

Adjudicating Family Law in Muslim Courts: A Book Review

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Elisa Giunchi is an Italian professor who teaches History and Institutions of Islamic Countries at the University of Milan. She has worked as a senior research fellow at the Italian Institute for International Political Studies ('ISPI'). The primary focus of her research is South Asia, and in particular, Islamic Law and gender in Pakistan. She has published six books and seven papers on different topics including *Ethnic Strife and Democratization in Pakistan: Some Observations on Concepts, Measurements and the Importance of History; Islamization and Judicial Activism in Pakistan: What Shari'ah?; Democratic Transition and Social Spending: The Case of Pakistan in the 1990s; and Muslim Family Law in the West.*

The book *Adjudicating Family Law in Muslim Courts*, which was originally published in November 2013, is a collection of case studies by various authors from different countries. It is based on their writings on field researches, focused mainly on court documents, interviews, and in some cases, court observations. The book attempts to highlight the implementation of the Muslim Family Law by judges in different countries. It fills the gap in the literature on the practical implementation of laws related to personal status. The author believes that the Islamic laws on marriage and divorce have been accorded more attention than needed, as Western Orientalists consider these laws as discriminatory and oppressive towards women. For Muslim scholars, the family structure and familial ties hold central importance, and women are at the heart of this structure. However, the practical implementation and interpretation of different laws in various Muslim and non-Muslim countries was given little attention by scholars until recently. Giunchi has incorporated case studies from countries with different legal structures to enable the readers to get a holistic idea of how the judges from diverse religious and ethnic backgrounds implement Islamic family laws. Besides, the author also aims to highlight the extent to which the judges in Muslim countries have leeway in interpreting statutes and laws related to personal status, keeping in view the changing circumstances and the traditional Islamic approaches.

The book is divided into nine chapters. The first chapter includes the introduction of the key terms and concepts that are discussed in the book. The next eight chapters include case studies from seven countries, namely, Lebanon, India, Pakistan, Egypt, Morocco, Iran, and Turkey, all of which besides India have a Muslim majority population. Although India has a Hindu majority population, it also has a significant number of Muslims.

The first chapter titled, *From Jurists' Ijtihad to Judicial Neo-Ijtihad: Some Introductory Observations*, is written by Elisa Giunchi herself. While discussing the origins of the Islamic legal doctrines, the author explores the reasons that led to different interpretations of *Shari'a* by various scholars throughout the history of Islamic law. Giunchi also highlights the prevalence of conflicting opinions on the practice of *ijtihad*, and its continuation as an on-going process rather than a static phenomenon. Furthermore, she sheds light on the phenomenon of the modern state and social control to highlight how different states have historically dealt with family law. For example, colonial powers considered the domain of family law irrelevant to their political and economic interests. Similarly, non-

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colonized powers were also reluctant to reform this area of law. The Ottoman Law of Family Rights ('OLFR'), which was introduced in 1917, was the first attempt to introduce a comprehensive code of family law. Giunchi proceeds to discuss the classical family law, its codification as well as practices of courts regarding the implementation of such laws, and the gender implications of judicial activism. Further, she discusses the process of adjudication by the modern day judges who seem to retain an interest in litigation that characterized the traditional *qadis*. The author opines that the major hurdle in the way of achieving gender equality is the local usages of the family law in rural and tribal areas that are more restrictive than the *fiqh*. The author also discusses the different patterns in the application of laws and the challenges that are being faced by the judges and lawmakers due to recent developments, such as internet *fatwas*.

The second chapter titled, *Shari'a Courts and Muslim Family Law in Lebanon*, is based on Morgan Clarke's case study from Lebanon, which is predominantly a Shia country. In Lebanon, Islamic laws concerning personal status are still mostly anchored to OLFR. The study is based on extensive anthropological fieldwork conducted in Beirut during 2003-2004 and 2007-2008, and focuses on courts of first instance and appellate courts. It also concentrates on the *Shari'ah* courts and their implementation of family laws. Clarke mainly discusses the cases of marriages and divorce in Sunni and Shia courts. In his view, for Sunnis as compared to Shias, the process of getting married is more complicated but taking a divorce is easier. Sunni judges usually apply OLFR, while Shia judges usually apply the *Jafari Fiqh*. Clarke finds that OLFR gives more rights to women as compared to the *Jafari Fiqh*. The latter is mostly non-codified, and Clarke thinks this gives a greater leeway to Shia judges while practicing *ijtihad*. Clarke claims that there is an overall lack of recent reforms in the legislation regarding family laws, and thus reference is usually made to the uncodified sources. He concludes by stating that most of the judges in Lebanon see their role as religious professionals or mediators. For most of them, family disputes require the facilitation of *sulh* (reconciliation) more than the intellectual virtuosity in *Hukm* (ruling). For a minority of them, the introduction of progressive interpretation of the *Shara'i* norms would be the best means to secure the Islamic nature of court practices.

