Review Article

An Orientalist Perspective of Islamic Law: from Fossilization to Legal Transplant

ISLAMIC JURISPRUDENCE IN THE CLASSICAL ERA. By Norman Calder, Cambridge: Cambridge University Press, 2010. Pp 233. ISBN: 978052111 0809 HB.

WOMEN IN CLASSICAL ISLAMIC LAW: A SURVEY OF THE SOURCES. By Susan A. Spectorsky, 2010. Leiden: Brill. Pp. 223. ISBN: 97890041743 51 HB.

AN INTRODUCTION TO ISLAMIC LAW. By Wael B.Hallaq, Cambridge: Cambridge University Press, 2009. Pp. 200. ISBN: 9780521678735.

THE LONG DIVERGENCE: HOW ISLAMIC LAW HELD BACK THE MIDDLE EAST. By Timur Kuran. Woodstock: Princeton University Press, 2011. Pp 405. ISBN 9780691147567 HB.

MUSLIM MARRIAGE IN WESTERN COURTS. By Pascale Fournier, Surrey: Ashgate. 2010. Pp. 206. ISBN: 9781409404415 HB.

Since the beginning of Orientalism as a discipline in the 17th century until today, research methodology on Islamic law has witnessed a paradigmatic shift. The derogatory and colonialist tone of pioneers such as Goldziher, Schacht and Watt has been replaced by academic objectivity by scholars such as Nadia Abbott and Wael Hallaq. The latter reflects also a trend within American rather than European scholarship.

Professor Muhammad Hamidullah drew attention to the fact that the epistemologies of most contemporary legal systems have their roots in two main systems: the Roman law, which took shape mainly under Justinian and the Islamic law. Most legal systems in the West are offshoots of the Roman legal worldview now called secularism. On the other hand most Eastern legal systems were, until the last two centuries, premised on Islamic law. With the advent of Western colonialism in Muslims lands, Islamic law was overshadowed by secular law. The two legal systems, Roman law and Islamic law, evolved diagonally at

opposite directions because their sources are different, their legal reasoning is at variance, and their principles of jurisprudence are also poles apart. This is why it is difficult to come up with converging answers to both laws when one adopts a purely secular research methodology in preference over religious law.

It is this secularist analysis which is becoming today of great concern to Islamic law. Factors such as colonization, globalization, state building, Western economic models, etc, are exogenous forces that are moulding different nuances to the interpretation of Islamic law. Orientalists have analysed the different contours of Islamic law based on different research approaches which consequently led to different results. Their researches are often converted into governmental policies, and for this reason their writings require attention. There are two aspects that are brought under sharp focus in their writings. One group of Orientalists, which includes Calder, argues that Islamic law was resistant to reality and social changes during the classical epoch. The second group, which includes Hallaq, argues that Islamic law evolved and is still evolving, in an exogenous rather than in an endogenous fashion, due to the westernization process it underwent and is still undergoing. Islamic law is therefore changing its colour and a legal transplant is taking place.

Islamic law has two categories of rules: one is immutable and the other mutable. This ought to make it easy and quite clear as to what rules can be amended and what rules cannot be. The process of legislating is quite intricate in Islam and for this reason one needs to appreciate the role of *ijtihād* in Islamic law as an invigorating catalyst for Islamic legal revivalism. There have been two main types of revivalism of Islamic law that took place in Muslim lands after a period of legal sluggishness. The first took place after the attack of the Mongols on Baghdad (1258 CE), the seat of the Muslim civilization. This episode saw the emergence of revivalists such as Ibn Taymiyyah and Shāh Walīullāh al-Dihlawī. The other one was in the post-decolonization period after World War II, which saw the emergence of Islamic groups such as the Muslim Brotherhood and the *Jamā'at-i-Islāmī*. These groups do not really have an epicentre, but are rather scattered in various jurisdictions and are relatively difficult to be followed due to their intensive intertwining of Islamic law and politics. There are some differences between these two categories of revivalist movements. The first difference relates to the localization of the first category, and due to this it did not have the momentum to spread in various jurisdictions while the second category tends to spread its ideology in various jurisdictions. The second difference is that the first group of revivalist movements was led mainly by universally acclaimed major scholars, while the second revivalist movement was spearheaded mainly by professionals who studied Islam but did not display the legal acumen of the former category.

