

## Muslim Family Law: a Source Book, by Keith Hodkinson

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**MUSLIM FAMILY LAW: A SOURCE BOOK.** By Keith Hodkinson. London, England: Croom, Helm Publishers, 1984, 401 pp., \$25.00.

Keith Hodkinson's *Muslim Family Law: A Source Book* focuses on the application of Muslim family law in India and Pakistan. Hodkinson's basic thesis is that Muslim family law in the subcontinent differs substantially from "pure" Muslim law, primarily as a result of Britain's colonization of this region. Hodkinson states in his introduction that "it is the uniqueness of the law of Islam in the subcontinent that makes it worthy of study in its own right and not merely as a footnote to a study of the classical law in the Middle East." With the creation of India and Pakistan in 1947, the application of Muslim family law has in turn been influenced by the different paths these two countries have chosen to take. *Muslim Family Law: A Source Book* thus deals with three interrelated aspects: 1) pure or classical Muslim law; 2) the influence of the British legal and administrative system on that law; and 3) the application of this "Anglo-Muslim" legal hybrid in both India and Pakistan today.

Hodkinson's book is divided into an introduction and four chapters, each of which focuses on a specific aspect of Muslim family law: The validity of marriage; husband and wife; the dissolution of marriage; and parent and child. In addition to a review and analysis of the various laws and statutes in each category, the chapters contain a large sampling of cases which illustrate the interpretation of laws and statutes by the courts. The chapters are supplemented by two appendices: West Pakistan Family Courts Act of 1964; and an extensive bibliography. The book also contains a glossary of Arabic terms that appear most frequently in family laws, an index, and three tables.

Hodkinson uses his introduction to provide the reader with a good general foundation from which the remaining subject-specific chapters can be approached. The author concisely summarizes the sources of Muslim law — the *Sharia*, or the collection of God's commands as revealed in the Holy *Qur'an* and in the *Sunna*, and the *Figh* or the understanding, explanation and interpretation of the *Sharia*. The classical theory of the *Sharia* restricts the sources of *Figh* to four: The *Qur'an*, the primary source; the *Sunna*, the Prophet's actions as recorded; the *Ijma*, the agreement of qualified legal scholars of a given generation; and the *Qiyas*, the reasoning by analogy. In terms of modern courts, Hodkinson maintains that the *Ijma* is the most important source of law, for only those interpretations of the *Qur'an* which are ratified by the *Ijma* are authoritative. By contrast, the *Qiyas* is referred to only when the legal problem is not answered by the *Qur'an*, the *Sunna* or the *Ijma*, because the *Qiyas* relies on human reasoning. Hodkinson also summarizes briefly the characteristics of the four most important schools of

Muslim law within the Sunni sect. Finally, Hodkinson introduces the reader to the distinctions between the Sunni interpretation of Muslim law and the Shia interpretation of the law.

According to Hodkinson, Britain's influence on Muslim law in the sub-continent has been extensive, largely as a result of four factors. First, the British took over the administration of native law in the civic courts rather than maintaining distinct religious courts. Second, the civic courts relied on literary sources of Muslim law which were often badly translated by local scholars. These in turn were interpreted and analyzed from a British legal perspective. Third, the British administration of justice also introduced the concept of precedent, which tended to perpetuate erroneous interpretations of Muslim law. Finally, principles of common law and equity were introduced into a wide range of legal problems because, in the absence of legal precedent, British courts felt entitled to give judgements that were not based on Muslim texts.

Both in India and in Pakistan, Muslim personal law applies automatically to all Muslims in cases governing marriage, divorce, maintenance, dower and legitimacy, as well as inheritance. In Pakistan, the government's aim as stated in its three constitutions, has been to bring existing law into conformity with the injunctions laid down in the *Qur'an* and the *Sunna*. Muslim personal law is thus a component of a broader religion-based legal system. In India, however, the establishment of a secular regime has been emphasized in its constitution. The constitution codified the continuance of existing laws and stated the goal of establishing a uniform civil code. For Muslims in India, then, a greater flexibility exists for opting in and out of Muslim law and secular law.