The third chapter titled, *The Application of Muslim Personal Law in India: A System of Legal Pluralism in Action*, has been taken from Sylvia Vatuk's book. Vatuk spent several years observing the judicial system of India and the implementation of Muslim Personal Law ('MPL') in the Indian courts. The writer begins by discussing the judicial system of India, maintaining that India has a pluralist legal system with multiple legal codes governing matters related to marriage and family for different religions represented in its population: one for Hindus, one for Muslims, one for Christians, and even Parsis and Jews have their own legal codes. Alternative Dispute Resolution ('ADR') is a prevalent legal practice in India – Muslims in India usually take their personal disputes to *panchayats* or *qadis* in mosques, which according to the writer are highly male-dominated forums where women are not even allowed to present their cases. Vatuk finds MPL to be highly discriminatory towards women, especially the provisions giving the rights of extra-judicial unilateral divorce and polygamy to men. Vatuk has given a number of examples of different statutes such as the Muslim Women Act 1986 and some landmark cases from India that interpreted or implemented MPL, in addition to those cases in which some provisions of MPL were criticized by certain Hindu judges. The case study includes instances relating to divorce, maintenance and polygamy and how judges in higher courts have tried to interpret laws progressively in certain cases. However, the author opines that since judges of the lower courts lack the ability to

understand the relevant precedents, women are still facing grave difficulties in proceedings regarding MPL.

The fourth chapter titled, *Family Law in Pakistan: Using the Secular to Influence the Religious*, is based on Nausheen Ahmed's case study. Ahmed initially discusses the statutes regarding family matters that were applied during the colonial and the post-colonial periods, and how the process of Islamization of various statutes started in Zia-ul-Haq's time. She mainly focuses on the Muslim Family Laws Ordinance 1961 ('MFLO'), and explains how this Ordinance tried to give a relatively liberal interpretation to MPL in Pakistan. In Ahmed's opinion, the Ordinance is tilted towards favoring women to some extent but has not been strictly followed by the courts in Pakistan. Ahmed finds the provisions that give the rights of extra-judicial unilateral divorce and polygamy to men as being repressive towards women and reinforcing their subservient position in the society. Women have to give up the amount of consideration for marriage if they file for *khula*, which is granted when the marriage has irretrievably broken down. She also states that despite the fact that the law regarding the custody of children is tilted towards favoring women, the general bent of the law remains prejudicial to the interests of women. In Ahmed's view, Article 2A of the Constitution of Pakistan 1973, which refers to the preamble stating that sovereignty over the entire universe belongs to Almighty Allah, plays an important role in the interpretation of statutes regarding personal status by judges in Pakistan. Consequently, judges usually take a very conservative approach while handling issues about divorce and maintenance etc. Given this scenario, the author argues that a more liberal interpretation of Islamic family laws is required so that the hardships that women have to face in courts can be diminished.

The next two case studies included in this book are both from Egypt. In the fifth chapter, *The Enforcement of Personal Status Law by Egyptian Courts*, Monika Lindbekk explains the Egyptian laws on personal status and how the Egyptian judges articulate a dual discourse on marriage. On the one hand, marriage is reinforced as a hierarchical institution where man is seen as holding the authoritative position. On the other hand, emphasis is laid on the Western-derived ideal of productive ties as the basis of conjugality. This case study, like the ones discussed above, highlights the laws granting the rights of unilateral divorce and polygamy to men. The writer points out that these laws have proven to be of oppressive nature in the context of women. Women in Egypt have a weaker position as compared to men in the society, and considering the ground realities, it seems that it is quite challenging for them to take their case to a court. This implies that getting decisions in their favor must also be extremely difficult. Besides, woman-initiated dissolution of marriage is frowned upon by judges, as they are usually inclined to interpret *Shari'a* in a manner that validates the authority of men. The amendments in Islamic divorce law in Egypt, known as Suzanne's Laws, made by President Mubarak's wife, were based on a western model. These amendments are considered to be anti-Islamic and a threat to various conservative religious groups. Lastly, the author also discusses different aspects of the marriage contract including its provisions, capacity to enter into it, and dissolution of marriage.