Both waves of revivalism aimed at reactivating Islamic law. They were not oblivious to *ijtihād* but were also conscious of the prophetic tradition that at the end of every century there will be a *mujaddid* (a renewer of the religion). They understood that Islamic law cannot be fundamentally changed by *ijtihād*. Some aspects of Islam are immutable whereas some are mutable. The need to preserve Islamic law was thus a driving force for revivalism.

Whether or not Muslims have been abiding by the same rules for centuries without being sensitive to reality is a common theme in the five books under review but debated differently by their authors. Calder and Spectorsky are of the opinion that Islamic law is fossilized. In their view, what was witnessed in the classical era is that one scholar would write a condensed version of Islamic law in his *mukhtaṣar* and later himself or other scholars would comment extensively on the same book in a work which ran into volumes. These are called *mabsūṭs*. The same genre of legal literature would be reproduced from different angles pertaining to the same subject matter by Muslim scholars over the centuries. Other Orientalists take an opposite position. Their research reveals that Islamic law has evolved and has also undergone a legal mutation under secularism when the concept of State law gained currency among Muslims beginning from the 17th century.

To understand this legal space being created in Western literature one has to understand that the sources and mechanisms of the development of Islamic law are different from those of secular law, as already mentioned. Islamic law has been developed through a process of *ijtihād* whereby the *mujtahid al-muṭlaq* (a *Mujtahid* not bound by the legal opinions of any other scholar or school) formulated specific juristic tools for textual interpretation. The purpose of *ijtihād* is primarily to 'discover the intention of the Lawgiver (*al-Shāri'*)'. In doing so there is an important principle of *ijtihād* which balances the debate relating to "fossilization" and "legal transplant" that we are talking about. The principle is that if the text is *qaṭ'ī al-thubūt* and *qaṭ'ī al-dalālah* there is hardly any scope for *ijtihād* as the law then is clear-cut and changing the law is not possible as such. But there are cases where the text is *qaṭ'ī al-thubūt* while being *ẓannī al-dalālah* and this opens up a small space for *ijtihād*. A legal text can also be *ẓannī al-thubūt* and *ẓannī al-dalālah* as in the case of *khabar al-wāḥid* or *ẓannī al-thubūt* and *qaṭ'ī al-dalālah* as in cases of well established practices. All these different classifications are possible when interpreting a text and this explains the emergence of the schools of law.

However, one must refer to the important historical contextualization of the evolution of Islamic law which is that whatever the *mujtahid al-muṭlaq* develops needs further consolidation. This was achieved by the development of many disciplines, such as *uṣūl al-fiqh*, in order to consolidate and formalize

the laws of a given *madhhab*. Different categories of *mujtahids* emerged to realize this Herculean task during the classical era and even later. ʿAbd al-Ḥayy al-Lukhnawī identified the various categories of *mujtahids* and classified them in seven groups. Their books were at times very condensed (*mukhtaṣar*) and at times voluminous (*mabsūṭ*). Some of those books are scrutinized by the authors of the books under review.

Over the centuries the *mujtahid*s devoted their lives to clarifying the finer issues of the *aḥkām al-khamsah*. This legal process, or rearranging *fiqh* books, brings one to an important debate by the Orientalists. The Orientalists claim that there are too many variances in juristic opinions among the *madhāhib*. It is submitted that from a simple arithmetic point of view most rulings are met with concurrence in the different *madhāhib*. The great Muslim scholar Zāhid al-Kawtharī has aptly pointed out that in approximately 75% of the cases there is consensus on the rulings; only in about 25% of the cases there is difference of opinion among the different Muslim legal schools. What is viewed as differences can only fall in the *al-aḥkām al-khamsah*, i.e. the "categorization" of the rulings as to whether they are *farḍ* (obligatory), *mustaḥab* (praiseworthy), *mubāḥ* (legally indifferent), *makrūh* (blameworthy) or *ḥarām* (unlawful;). Difference in the categorization of a ruling does not amount to its negation. If the Ḥanafīs, for example, state that there are four mandatory acts in ablution, this does not mean they deny the mandatory acts stipulated by the Shāfiʿīs who consider some of the acts of ablution, such as the intention, as more important. The Ḥanafīs would say that intention in ablution is a *sunnah* while the Shāfiʿīs would claim that it is *farḍ*, an obligation. The fact remains that "intention" is still part of the ritual of ablution and the difference between the two legal schools cannot really be construed as a major difference of opinion (*Ikhtilāf*). It is rather a question of prioritization which is based on their methodology of deducting legal rulings (*istinbāṭ*).

