

Muslim Family Law in Western Courts

Elisa Giunchi (Editor)

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Muslim Family Law in Western Courts, edited by Elisa Giunchi, explores the interesting collision of local and Islamic family law in Western jurisdictions including Canada, Switzerland, Norway, Spain, Britain, Australia and the United States. This text clearly identifies a pertinent issue in current Western legal systems – that movement of people must also mean movement of religion and family law. The authors demonstrate that on many levels local courts in the West must reject Islamic law on the basis that it conflicts with the interests of *ordre public*.¹ Through the use of case studies, the text ultimately shows that integration of Islamic law falls far short of establishing legal pluralism in the West and instead is generally only recognised where some equivalency can be found in local law.

The text consists of nine edited chapters mainly detailing how each of these Western jurisdictions considers aspects of Islamic family law and the domestic contexts which influence a state's law.

All chapters exhibit a sense of balance in arguments, exemplifying the authors' cultural and legal awareness of these issues. This is most evident in Giunchi's preface and introductory chapter. Giunchi provides a broad overview of the religious, gender and legal issues facing integration of Islamic law in the West. Discussion of topical issues such as gender parity in Islamic law and the plurality of Islamic legal sources immediately signposts the text as both academically and socially important.

An underlying theme of the text is that integration of Muslim family law in Western nations is highly dependent on the individual nation's social and political agenda. It is influenced by such issues as migrant population, bilateral agreements² and domestic courts understanding of Islamic law. For example, Ana Quiñones Escámes explains that Spain frequently considers Islamic law in the form of the *Moroccan Family Code* as the country has a large population of Moroccan migrants.

¹ Fundamental principles of a State's legal system which prevail over foreign law.

² The text provides the examples of bilateral agreements between Switzerland and Iran (*Convention d'établissement entre la Confédération suisse et l'Empire de Perse du 25 avril 1934*) and Norway and Pakistan which address the application of family law principles to foreign nationals (though Jansen Fredriksen notes the lack of consultation which has occurred between Norway and Pakistan).

Analyses of the Canadian, American and Australian systems follow discussions of European law and provide intercontinental comparisons. However, given family law in traditional common law countries is codified,³ the chapters do not provide a great level of comparison in terms of how civil and common law jurisdictions legally manage disintegration of Muslim relationships. For example, recognition of overseas marriage and divorce in Australia is primarily guided section 104(5) of the *Family Law Act 1975* (Cth) rather than by common law principles developed in *Indyka v Indyka*.⁴

Instead, social issues relating to integration provide better contrast. Both authors of the American and Australian chapters begin with a discussion of the perceived 'threats' Islamic law poses to society, an issue not addressed in the European chapters which suggests a difference in public attitude. Further, Anna Black highlights that in Australia Muslim culture is hardly homogenous, consisting of communities with varying traditions which impose further barriers in understanding the effect of Muslim law in Australia.

Abed Awad's chapter on Muslim law in the United States and Black's illustration of Australian law can be further compared to Pascale Fournier's discussion of Islamic law in Canada. Fournier's chapter draws upon research with a focus on gender issues associated with Islamic law in Canada. Direct quotes from participants of the study injects human experience into the text and gives insight into modern Muslim relationships. Refreshingly, Fournier not only articulates the plight of women before Islamic law but also reveals how they, like men, 'jurisdiction shop' in order to achieve a more desirable outcome. The chapter convincingly argues that Muslim women face injustices such as limited access to divorce and inherent institutional bias towards men in granting divorce⁵ by providing a comparison of each gender's struggles within these conflicting legal systems. This balanced analysis makes this chapter particularly effective in highlighting the underlying gender issues associated with Islamic law in Western jurisdictions.

Despite exploring a wide range of Western legal systems, the text omits to provide a complete picture of issues relating to Islamic family law. Each chapter focuses on marriage and divorce but, for the most part, avoids child custody issues. Children's issues are a major division of

³ See, eg, *Family Law Act 1975* (Cth) and *Family Law Act 1996* (UK).

⁴ (1969) 1 AC 33. Upheld in the Australian cases of *Nicholson v Nicholson* (1971) 17 FLR 47 and *Dornom v Dornom* (1984) FLC 91-556. These cases supported a test for recognising foreign proclamations based on whether there was a 'real and substantial connection' with domestic law.

⁵ Fournier argues this exists both in institutional practices such as *talaq* divorces as well as attitudes of leaders of the Muslim faith.

family law and are often considered alongside divorce cases.⁶ Giunchi foreshadows child custody issues as an example of gender imbalance, however these issues are only partially discussed in Black and Awad's separate chapters.

Muslim Family Law is a highly topical and engaging text. The numerous Western case studies outlined by authors of *Muslim Family Law* provides clear comparisons and demonstrates differing approaches taken by courts in integrating (or not integrating) Islamic family law. The strength of this text lies in its balanced analysis of sensitive issues such as treatment of women under Islamic law, societal attitudes towards integration and the notion of religion providing the framework for law. It is a valuable resource for anyone seeking to engage in these contemporary legal issues whether they are looking for an introduction to the topic or a more in-depth analysis.

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⁶Australian Law Reform Commission, *A statistical picture of Australia's children* <<http://www.alrc.gov.au/publications/2-statistical-picture-australias-children/children-and-family-court>>.

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