The second chapter of Hodkinson's book focuses on the validity of marriage. Unlike Christian and Hindu marriages, the courts in India and Pakistan view Muslim marriages or *nikas* as civil contracts rather than as sacraments. Although this makes the rights and obligations of *nika* enforceable in the courts, because the rights are determined by the *Sharia*, Muslim jurists also regard the *nika* as having a religious nature.

In both India and Pakistan, statute has intervened in family law governing marriage validity. Hodkinson particularly details attempts of both governments to regulate the incidence of child marriage, polygamy, and marriages between Muslims and non-Muslims. The contrast between India's secular laws and Pakistan's reliance on Muslim personal law is also clearly shown. The analysis and the illustrative cases that accompany it demonstrate that despite the two different approaches taken by India and Pakistan, their attempts to regulate the marriage codes have been largely unsuccessful.

The third chapter details the rights and obligations which govern the relationship between husband and wife in a Muslim marriage. The most

unique aspect of a Muslim marriage is that, unlike other legal systems, Muslim law "recognizes no concept of a merger of the personalities of the spouses, nor any doctrine of community of property." Perhaps because of this leniency, the obligations and rights which determine the relationship between the spouses are quite detailed and include: the law of dower and dowry; the right to consortium; consortium; the husband's right to control; and the laws governing maintenance. In both countries, attempts have been made to regulate these obligations, particularly with respect to dower and dowry and maintenance of a divorced or widowed woman. The cases at the end of the chapter are very extensive and highlight the different approaches taken by the courts in Pakistan and India.

The fourth chapter focuses on the dissolution of marriage: through death; *talaq*, repudiation of the wife by the husband; *faskh*, a judicial decree which is primarily a recourse for women; and *lian* — an unsubstantiated accusation of adultery by either spouse. This is one of the book's strongest chapters. Hodkinson describes in considerable detail the classical basis for dissolution by these means, as well as how the classical law has been modified by statutes in India and Pakistan. The explanations are very clear, and are enhanced by Hodkinson's conclusion as to why the relevant statutes were enacted and how much of an effect these have had on both regulating the practice of *talaq* and on enhancing the woman's recourse to *faskh*.

In the final analysis, Hodkinson concludes:

There is no question that to the Western observer, the Muslim law of divorce, even allowing for recent developments in the subcontinent [facilitating the woman's use of *faskh*, and restricting the husband's use of *talaq*] remains in practice heavily weighted in favour of the husband. It cannot be denied that the classical law of divorce and of *talaq* in particular is perfectly consistent with . . . Muslim marriage law and with basic Islamic tenets. . . . It is however equally certain that the imbalance was exaggerated by . . . incorrect and restrictive interpretations. . . .

Hodkinson continues:

It may seem an odd response when criticizing the unrestricted *talaq* to extend the wife's rights to divorce. . . . But this may well be the only way in the short term of relieving the wife of some of the abuse of *talaq* and consequent ill-treatment to which the Muslim system in practice though not in intent lays her open. (pp. 245-46)

The final chapter deals with the relationship between parent and child.

In this aspect of family law the contrast between legal statutes in Pakistan and India is very apparent. The legal relationship between parent and child depends on the legitimacy of the child at birth. The importance of establishing legitimacy cannot be overemphasized, because adoption and legitimation are not recognized in Muslim law, and because this determines the child's right to maintenance and inheritance through the father. Hodkinson points out that Muslim law has somewhat mitigated the harshness of these dictates by establishing very generous guidelines for legitimacy. The child is considered legitimate if it is born any time after six months of marriage and within two years of the marriage's termination. The Indian Evidence Act of 1872 is also generous in its definition of legitimacy; the child is legitimate if it is born any time during the marriage and up to 285 days after the marriage is dissolved. As a general rule, although not always, Muslim definitions govern legitimacy in Pakistan under the Muslim Personal Law Act of 1962, while in India recourse is often taken to the Indian Evidence Act.

Hodkinson also describes in considerable detail the problem of child custody which, according to Muslim law, is awarded to the mother until the child reaches puberty for a girl or the age of seven for a boy, at which point the child is transferred to the father. Hodkinson points out that, although in the case of a woman's remarriage, custody is automatically awarded to the father, the reverse does not apply. In this respect, the Guardians and Wards Act of 1890 placed a greater emphasis on the welfare of the child in determining custody, an aspect which has been emphasized in the Pakistani courts as well. Regardless of who has custody of the child, however, the father retains guardianship over the child's person and property, and is therefore allowed to determine the child's marriage partner.