The failure to understand these fine jurisprudential points leads often to the confusion that permeates the writings of many western authors on Islamic law. They seem to have difficulty in acknowledging the strong level of the principles of jurisprudence that underpin Islamic law unlike theology with which they are mostly accustomed. Most western countries are products of medieval Christianity; and hence they have no real legal system which allows them to understand religious law. There is also a further essential point that one must grasp. Historically, Western legal systems tried to blend Roman law with Christian dogma and this allowed for the development of ecclesiastical law. But ultimately the two systems divorced in order to give to Caesar what was his and to God what was His. In Islam, religion and politics do not operate

independently of each other. It is difficult to secularize Islamic law, though attempts have been made since the colonization of India in 1772.

This failure to appreciate the way Islamic law operates and develops, coupled with the fact that there is limited scope for state legislation, has driven some Orientalists and their Muslim students to label it as the "fossilization" of Islamic law. These Orientalists could not detect any evolution in the Muslim legal system because the classical jurists endeavoured to formalize the legal system thematically. This in turn led to what some researchers in Islamic law called "stagnation". One of the special characteristics of Islamic law is that it is not legislated by a parliament but by the *mujtahids*. Its other characteristic is that its legislative process is different from that of the secular system. Many Orientalists concede that Islamic law does not follow the black-letter research methodology used for secular law. In Islamic law, it is the socio-legal methodology which is used. Islamic law takes into account *'urf* (social norms and customs), *maslaḥah* (public interest), and many other legal technical devices before the rulings are formulated. In the absence of such religious legal sophistication, a vacuum was created in the West which made it difficult to derive religious or moral laws. As a solution, the West resorted to ethics as a separate discipline to resolve, preserve or develop their moral values. This was a man-made approach which, if need be, would later be followed by legislation.

The Orientalists differ regarding the factors that have influenced the alleged "stagnation" of Islamic law. Depending on their different research methodologies, they have reached contradictory results. Wael Hallaq, for instance, considers colonization as a factor, while Calvin favours the argument that the scholars were oblivious to reality, whereas Kuran rebuts this argument and claims that Islamic law itself lacks the inherent capacity to expand its horizon and is thus idiosyncratically deficient. Fournier maintains that there is room for the accommodation of Islamic law in modern society through legal transplant. Here, a brief analysis of these authors' views on Islamic law is in order.

Norman Calder's interest in Islamic law has made him a towering figure among the 20th century Orientalists. The present book, *Islamic jurisprudence in the Classical Era*, is an edited version of his latest unpublished works. In this masterpiece, he has cogently applied his mastery of the "literary critical approach" to review four different genres of juristic literature. The reviews are firstly a diachronic assessment of the epistemology of *fiqh.* Secondly, it is thematic in that Calder has tried to string out a hypothesis that Islamic law was fossilized during the classical era. He argues that Islamic law tended to revolve around few *mukhtaṣars* and *mabsūṭs*, coupled with some stylistic textual refinements and adjustments over the centuries and often entrenched in a

given *madhhab*. He depicts a picture of busy classical scholars weaving the same pattern of literature over the centuries without much consideration of reality. They laboured to refine the existing texts and improved upon their style and language. In order to prove his point, Calder studied the law of adultery under the Ḥanafī school, using mainly the works of Qudūrī, Sarakhsī, Karsānī and Mawṣilī. He argues that many debated issues were not linked to reality such as the question of bestiality which took an unnecessary space in the books of *fiqh*. But it seems that this hypothesis is indefensible because had he read Dr Alfred Kinsey's Reports (as well as many other reports), he would have realised that the issues raised by Muslim scholars are genuine as zoophilia is a phenomenon that exists in the West even in the present day. So if Muslim scholars have dealt with this question it does not imply that they had endorsed zoophilia. Rather, what they were trying to do was to give an Islamic ruling on it, i.e. whether or not it falls under fornication.

