Gender Justice in Islamic Law: Homicide and Bodily Injuries: A Book Review

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The issue of gender justice is considered important not only generally but also for the purpose of research and analysis. Unfortunately, there is a dearth of scholarship in the area of gender justice in Islamic criminal law. Perhaps, this is because of a tacit consensus that Islamic criminal law could not be an appropriate subject for this kind of analysis as it is incapable of ushering any such perspective that minimally justifies a gender justice yardstick. This unwritten consensus finds support, rightly or erroneously, from books authored by classical Muslim jurists. Some of us who teach and research Islamic law are well-conversant with such debates and consider them to be axiomatic truths. These debates include, for example, the payment of half *diyah* in case a woman is murdered and the non-implementation of *qisas* on a man for committing the offence of murder against a woman. Such a perspective prevents researchers from engaging in a serious analysis of classical legal texts, which can add to their perspective and consequently to the present-day academia.

Musa Usman Abubakar's book *Gender Justice in Islamic Law* is an exception to the prevailing discourse on Islamic criminal law. It provides a refreshing opportunity for us to delve into the debates of classical Muslim jurists and the context in which they have extrapolated various aspects of Islamic criminal law. Though the issue of contemporary gender justice was clearly not the main concern of these jurists, their discourse is not one without a debate on gender related issues. Reframing such debate in the phraseology comprehendible by modern readers is the major contribution of Musa's book.

The book explores issues related to gender under the offences of homicide and bodily injuries in Islamic criminal law. Written from a broad range of perspectives, the book is developed from the author's research during his doctoral studies at the University of Warwick.

The book comprises two parts, which are subdivided into ten chapters, in addition to a well-crafted preface that dispenses the necessity of an introduction. The first part, containing six chapters, analyses the debates of classical Muslim jurists and the second part, divided into four chapters, is dedicated to an analysis of the contemporary application of Islamic criminal law in Pakistan and Nigeria. The book is a rigorous exploration of the theme through philosophical, theoretical, historical, and contextual perspectives. The author conducts a thorough analysis of laws on homicide and bodily injuries in the above-mentioned Muslim countries. It is surprising to note that such a diverse and multifarious approach does not leave an impression that there is any drift in the theoretical consistency and the analytical coherence of the book.

Departing from the author's classification of parts and chapters and bearing in mind the sequence and the arguments of the book, I will summarise its main findings by dividing the review into three main sections. The first is philosophical and theoretical (Chapters 1 and 2), the second is the analysis of the classical legal texts of Muslim jurists on gender related issues, pertaining to homicide and bodily injuries (Chapters 3 to 6), and the last, the application of findings of the above sections by a systematic analysis of the two Muslim jurisdictions, i.e., Pakistan and Nigeria (Chapters 7 to 10, two chapters for each country).

In Chapter 1, the author discusses that justice in Islamic law, though co-extensive with other worldly notions of justice in many respects, is derived from the divine, which is its distinguishing feature. This aspect may be appreciated by many from their own subjectivities and inclinations, but for the author it exclusively implies that the administration of justice in Islam is primarily a divine responsibility. Therefore, in worldly affairs, no Muslim can put away this obligation from his/her shoulders. In this milieu, it seems entirely implausible that various precepts of Islamic law are construed to augment gender hierarchies and cause gender injustice. This conundrum of having justice as a divine commandment on the one hand and the injustice found in various precepts of Islamic criminal law relating to homicide and bodily injuries on the other, persuaded the author to analyse the classical legal texts.

Another building block of the author's philosophical and theoretical analysis is dealt with in Chapter 2. Musa has delved into the debate of divine and non-divine/human components of Islamic law. According to him, the Qur'an and authentic *Sunnah* of Prophet Muhammad (PBUH) are divine sources and the rest, e.g., *ijma*, *qiyas* etc. are methods and principles, which cannot be treated at par with the divine sources. Therefore, a distinction has to be made between what can be termed as 'immutable' and 'not immutable'. The latter can thus be subject to change according to the contemporary values.[1] While explaining the non-divine/human component, the author, by enlisting *qiyas*, *urf*, *maslahah*, *istislah*, *istishan*, has confined his explanation to *ijma*, assuming that his readers would possess sufficient familiarity with the rest. Chapter 2 also examines the various techniques adopted by Muslim jurists for ascertaining the meaning and attributing implications to contradictory precepts of the divine. These include reconciliation, preference, elimination, and/or abrogation. This debate is inextricably linked to the author's scrutiny of the contradictory divine precepts in Chapter 6, which forms the foundation of gendered readings.

