academic publications brings knowledge and critical perspectives. Few who teach in the area would hold themselves out as experts, but American lawyer David Forte, reassures that he has:

> "Known many experts in Islamic law though none would seek to claim the title. All of us fascinated by one of great legal systems of world history and standing in awe of some of the most creative legal minds, can only be students."[35]

What to teach

Whilst courses introducing Islamic law aim to promote critical thinking and the contextualising of law, such courses cannot be all discussion, reflection, and debate.

[35] David Forte, *Studies in Islamic Law* (1999 Austin & Winfield).

There is a lot of content in the law itself. Until students know what the law is, and the variations that arise on a particular issue, it is difficult to have informed or meaningful debate. It is also necessary for students to understand the legal methodology for Islamic law which is quite distinctive from the common law method with which they are familiar. This methodology enables the difference in interpretations to be understood and appreciated. It would be logical to approach a given topic area with the primary sources based in the Quran and the Sunnah, supplemented with a selection of the secondary sources of law as developed by the leading jurists of their time in addition to the methodology they employed.[36] As well, significant differences between the madhabs,[37] fatwas,[38] enacted contemporary legislation [39]and reported cases[40] should be considered. From this basis, students are better informed and can have meaningful debate on contentious issues or topics on which there is divergence. One of these would be the role and legal recognition, if any, Sharia law should have in dispute resolution for Muslims living in Australia.

Each course co-ordinator will have different preferences, but it would be expected that an introductory course of this type would include some of the following: the history and development of Islamic law and legal systems; the features of an Islamic legal system; sources of Islamic law; the emergence of different schools of law; the theory and practice of the application of law within the modern Islamic States; and the impact and consequences of colonisation, globalisation, and international bodies on local law. Specific area to be covered would include family law and recent reforms in this area; Islamic law of contract and sales; Islamic criminal law and evidence; Islamic laws of the economy and finance including the Quranic prohibition of interest, gambling, speculations and other forms of unjust gains; the law of succession; the laws pertaining

[36] This includes principles of consensus (*ijma*), reasoning by analogy (*qiyas*), accepted customary practices (*urf*), *maslaha* (public benefit), necessity (*darura*), equity (*istihsan*) and the use of legal presumptions (*istishab*).

[37] Shia and Sunni, plus the four Sunni madhabs: Hanafi, Maliki, Shafi'i and Hanbali.

[38] Interesting series of fatwas on responses to Covid -19 immunisations. Also, Ann Black & Nadirsyah Hosen, 'Fatwas: Their Role in Contemporary Secular Australia' (2009) 18 (2) *Griffith Law Review: A Journal of Social and Critical Legal Studies,* 405 – 427; Ann Black, 'Fatwas and Surgery: How and Why a Fatwa May Inform a Muslim Patient's Surgical Options' (2009) 79 (12) *Australian and New Zealand Journal of Surgery,* 866-871.

[39] This would be in countries where the Sharia l has been codified and applicable to its Muslim citizens.

[40] Whilst there is no system of stare decisis in Islamic law, reports of cases can be obtained in many countries, particularly those where the common law was imposed during the era of colonization.

to gender; constitutionalism and the nature of the Islamic state including overviews of Iran, Saudi Arabia, Malaysia, and Egypt; the processes of Islamisation; human rights; the position of non-Muslims under Islamic law, and the accommodation of Islamic law in non-Muslim states specifically Australia, but also France, China and Canada. There is also currency in introducing students to al-siyar (Islamic international law) in which the Islamic laws for war and peace are contained. This enables students to encounter concepts such as jihad and dar al-harb in an academic rather than media fed context, and to consider the textual rulings regarding for terrorist acts, suicide bombings and foreign occupation.

Given the wide scope of topics, it is possible to tailor a course to suit the student population, whether predominantly Muslim or non-Muslim, and whether more or less weighting should be allotted to commercial, constitutional, criminal or personal law aspects. For example, a high proportion of students from a business law major would warrant greater concentration on commercial topics of contract, banking, and insurance. Surveying students as to content can also be useful. When I surveyed my students taking the course at one university showed that my assumption that most would be doing the course to learn about aspects of Islamic business, financing and trade principles, that this was in fact a fairly low priority in student's selection to do the course and in their evaluations of it after completion. As noted earlier, students identified their main reason for doing the course as 'the relevance of the subject matter in light of world events'. This is now reflected in the course content with Islamic constitutionalism, conceptions of human rights, and the diversity in contemporary Islamic states, being strengthened.

Conclusion

Whilst Australia is no longer a mono-cultural, Anglo-Saxon, overwhelmingly Christian society our legal system remains deeply rooted in that heritage. How the nation and our legal system accommodates and engages citizens of other religions and ethnicities is a litmus test for the success of our multi-cultural policy. Lawyers are important in this process as influential players at all levels of society but also fulfill the

role of 'gatekeepers'[41] to the legal system. Encountering 'the other' through a course on Islamic law is one way by which lawyers can be prepared for legal practice in a country where Muslim Australians are an integral part.[42] It also will enable our future lawyers to be better informed citizens of the world at an important time when the relationship between Islam and western secular societies is being negotiated. It will hopefully enable us to also engage more sensitively and effectively with the Muslim nations which are our neighbours.

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[41] Fred Zacharias, 'Lawyers as Gatekeepers' (2004) *San Diego Law Review.* <http://ssrn.com/abstract=591655>.

[42] Islam has the greatest growth of any religion in this country since World War II Gary B Bouma, Joan Daw & Riffat Munawar, 'Muslims Managing Religious Diversity', in Abdullah Saeed & Shahram Akbarzadeh, *Muslim Communities and Australia* (2001) 53.

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