Calder's second chapter deals with Nawawī's *al-Majmū'*, which is of the *mabsūṭ* genre. *Al-Majmū'* is an encyclopaedic commentary of another classical work, the *Muhadhdhab* of al-Shirāzī. Calder renders a textual analysis of Nawawī's approach to *Zakāt* from his various books. Nawawī also wrote *Rawḍah* and *Minhāj al-Ṭālibīn* which are *mukhtaṣarāt*, i.e. reproductions of existing legal texts. His commentary on *Ṣaḥīḥ* Muslim is also analysed. Calder reiterates that 'the fundamental character of school literature was conservative, fossilized.' as Nawawī's literature was to consolidate Shāfi'ī *fiqh*.

Calder's third chapter is an interesting analysis of al-Subkī's *fatāwā* and, through a reading of these *fatāwā*, the latter's vision of the categories of Muslim scholars who mould Islamic law: the *Qāḍī,* the mufti and the jurist. Calder explains how each one of these has a well-defined jurisdiction in the legal process. The *Qāḍī*'s judgement is binding as it is supported by evidences, while the mufti's fatwa is not, because it is circumstantial and linked to a specific scenario relating to the *mustaftī's* question. The mufti encapsulates all the legal particularities found within the generalities of law mastered by a jurist in any given *madhhab*. This approach is quite interesting as it shows that the internal inclination to revert back to the mother *madhhab* is another way of fossilization. Calder also discusses the tension between the secular legal practice and religious authority, a point also raised by Hallaq.

Calder's fourth chapter deals with the social function of fatwa and its typology. Here, it is argued that the distinctive qualities of an individual fatwa do not account for its social function. The process of giving and receiving fatwa was also symbolic, it reflected a communal expression of participation in divine revelation. This process of issuing fatwa was also linked to an existing legal hierarchy within any given *madhhab*.

Spectorsky follows in the footsteps of Calder by focusing on a more specific genre of Islamic law literature as the title of her book indicates. Her work is a good presentation in English of many important Islamic legal rulings affecting Muslim women's married life. It is a collation of the *ikhtilāfāt* among the various schools and how patriarchal interpretations dominated the scene. The points she raises are not new to students of Islamic law as there are whole books devoted to this type of topics like *al-Mughnī* by Ibn Qudāmah and *al-Fiqh ʿalā al-Madhāhib al-Arbaʿah*, etc. However Spectorsky's survey of the classical books provides a framework for those who wish to delve further into the legal aspects of women's lives. She echoes Calder's hypothesis that these classical books are built on the work of the founders of the main Muslim legal schools. She also stipulates that modern *fiqh* literature is an extension of the *fiqh* literature of the past. Moreover, she accepts the legal sources without giving much attention to the reliability of the *isnād*, chains of transmission, which is unacceptable from the Islamic standpoint.

Spectorsky's book is however well-structured and this helps one to follow her line of argument. Basically, she contends that there are variances in the legal opinions of the different Muslim legal schools, and as such women should not adhere to one particular patriarchal interpretation! Both works by Calder and Spectrosky are based on literary analysis without taking into account the wider picture of the mechanisms of Islamic law.

Hallaq's book, on the other hand, opposes Calder's and Spectorsky's hypothesis of the fossilization of Islamic law. Using the jargon of Calder and Spectrosky, Hallaq's present book can be considered a *mukhtaṣar* of his other *mabsūṭ*: *Shariʿah Theory, Practice, Transformation.* Hallaq argues that there is a well-structured framework for the development of Islamic law. The four main architects responsible for the design of Islamic law were: the Author-Jurist, the *Qāḍī*, the law Professor and the Mufti, each one of whom had a historical role to play in enhancing the corpus of Islamic law.