Having constructed a theoretical and philosophical perspective inspired by the divinity of justice in Islam, the author steps further into the analysis of various juristic opinions and their bases - textual as well as rational. These are dealt from Chapters 3 to 6. In this section, the main contribution of the author was to juxtapose different sources of Islamic law on homicide and bodily injuries and create a link between them.

In Chapter 3, the author, critically explores the difference of opinions among jurists in two particular situations. One is where there is non-implementation of *qisas* when a man has killed a woman and the second where there is payment of half *diyah* when a woman is killed. He highlights the default contextual setting of a pre-Islamic Arabian society, where the physical strength of a man and his economic utility were valued far more than the qualities and capabilities of a woman. It was this socio-economic context that shaped the specific construction of the 'gender differential treatment'.[2] Chapter 5 of the book critically engages with some assumptions that include the requirement of having two women in place of one man for the purpose of providing evidence, the provision of only half share in inheritance for women, and the debate about the latter's intellectual inferiority. In this context, the author contends that the faulty

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[1] Musa Usman Abubakar, *Gender Justice in Islamic Law: Homicide and Bodily Injuries* (Hart Publishing 2018) Preface ix.

[2] (n 1) 22.

generalisations and cross contextual analogies possess great potential for us to end up with erroneous conclusions.

Chapters 4 and 6 challenge the contemporary discourse on Islamic criminal law that does not imagine any possibility of developing a gender-sensitive reading of divine texts in addition to emphasising the contribution of Muslim jurists. In Chapter 4, the author elucidates the anatomy of an erstwhile balancing institution of *aqilah*[3] and how it could 'balance gender disparity'.[4] Muslim jurists utilised it to mitigate the effects of such readings according to their own socio-economic context. Since the women at that time were not considered economically beneficial and physically able to contribute to their families and clans respectively, they were not treated equivalent to men. This handicap of theirs was converted into a privilege when in similar circumstances men were obliged to contribute to *aqilah* payments and were exempted for it, in addition to being declared entitled to receive the share from such payments where the victims happened to be their close relatives.

The author points out that the institution of *aqilah* had been transformed during the era of Prophet Muhammad (PBUH) from a single-clan based solidarity group to a multi-clan based group; one was composed of migrants from Medina and the other of all clans of the Makkan Muslims.[5] Moreover, this institution was confined to accidental killings. Considering the expansion of Muslim population to far off geographical areas, the institution of *aqilah* was transformed once again during the reign of Caliph Umar. He organised solidarity groups on the basis of those who were enlisted in one register (*Diwan*) and these groups were then obliged to extend financial assistance to each other. According to Musa, it would be a mistake to assume that this institution has lost its potential for transformation. The institution could be brought into service for the betterment of the legal heirs of the victims. In addition to this, it can also provide assistance to the culprits who, due to their poverty, are unable to pay *diyah*.

Inspired by the welfarist spirit of the *aqilah* institution, the author proposes establishing a 'citizenship solidarity paradigm' to utilise its potential in the best possible manner.[6] In consonance with the constitutional and international obligations, the author states that religion-based solidarity groups cannot survive in a constitutional polity and therefore, argues for organisation of such groups on the basis of citizenship. It is deplorable that the institution of *aqilah* has been jettisoned by the contemporary regimes of Islamic criminal law. According to Musa, this institution holds a multitude of benefits for the society, ranging from being a means of financial assistance to needy offenders and victims to providing religious harmony and fostering the culture of accommodation.