In the sixth chapter, *Courts and the Reform of Personal Status Law in Egypt: Judicial Divorce for Injury and Polygamy*, Nathalie Bernard-Maugiron discusses the amendments made in the Egyptian laws concerning dissolution of marriage. Maugiron gives examples of different cases from the Egyptian Court of Appeals, Court of Cassation and Supreme Constitutional Court while attempting to define the concept of 'injury' that a wife has to show in case of woman-initiated divorce. Legal scholars have defined this concept in different ways, and the meaning changes for people depending on their background and

social class. The author also highlights Article 2 of the Egyptian Constitution, which states ‘... Shariah is the main source of legislation’, and explains its impact on the family laws and their implementation in Egypt. In conclusion, Maugiron opines that Egypt is a patriarchal society where men hold influential position in the family. Women are economically and politically weak as well as dependent on their families, which makes it extremely difficult for them to approach courts.

The last three case studies included in the book are from countries where Islamic family laws have been reformed. Morocco, Iran, and Turkey are the countries which have tried to give a more moderate/liberal interpretation to their family laws. However, even in these three countries, women still face hardships in certain cases involving conservative interpretation of Islamic family laws. Still, women in these countries are generally in a much better position as compared to the other countries that have been discussed so far. The way judges in these countries conduct court proceedings also favors women in most cases.

In the seventh chapter titled, *The Potential Within: Adjudications on Shiqaq (Discord) Divorce by Moroccan Judges*, Fatima Sadiqi discusses the different phases through which reforms were made in Morocco and the importance of the practice of *ijtihad* in the Moroccan courts. Five cases are presented which show that despite the fact that usually court decisions come out in favor of women, the latter have to decline their rights arising out of marriage because of social pressure. The educated urban women in Morocco are quite vocal about their rights and thus try to raise pressing issues such as the need to make and amend laws that do not discriminate against females in the domain of personal law. Judicial *ijtihad* is of great importance and according to Sadiqi, trained judges tend to be more flexible while practicing *ijtihad* and implementing Islamic family law. Sadiqi believes that even though the divine text cannot be changed, we can still strive to interpret it in a way that can lead to a change in the status of women in society, from being subordinate to being equal to men.

In the eighth chapter titled, *Family Law in Post-Revolutionary Iran: Closing the Doors of Ijtihad?*, Anna Vanzan discusses the changes made in family laws in Iran that were modernized during Pahlavi’s period (the right of unilateral divorce was abolished and polygamy was limited by submitting it to judicial approach) and later made conservative following the Islamic Revolution in 1979. Various laws that were enforced after the revolution were highly disparaging towards the status of women in the Iranian society. During the first decade after the revolution, efforts were made by women at different levels to get these laws amended at least to some extent. The women’s rights campaigns in Iran started gaining momentum in the 1990s when various lawyers, activists and journalists started protesting at different levels and demanded amendments in the laws. While some progress was initially seen, there were successive governments of hardliners who saw these campaigns as threats to the preservation of religious values and thus tried to sabotage them through repression and intimidation. There is still an on-going war between women’s rights activists and hardliners in Iran over the issue of amendments in Islamic family laws.

The last chapter of the book is *Islamic Family Law in Secular Turkish Courts* by Ihsan Yilmaz. It is based on the practice of Turkish courts and attempts to show how the Turkish model is different from the models in the rest of the Islamic world in the sense that though the laws have been completely secularized, reverence is still given, especially by judges of the higher courts, to the prevailing religious customs. This balance is seen nowhere else in the Islamic world. The author provides examples of various cases in which the official procedure for getting a marriage registered was circumvented only to perform the *nikkah*,

which was later validated by the Court of Cassation as a marriage contract. Although there are some reported cases of marriages of underage boys and girls and a few cases of polygamy as well, the condition is generally much better than in other Muslim countries. Most importantly, the right of husbands to extra-judicial unilateral divorce stands abolished. Therefore, it may be concluded that Turkey has set the best example for other Muslim countries in maintaining a balance between the secular and religious interpretations of family laws and their implementation, and also in creating a balance between male and female prerogatives and their respective statuses.

In the preface of the book, Elisa Giunchi writes that this book has not been compiled with an aim to provide a grand narrative about the entire Muslim world or to take into account all aspects of court practices. She states that the material included in the book would provide a micro-account of the status of the implementation of family law in various Muslim countries, and would highlight some important aspects of the judicial practices including interpretation of family laws by courts. Building upon this aim, the articles compiled in the book explore various issues that are of primary importance in the practice of family laws. All the articles and case studies included in the book are quite basic and thus even a person who lacks prior knowledge on the subject can easily grasp the arguments that have been presented. The language of the articles is also quite simple, and this simplicity has been maintained even while explaining the various statutes and legal proceedings.

