



Explanatory Note on the Judicial Process and Participation of Muslims

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- Australian National Imams Council

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1 Introduction

This document is intended as an explanatory note on matters which may be raised in connection with Muslims participating in court processes. It has been prepared by the Australian National Imams Council to:

- (a) give practical guidance and explanation to members of the Australian Muslim community of the etiquette and behaviours expected of persons engaging in the judicial processes so that they may act consistently with these without compromising their religious beliefs; and
- (b) provide information to judicial officers on Islamic concepts and practices as they relate to matters which may be raised in connection with Muslims participating in court processes.

In developing the guidelines it is acknowledged that in any court matter, the presiding judicial officer has duties to uphold the rules of justice and apply the established court practices and conventions, particularly as they relate to persons appearing before a court.

2 The meaning of justice in Islam

In Islam, justice means to put things in their rightful place and to treat others equally. Justice is also regarded as a moral virtue and an important aspiration and part of the human personality, as it is in the Western tradition. The equality of justice creates stability by ensuring that all people have equal rights and understand their duty. The Holy Quran, the sacred scripture of Islam, considers justice to be a supreme virtue. In the words of Allah:

“O My servants, I have forbidden injustice for Myself and forbade it also for you. So avoid being unjust to one another.” (Saheeh Muslim)

Justice represents moral integrity and fairness, as it places things where they belong. In Islam, justice stands next in order of priority to belief in God’s exclusive right to worship. This is a position affirmed in the Holy Quran; for instance, see Chapter 16 at [90]; Chapter 5 at [8].

Therefore, , properly considered and understood on the basis of scriptural texts, justice is an obligation in Islam and injustice is forbidden.

2.1 Sharia law

A very common term used in the Holy Quran and in Islamic law is Sharia or Sharia law. Sharia or Sharia law is the Islamic legal system derived from the religious principles of Islam, particularly the Holy Quran and the Hadith (prophetic traditions). The term sharia comes from the Arabic language term *Sharī'ah*, which means a body of moral and religious law derived from religious prophecy.

Sharia to Muslims is a way of life and guides the way of worshipping God. Sharia includes crime and economics, as well as personal matters such as family affairs, hygiene, diet, prayer, everyday etiquette and fasting.

The Sharia also uses guidelines such as *ijma* (usually the consensus of the scholars in one particular era), *Qiyas* (analogy derived from the primary sources), and *Urf* (customs). *Urf is particularly significant in an Australian context as matters of custom can become imported into religious obligations and conditions which then also apply by force of religious law.*

2.2 The authority of the Judge and compliance with Australian laws

Muslims who live in Australia are considered to be living in that country under a covenant. They must, therefore, comply with the laws of that country of residence as this is considered in Islam as loyalty to the covenant which they have entered into. This is a position mandated by the Holy Quran: for instance, see Chapter 5 at [1]; Chapter 17 at [34]; and Chapter 16 at [91].

A Muslim should not break or violate oaths or promises. He or she will not be considered a faithful Muslim if he or she does so. Among the characteristics of a hypocrite that is mentioned in Islamic traditions is that he: “acts treacherously toward covenants (pledges), and when entrusted he betrays.”

Scholars have stated that those who enter any country have to adhere to the respective laws and regulations even if they have entered those countries illegally, and they have no justification for breaking those laws, since they were entrusted to abide by those laws upon entry.

3 Court protocols

3.1 Standing up for the Magistrate or Judge

There is no prohibition or restraint on a Muslim standing up for the Magistrate or Judge as a sign of respect to the Magistrate or Judge and to the court.

Courts are very formal places. Everyone in court, including lawyers, police, witnesses, defendants and members of the public must follow the court's procedures. The Judge or Magistrate is in charge of the court. They should be shown respect by everyone in the courtroom. Standing up for the Magistrate or Judge is a sign of respect to the court.

This sign of respect is also reflected in the teaching of Islam. The Prophet (peace be upon him) commended his companion to stand up for one of the chief companions by the name of Sa'ad ibn Muath in which he said, **"stand up for your chief."**

In the famous Hadith collection, Al-Bukhari states that a funeral procession passed before the Prophet (peace and blessings be upon him), and when he saw it he stood up (showing respect to it). Then it was said, it is a funeral of a non believer. The Prophet replied, **"Isn't it a soul!"**

3.2 Bowing to the Magistrate or Judge

As is the position above, there is also no prohibition or restraint on a Muslim, when entering or leaving a courtroom, to stand and lower their head in a mark of respect. To do so is also consistent with the established custom of the court room.

During court proceedings, it is customary to lower one's head to the Magistrate or Judge whenever one enters or leaves a court room. This is a custom of respect to the court. In the Muslim faith, there are two types of lowering of the head:

1. lowering of the head, or bowing, to the creator as a form of worship; and
2. Lowering of the head to the creation as a form of respect.

In this regard, examples are given in the Holy Quran when persons were directed to lower their heads to creation: for instance, see Chapter 2 at [34]; Chapter 12 at [100]. These examples relate to the angels being directed to prostrate to Prophet Adam, and the parents of Prophet Joseph bowing to him as he sat on the throne.

One can also find such customs of respect in ordinary interactions, for instance, in practices pertaining to certain martial arts.