In Chapter 6, the author claims that in construing the divine sources, Muslim jurists tilted more frequently in favour of reconciliation of contradictory text. In consequence, this unwarranted inclination sometimes favoured men over women. The author argues that when the gender-neutral tone of verse Q5:45 is reconciled with an overtly contextual verse Q2:178, it

[3] *Aqilah* refers the group of people who are responsible for payment of blood money. This usually involves the paternal side of the family.
[4] (n 1) 43.
[5] (n 1) 52.
[6] (n 1) 58.

amounts to a hierarchal construction that justifies the non-implementation of *qisas* on men for killing women.[7] He further argues that the former verse was revealed later in time and should not have been coercively read with the latter verse. Instead, to avoid any adverse gender repercussions for women, the technique of preference and abrogation should have been opted.[8] Further, with reference to the *hadith* of the Prophet Muhammad (PBUH), which is treated as the foundation for issuing half *diyah*, the author compares its authenticity to another tradition on this issue, which is gender-neutral. According to the author, the former *hadith* is not found in the early *hadith* collections and six authentic collections of *hadith* according to the Sunni schools. Therefore, preference should have been given to the latter one. By switching from the technique of reconciliation to a preference cum elimination, the author presents a conclusion that in matters of *diyah* and homicide, there is no inequality among the genders.[9] To conclude the debate in this section, it is worth noting that a discriminatory approach was an outcome of the methods used by the jurists in construing the authorities.[10]

The last section of the book exclusively gauges the application of Islamic criminal law in Pakistan (Chapters 7 and 8) and Nigeria (Chapters 9 and 10). The criminal laws in both these Muslim jurisdictions are couched in gender-neutral phraseology. That is a deviation from the classical legal literature with regards to the punishments of homicide and *diyah*. The author, however, seems apprehensive to the claim that this change of heart is largely due to the constitutional and international obligations instead of the development of an inside gender-neutral perspective rooted in the divine. Both countries have demonstrated a similar sort of distrust in the institution of *aqilah* and have not enacted it in their legal systems. This has deprived them of a balancing equilibrium for reform within their Islamic framework. Pakistan, with the productive involvement of different stakeholders, e.g., women organisations for the process of refining the Islamic criminal law, has been successful to a reasonable extent in defusing those provisions that could stem gender injustice, e.g., *budl-i-sulh* (Chapter 7). On the other hand, non-specification of value of *diyah* in Zamfara, a state of Nigeria continues to provide manoeuvring space to judges for maintaining differential treatment for men and women (Chapter 10).

By thoroughly analysing the case law from Pakistan (Chapter 8) and Nigeria (Chapter 10), the author posits that a mere gender-neutral legislation is not enough for creating a gender-sensitive and egalitarian society. It is the whole range of paraphernalia that needs to be taken care of, from eradication of misogynistic customary practices, to attitudinal shift in various instrumentalities involved in the dispensation of justice. Laws are applied by the judges, who often bring along their gender bias, and transmit it through their judicial pronouncements. The illustrations of such judicial laxity can be observed through the leniency in infliction of severe penalties in cases of 'honour' killings and the resurrection of an erstwhile British colonial plea of 'grave and sudden provocation', even after its erasure from statute (Chapter 8). In addition to other factors, the author solicits the judges of both the jurisdictions to augment their belief that the divine neither perpetuates nor tolerates gender injustice. Therefore, gender-neutral legislations should be executed in their respective countries without any bias.

[7] (n 1) 78.
[8] (n 1) 83.
[9] (n 1) 105.
[10] (n 1) 104.

In conclusion, the author claims that prevalent gendered application of laws is partly attributable to the contemporary context, which is an amalgamation of colonial identity and gender-insensitive customary practices. In addition to this, there is an unwavering impression that the classical legal texts justify gender hierarchy and discrimination. This last impression is sure to destabilise once a reader peruses Musa's ground-breaking book. The book is a must read for the students and academicians who are engaged in Islamic criminal law, in addition to policy makers and legislators, who are assigned the task of laying down policy as well as legislative framework for implementation of the criminal law in Muslim polities.