Hallaq formulates a theory which explains the evolution of Islamic law, what it was and what it is now. His main contention is that there was a political drive, especially during the Mamluk era, to win over the ulema so that they side with the rulers. This was replicated on a wider scale by the Ottomans who opted to turn the legislation of Islamic law into an étatism (a word of French origin, meaning that the state has sole sovereignty to legislate), i.e. instead of the ulema having authority to formulate the Islamic law, the state would claim back this authority. This shift was important and has been analysed by other scholars as well, such as Noah Feldman. In the past, the ulema had their own independent responsibility of developing the law, while

the state had difficulty in extending its authority over a vast empire. Then, the ulema took the lead and the Caliphs had to follow them. The state had to submit to Islamic law as developed by these ulema who wore the mantle of legal authority. A corpus of law was therefore developed. The schools of law were well established and the *Qaḍīs* and muftis, being themselves products of their society which had its own ethos, could refer to this corpus of law which was in the form of legal manuals. Later the ruling elite realised that they have to ensnare the ulema so that they could rule over the people, for this was what an Islamic empire should do after all! They established and sponsored *madrasahs* and provided guaranteed job opportunities for their graduates. They exploited the "Study Circle" structure whereby the teacher would be surrounded by students, who stayed with him for a period of time to study. When a student studied under a teacher for some years, he would get an *ijāzah* (authorization) to teach.

Such reasoning by Hallaq is not palatable because the submission of the Caliphs to Islamic law was not a later development. When analysing the biographies of Muslim caliphs such as Abū Bakr, ʿUmar, Muʿāwiyah, etc, it is clear that they all asked for the congregation, from the pulpit, to guide them in case they run the state against the precepts of the *Sharīʿah*. So it is not that the later ulema devised this system, but rather the State has to submit to the precepts and rulings of Islamic law as this law itself stipulates this. Such a concept may not be acceptable in the contemporary political process. The need to change this line of thinking started with colonization whereby the state, rather than the individuals, had to legislate. So Britain was the first country to entext Islamic law in India in 1772 under the Hastings Plan and because of this Islamic law lost its flexibility. Hallaq argues that that Islamic law is not fossilized, and has never been fossilized. During adjudication, the *Qāḍī* was not bound to one Act of Parliament but could surf through different legal opinions (*furūʿ al-fiqh*) and then would apply the most appropriate legal ruling. With the codification of Islamic law, though this brings in some legal certainty, the disadvantage is that it takes away the judge's freedom and also introduces some rigidity in the law. This process of entexting law was followed by the Ottomans who became the first Muslim government to radically change the way in which Islamic law developed during the formative and classical eras by subjecting it to étatism. They played with the "Circle of Justice" to develop their *Qānūn*. They codified Islamic law based on the Swiss and French systems. By codifying Islamic law, the role of the ulema was no longer needed and the judges could do their job independently, as Noah Feldman argues in his article "Why Shariah?"

With the advent of colonization and the capitulation of the "sick man of Europe", Islamic law became a prey to legal reform. In the beginning a few stratagem were used: *ḥiyal*, *takhayyur,* etc. This paved the way, consequently, for futher changes in the law. Nowadays the very same stratagems are being used to formulate a legal transplant, i.e. incorporating Islamic law within secular law. One can understand that such political manoeuvring took place during the Mamluk period because of the infiltration of the rulers in the Study Circle. However, there are many instances which tend to discredit this hypothesis. Al-Ghazālī, for instance, was neither partisan to it nor were his teachers. We also have the case of Ibn Ḥajar al-ʿAsqalānī and many other scholars of repute. However it was a different phenomenon altogether with the Ottomans who succeeded to a great extent in suppressing the opposition of the ulema by establishing the *Mejelle* and *Qānūn*. Given that the law was codified, one can appreciate the view of Noah Feldman which suggests that by this very act the ulema's veto was undermined. This is why there is now a major shift in Islamic law in its legislative process. In the past, individual ulema were behind the stipulation of legal rulings and the state had to submit to their stipulation. But with the state-building scenario, in the post-decolonization period, legislation is the means to get to *Sharīʿah.* This is why people and movements are trying to gain power so that they can implement the *Sharīʿah*.