4 Oaths and affirmations

Muslims can affirm their evidence; or they can make an oath on the Holy Quran; or swear by the name of God or any of the attributes of God. If the Holy Quran is used, it is not necessary to make an oath by placing one's hands on the Holy Quran. An oath can be made by reference to the Holy Quran.

A person appearing as a witness or interpreter in court may choose to take an oath or make an affirmation. The court will inform the person that he or she has this choice, unless satisfied that the person has already been informed, or knows that there is a choice. It is not necessary that a religious text be used in taking an oath.

Procedure for administering an oath upon the Holy Quran:

1. The witness should be handed the Holy Quran (in its cover).
2. The witness should be asked to remove the Holy Quran from its cover.
3. The witness should be asked if he/she recognises the book as a true copy of the Holy Quran.
4. The oath should then be administered.
5. The witness should be asked to return the Holy Quran to its cover.

There are times when someone is not allowed to touch the Holy Quran such as not being in the state of ablution. In these instances, it is appropriate to have the person make an oath by reference to the Holy Quran.

Being deceptive or dishonest under an oath is a major sin in Islam and punishable by God.

5 Dress code

5.1 Standard of dress

In the Muslim faith, both men and women should maintain the Islamic dress code: Chapter 24 at [31]

Muslim women commonly wear a headscarf referred to as a hijab to cover their head and hair. On fewer occasions, women may wear a Burka or Nikab, which also covers their face.

The Hijab and Burka or Nikab are seen as a sign of modesty, and a symbol of religious faith. However, neither of these garments, should the women choose to wear them, present as an obstacle to participation in the court room process.

5.2 Testimony

It is not contrary to Sharia law for a woman to uncover her face when she is giving testimony in court, whether she is a witness in a case or is there to witness a deal, and it is not contrary to Sharia law for the Magistrate or Judge (male or female) to look at her in order to know or identify who she is, make assessments as to credibility where this is an issue and protect the rights of all concerned.

Indeed, the position in Islamic Law is indicated by the following authoritative pronouncements.

Imam al-Dardeer said:

“It is not permitted to give testimony against a woman in Nikab until she uncovers her face so that it may be known who she is and what she looks like.” (*Al-Sharh al-Kabeer li'l- Shaykh al-Dardeer*, 4/194)

Imam Ibn Qudaamah said:

“The witness may look at the face of the woman against whom he is testifying so that his testimony will speak about her in specific terms”.

Imam Ahmad said:

“He cannot testify against a woman unless he knows who she is.” (*Al-Mughni*, 7/459; *al-Sharh al-Kabeer ‘ala Matan al-Muqni’*, 7/348, *bi haamish al-Mughni*; *al-Hidaayah ma’a Takmilat Fath al-Qadeer*, 10/26).

5.3 Court cases

If called upon to give evidence in court, it is not contrary to Sharia law for a woman to uncover her face and for it to remain uncovered when she is giving evidence so that the magistrate or judge may identify her; make assessments as to credit; and in order to protect the rights of all the parties in the proceedings.

6 Dealing with the opposite gender

6.1 Shaking hands with the opposite gender

According to the majority of Islamic jurists, it is not permissible for a man to shake hands with a woman who is not close kin and vice versa. Not shaking hands can be perceived as offensive in some cultures, including Australia, but, it should be noted that no offence is intended by a practising and devout male or female Muslim who conforms to such a practice.

However, this should not ordinarily arise as an issue in court rooms given that there is no requirement nor custom of parties or legal officers shaking hands in the court room.

6.2 Eye contact and body language

Lowering the gaze and limiting eye contact are outlined as commendable practices in the Holy Quran. It is considered to be a part of modesty and respecting the opposite gender: Chapter 24:30-31.)

A Muslim applying this principle in his or her life may make a habit of this behaviour and may do it even in front of a Magistrate or Judge, including when they give evidence. If it occurs, this should not, in itself, be construed as the witness being evasive or troubled by the testimony which is being given. Rather, it is likely to be a sign of modesty or belief or practice as to modest behaviour.

6.3 Autopsy and handling deceased persons

Muslims believe in God and the afterlife. After a Muslim has died, it is a religious requirement that the body be buried immediately. Cremation is not permitted in Islam. Mourning lasts for three days after the burial, another reason why Muslims bury the deceased as soon as possible.

It is highly recommended in Islam to proceed with the funeral procession as soon as possible. That includes, washing, shrouding, praying on and burying the dead. This is believed to be a good sign for the deceased.

Dissection or autopsy are NOT recommended practices in Islam. Most religions have an unfavourable view of autopsy, and Islam is among them. It has called for respect of the body, even after death and prohibited its disfigurement.

Therefore Islam respects the sanctity of the deceased and outlines strict instructions to respect and honour them.

However, contemporary scholars have spoken about the autopsy process and have stated it is permissible to dissect a dead body for one of the following purposes:

(a) Examination in the case of a criminal investigation to determine the cause of death or if any crime was committed; that is when the (Coroner) is uncertain of the cause of death and thinks that dissection or autopsy is the way to find out these causes; and

(b) Investigation of diseases in cases where dissection or autopsy is called for so that in the light of this post mortem examination, precautions may be taken or suitable treatments may be determined for those diseases or necessary legal requirements fulfilled.