While going through the chapters, the reader gets a strong feeling that Giunchi is primarily concerned about the gender discrimination that is caused by the conservative interpretation of Islamic family laws. All the case studies are focused on the hardships that women have to face in judicial proceedings because of their weaker social and economic position in various Muslim countries. Moreover, all the writers presume that the classical Islamic law implies a status of women that is subordinate to that of men, and its implementation is highly oppressive towards females. The writers seem to have a consensus regarding the oppressive nature of the laws that give the rights of extra-judicial unilateral divorce and polygamy to men. Those countries that have tried to curtail such male prerogatives are seen as the ones having adopted the reformist approach. Besides, the writers consider the recent reforms and amendments in Islamic family laws and flexibility in interpretation by judges as positive steps being taken to elevate the status of women. The book argues for a complete overhaul of the legal systems in Muslim countries that have been derived from the traditional Islamic law, and proposes some reforms to assist in this endeavor.

Though Giunchi and other authors have skillfully handled the issue of discrimination of women in the context of the Islamic laws, they leave a definite vacuum when it comes to the narratives of the traditional Islamic scholars. Giunchi should have added some articles by legal scholars who favor the traditional or conservative interpretations of Islamic family laws so that the readers could have obtained a broad spectrum of approaches. This would have left a more balanced impression on the mind of the readers, and would have helped them in forming their own opinions on the subject. Although the writers included in the book have given examples of different cases involving conservative interpretations of the Islamic laws, almost all of them have expressed contempt for such interpretations in their explanations. It is generally considered a good practice to include contradictory opinions and to refute those by using relevant authorities while attempting to prove one's stance, but this has not been taken care of in the book.

Out of all the countries mentioned above, I can most effectively discuss family laws and their implementation in my own country, Pakistan. The ground realities appear to be somewhat different than what has been portrayed in the book in the case study regarding Islamic family law in Pakistan. In the case study, Nausheen Ahmed has missed out an important right of *talaq-e-tafwid*, which may be given to women under column 18 of the *nikkahnama*. If the husband has given this right to his wife, the latter can divorce herself by simply sending a notice to the concerned Union Council, and that too without relinquishing her dower or going to court. Besides, Ahmed stated that women have to relinquish their whole dower if they choose to go for *khula*. The current position in Pakistan is quite different, as in many judgments the superior courts have assumed the authority to reduce the amount of dower that is to be returned to a husband. In addition, the amendment introduced by the Punjab legislature in 2015 in Section 10 of the Family Courts Act 1964 also allows partial return of dower in case of *khula*.

In order to protect the interests of women in Pakistan, superior courts have liberally interpreted Islamic family law along with the provisions of the Dissolution of Muslim Marriages Act 1939 ('DMMA') and the MFLO. The courts have expanded the definition of cruelty under the DMMA to include mental torture as well, and also made evidence produced by the relatives of the wife admissible. Besides, the courts have usually refused the return of dower in cases of *khula* where the dissolution was sought due to some fault of the husband. In recent cases, the courts have also held that wife's life spent with her husband has economic value and the duration of marriage should also be taken into account while deciding the issue of the return of dower in cases of *khula*. For instance, the Peshawar High Court has delivered various judgments in favor of the wives in cases involving the return of dower. In *Abdul Rashid v Shahid Parveen*, the Court held that the life spent by a wife with her husband could be deemed consideration for *khula*.¹ In *Nasir v Rubina*, the Court held that the period of wedlock, the birth of children, or the second marriage of the husband could preclude the return of dower in case of *khula*.² The trend in the case law shows that in the near future, the courts will attach even greater economic value to the services rendered by a wife for her husband. This will further help in reducing the financial burden of the dissolution of marriage on wives.

The overall picture that one gets after reading this book is not robust enough for guiding reforms. The book is mostly theoretical in nature and primarily revolves around the status of women being subordinate to that of men under Islamic law, and the ways in which various Muslim countries have interpreted and implemented Islamic family law in the past and continue to do so in the present. However, the book certainly highlights the need for progressive reforms in interpreting Islamic family laws and the training of judges in this regard.

¹ 2013 YLR 2616 (Peshawar).

² 2012 MLD 1576 (Peshawar).

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