This continuum in legislation is a new phenomenon which needs to be debated. Mohammad Hashim Kamali, for instance, recognizes the need for a body of *Sharīʿah* scholars to exercise *ijtihād* but independently of the state, even though they have to be initially appointed by the state. Nyazee calls for the general theory of law advocated by Ronald Dworkins for the legislative process. These views favour adopting a legal transplant from the western legislative process, originally initiated by the British and followed by the Ottomans in 1823 through the *Tanẓīmāt*. The question, though, is how far can Islamic law go by vacillating between individualism or *madhāhib* eclecticism and nationalism? This is because nationalism or state building has also its own problems. Other questions which deserve to be answered are: is Islamic Law heading towards a "cosmopolitan *madhhab*"? Or is the legal transplant stronger? Does the Muslim state derive Islamic law from within the existing legal schools, instead of adhering to one *madhhab* or does it borrow from secular law to rebuild the state, which in turn is mandated to legislate? These are real tricky questions which require satisfactory answers.

Hallaq argues that colonization was a stumbling block in the way of the development of legal thought in the Muslim world. In fact, Habibul Haq Nadvi argues that not only colonialism was a stumbling block in the way of

the development of Islamic law but the Crusades, which lasted for nearly two centuries, also affected this development. But the counter-argument is that if this was the case, why did the West evolve while the Muslim world failed to do so when the fight was on both sides?

The suggested answer to the above question is postulated by Timur Kuran in his book *The Long Divergence: How Islamic Law Held Back the Middle East.* His main hypothesis is that Islamic law was not appropriately developed by the ulema to accommodate the financial and legal changes needed to match the Western economic, institutional, educational and military advancements. He cites four areas of Islamic law which, he argues, prevented the economic expansion in the Middle East from staying at the forefront. First, there is the failure in developing the concept of the legal person or limited liability companies. When Europe expanded it needed capital. But with the existing partnership law, it would have not been able to expand due to the risk exposure of the partners; whereas an expansionist economy needed a colossal amount of money to attain its objectives. And so the concept of limited liability was conceived to facilitate this process. In the Middle East they got stuck with the concept of *Muḍārabah* which is not adequate for meeting financial challenges. The second area of Islamic law he attacks is the law of inheritance whereby the wealth gets disjointed according to the Islamic law of inheritance, and thus the element of perpetuity which helps corporations carry on in their work could not be achieved. The third element is the lack of legal creativity in creating institutional bedrocks for economic development, such as banks and other institutions which are needed for boosting the economy. The fourth is the multi-million dollars worth of assets locked in *awqāf*, and which could not be financially re-engineered for economic development due to the law of *waqf* preventing such a move.

Kuran bases his argument on some statistics and published literature, which to some extent do have some merits from the point of view of economics. However, after the recent credit crunch, his argument can be discredited because the same assets, banks, limited liability, etc, which helped the Western world to advance, have now brought it to an economic bankruptcy. The limited liability company legal concept for instance is protecting the bankers while perpetuity is not expected from many multinational companies. In fact it can be argued that the same Islamic law, which is being criticized, has protected Islamic banks from the contagious effect of the credit crunch. Some legal factors might have contributed to helping some Western countries to expand but why was this not the case for all western countries? Were the renaissance and enlightenment not for all? Why did some states, such as the PIGGS states,

fail? Kuran should have compared like with like. Islamic law is versatile but *ijtihād* has its own limits. An economic transplant does not necessarily imply a legal mutation. It would seem that Kuran wants Islamic law to be changed so that there is an economic take off in the Middle East. But, as mentioned earlier, there is scope for *ijtihād* in Islam but the limits of this *ijtihād* should be observed. Economic development is not the sole factor to be considered. Factors such as corruption, drop in education level, colonization, etc, do also tend to explain the downfall of the Middle East. Ibn Khaldūn, among others, has elaborated on the causes for the fall of civilizations. Of all the causes he cites for the downfall of civilizations, law is not one of them. Likewise, the law of inheritance is immutable due to its *qaṭ'ī al-thubūt* and *qaṭ'ī al-dalālah*. This is a fundamental principle of *ijtihād*. So how can anyone expect Muslim scholars to change this law?