The primary value of this book lies in Hodkinson's thesis that Muslim law in the subcontinent is unique and differs in many respects from classical Muslim law and how it is applied in the Middle East. As such, it is one of the few studies which approaches Muslim family law from this perspective. The complexity of a legal system which has been influenced by, and coexisted with, a variety of legal systems cannot be underrated and Hodkinson is justified in choosing the subcontinent for study.

Second, the author is careful to emphasize the impact partition has had upon Muslim law in India and in Pakistan, an aspect which, in light of Pakistan's "Islamization" and India's emphasis on a civil code, cannot be ignored. In addition, the book serves as a good source of brief definitions of Muslim legal terms relevant to Muslim family law; noting how that law has been modified in India and Pakistan. It also provides the reader with a considerable number of case studies focusing on various aspects of Muslim personal law. Through these, the reader is given an idea of how decisions were reached, and what precedent was used when similar cases were decided differently. For the reader without access to such cases, this will prove

to be a valuable reference.

Finally, the book provides an impressive array of Indian and Pakistani statutes dealing with family law. These cover aspects of marriage, Muslim personal law application and family law ordinances, statutes which focus on the dissolution of marriage, on inheritance and child custody, as well as Indian and Pakistani constitutional provisions. These documents can be found in the specific chapters pertaining to those aspects of family law and are also cross-referenced in a table at the end of the book.

In general, Hodkinson organized his material in a clear, logical fashion. The book begins with an overview of the sources of Muslim law, the main schools in Sunni Islam, and the impact of British rule on the legal process in the subcontinent. He then approaches family law beginning with the institution of marriage, progressing through the marriage bond, to its dissolution and concludes with the relationship between parent and child. The book is well documented and puts an impressive amount of reference material at the reader's disposal. The language is fairly technical, although, not overly so.

A few modifications and additions, however, would have enhanced Hodkinson's book. First, because Muslim law is based on the *Qur'an*, it would have been useful to have reproduced those chapters or *Suras* which focus on Muslim family law. Although Hodkinson paraphrases and summarizes the salient *Qur'anic* injunctions, the reader would have benefited most from being able to refer to the unedited original.

Second, it would have been helpful to have made a greater distinction between Indian and Pakistani cases. The illustrative cases appeared together at the end of each chapter, and, unless one knew in what country the city was located in which the case was tried, it was difficult to determine whether it was an Indian or a Pakistani case.

Third, a conclusion or summary either at the end of each chapter or at the end of the book recapping the trends and distinctions between Indian and Pakistani jurisprudence would have been very useful. Finally, a socio-cultural perspective on family law in the subcontinent would have benefited the book. Although Hodkinson analyzed Muslim family law from a technical-legal perspective, socio-cultural factors have an effect on how the society views those laws, on whether people utilize the court systems, and on which aspects of family law they feel to be the most important.

In critiquing this work, the reviewer approached the subject matter without a legal background, and without a formal knowledge of Muslim family law; but with the benefit of having done research on Muslim women in various countries which necessitated an understanding and knowledge of family law within various socio-cultural contexts. To fully appreciate Hodkinson's book it is suggested that a strong background in law and a firm understanding of Islam are needed. The Muslim legal system is very com-

plex, because, as Hodkinson makes clear in his introduction, "Islam does not only cover the person's religious life, but is in fact a system which outlines how the person should conduct social, political, and personal relationships." Muslim law in the subcontinent has been further complicated by the legacy of the British legal system and by the divergent paths taken by India and Pakistan at the time of partition. The foregoing factors result in a system whose intricacies challenge the novice. Nonetheless, the book is meritorious from the layman's perspective.

In conclusion, Hodkinson's book is a valuable asset to the existing material on family law practices in the Muslim world today. It is recommended for anyone who seeks an understanding of the legal process in the subcontinent and for those who would like a comparative perspective of Muslim family law outside the Middle East.

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