With regard to the lack of institutional evolution, it is true that a civilization cannot be built without a necessary economic, military and political infrastructure. The Muslims were slow in developing these institutions. But was this due to Islamic law *per se* or to other factors? The empirical evidence does not entirely endorse Kuran's argument that Islamic law is responsible for the downfall of the Middle East. Kuran seems to be trapped in the same argument of the fossilization of Islamic law. In his recent article, "Is the Shari'ah the Culprit?" the Turkish academician Murat Çizakça has ably refuted the claim that Islamic law was behind the lack of development in the Middle East.

However, Kuran's idea that the Middle East and other Muslim countries started developing after there was an economic transplant which they borrowed from the West makes sense. Economic transplant can only be optimized if there is a parallel legal transplant in order to accommodate various economic demands. This legal transplant cannot be confined to the economic sphere alone, especially when approximately 40% of Muslims are living in non-Muslim states. This brings into play another category of legal transplant.

There are three areas of law that have facilitated the hearing of Islamic litigation in Western courts: 1) a new human rights paradigm; 2) democracy which created a new political ethos and freedom; and 3) constitutionalism which provided the concept of the rule of law in a more structured way. Muslims are now benefiting from these legal frameworks to claim their Islamic rights. The challenge for secular courts is that they have to entertain a non-jurisdictional law within a jurisdictional law. There is no structured precedence in history for this scenario. The courts look at Islamic law based on two main criteria: one is their own legal space and the second is the way Muslim litigants present their cases.

Fournier has brilliantly analysed these issues by focusing on *Mahr* in four Western courts. Her book *Muslim Marriage in Western Courts* is a pioneering work in this field and has a lot to offer to students and researchers of comparative law. Very insightfully, she identifies three approaches adopted by the courts in USA, Germany, France and Canada (all four being constitutional states), in adjudicating on the issue of *Mahr*: 1) the Liberal-Legal Pluralist approach (LLPA); 2) The Liberal-Formal Equality Approach (LFEA); and the Liberal-Substantive Equality Approach (LSEA). All three discourses fall within a wider spectrum of liberalism because they all share the same commitment to individual autonomy and freedom. LLPA seems to take account of race while LSEA takes account of gender. Fournier argues that *Mahr* has been the subject of competing aesthetic and political representations, from a form of religious family affiliation (LLPA) to a space of mere secular contract (LFEA) and, finally, to the projection of a fairness symbol of gender (LSEA).

Western culture developed its legal framework in an atmosphere of democracy, and it is trying to emulate what Islamic courts did centuries ago, i.e. to give minorities their own legal space within the arena of personal law. Any student of Islamic law will realise that in an Islamic court, religious groups are judged according to their own religious laws in matters pertaining to personal law, such as business affairs and in matrimonial litigation. The Muslim *Qāḍī* would adjudicate on these litigations based on the religious law of the minority groups. Now given that a great number of Muslims find themselves as minorities in secular courts in the West, how is Western law dealing with this issue of judging a non-jurisdictional law within a jurisdictional law? Pascale Fournier's work traces this evolution in these four constitutional states which have different legal systems. This is an important development because in the past the "doctrine of entanglement" did not allow a secular judge to rule in a religious matter. Fournier asserts that there are some common denominators underlying the three legal doctrines, such as judges are independent and protect legal doctrines by discarding ideologies, and each legal doctrine can predict the outcome of *Mahr*.

The point is that a space is being created in secular courts to accommodate Islamic law but from a Western legal perspective. This is aptly elaborated from case laws in Islamic finance where British courts advised that they will accommodate the Islamic law of contract if it is well spelled out by applying the common law principles of contract. Beximco Pharmaceuticals (2004) and Symphony Gem (2002) case law is another example in Islamic finance. This legal transplant is bourgeoning in secular courts but to what extent will Muslims accommodate these if their immutable laws are changed? What will happen, for instance, if *Ṭalāq*, which in Islam is the husband's sole right, is rejected on the

basis of unfair discrimination based on gender inequality using the "Liberal-Formal Equality Approach". This is the kind of challenge and dilemma that Muslims will have to consider when balancing the issue of legal transplant with that of the "fossilization" of immutable rulings.

Markfield Institute of Higher Education, UK **Faizal Manjoo**