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BOOK REVIEWS

Modern Challenges to Islamic Law. By Shaheen Sardar Ali. Cambridge: Cambridge University Press, 2016. Pp. 324. $41.99 (paper). ISBN: 9781107639096.

Scholars from multiple disciplinary and interdisciplinary backgrounds have published numerous books on Islamic law during the past few decades. The distinguishing feature of Professor Shaheen Sardar Ali's book on this topic is its semiautobiographical nature. She writes about the challenges faced by Islamic law in the modern world in the realms of family law, constitutional law, financial law, and international human rights law. Ali has structured this book on various themes that encompass her lifelong experiences as a mother and grandmother, an immigrant to the United Kingdom, a women's rights activist, a cabinet minister, advisor to the United Nations, and a university professor. Combining theoretical perspectives with the lived reality of Islamic law, she narrates a story of her personal and professional lives, both of which are closely associated with her practice, research, and teaching of Islamic law. She presents a personal and contextual narrative of how she "lived, practiced and reflected upon Islamic law" (7). Navigating through multiple identities as a Pashtun, Muslim, Pakistani, and Briton, she draws a picture of Islamic law, which, according to her, is diverse, pluralistic, fluid, and dynamic.

Ali's main argument in *Modern Challenges to Islamic Law* is that though based on immutable sources, the principles of sharia are "inherently dynamic, sensitive, and susceptible to changing needs" (10). Further, "Islamic law is an evolutionary, dynamic, responsive and multidimensional phenomenon capable of generating responses from within varied and rich traditions, highlighting its plurality and its inbuilt transformative processes" (10). Ali conceptualizes sharia as "a flowing stream composed of varying currents—intertwined, dynamic, vibrant, and responsive to changing place and time," having "both moving and fixed components, each of which is susceptible to varying interpretations" (263). Though seemingly rhetorical, her argument is supported through a variety of evidence presented in eight chapters.

In chapter 1, Ali distinguishes the term *sharia* from those of *fiqh* (understanding of sharia) and *Islamic law*. In her view, sharia is "the overarching umbrella of rules, regulations, values and normative frameworks, covering all aspects and spheres of life for Muslims," while *fiqh* is the human understanding of sharia (22, 28). According to her, the English translation of *sharia* and *fiqh* into "Islamic law" undermines their "human dimension" by masking "the on-going socio-legal, political and economic journey that the text has undertaken to arrive at legal formulations as we understand them today" (40). This theme is further explored in chapter 2, which Ali focuses on Islamic constitutionalism(s). At the outset, Ali highlights the paradox of "constitutional democracy," which is based on two related yet intrinsically opposed notions of "constitutionalism" and "democracy." While the former imposes limitations on the government for the protection of fundamental rights of citizens especially minorities, the latter grants sovereignty to majority voters. After referring to this paradox, Ali argues that "Islamic constitutionalism(s)" in the modern Muslim world is viable despite apparent contradictions in this term that have been pointed out by a number of scholars, such as Abdullahi Ahmed An-Na'im and Wael Hallaq. She conceptualizes "Islamic constitutionalism(s)" as "limited government under *sharia*" which "describes and prescribes *sharia* as both the source and the limits of government power" (49).

Chapter 3 focuses on Islamic family law reform in Pakistan. Ali regards such reform as imperceptibly subtle and incoherent due to a top-down legislative process that has limited positive impact on the ground (81). She argues that the transformation of women from autonomous to dependent legal persons under the perpetual guardianship (*wilaya*) of a male supervisor (*qawwam*) was socially constructed for the allocation and control of material resources within the institution of marriage. This link between guardianship and supervision (*wilaya-qiwama*), Ali points out, leads to the "paradox of equality," wherein spouses, who are equal to enter into a marriage, have unequal rights within the institution of marriage (86). She suggests that this paradox must be deconstructed by looking into the functions of the institution of marriage as resource allocation rather than on the basis of gender and equal rights.

In chapter 4, Ali explores the challenges and dilemmas of Islamic finance, which, according to her, is presented as an alternative to conventional finance but, in reality, is a mirror image of the latter, notwithstanding the use of Arabic name tags and sharia compliance certificates for the "new" financial instruments. She argues that Islamic finance faces the dual challenge of religious legitimacy and economic viability despite the inclusion of ulama as sharia advisers and its rapid global expansion.

Chapter 5 explores the contribution of Muslim women to the drafting of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Ali challenges the view that human rights are Western constructs. Rather, she argues that human rights are new concepts both for the West and the non-West. This, according to her, explains the refusal of the United States to ratify the CEDAW and the Convention on the Rights of the Child, and the reservations to the CEDAW by the governments of the United Kingdom and France (154). Her primary research on the drafting of the CEDAW helps her expose the undue focus in academic literature on the so-called sharia reservations of Muslim states on various articles of the CEDAW. Her analysis of the debates on the formulation of the CEDAW not only highlights the pivotal role of Muslim delegates in this process but also shows that minimal references were made to sharia or Islam in such debates.

In chapter 6, Ali provides an inside story of Pakistan's ratification of the CEDAW. She was a member of the prime minister's National Consultative Committee, which decided to ratify the CEDAW. Despite stiff resistance from religio-political parties, Pakistan ratified the CEDAW with the reservation "subject to the provisions of the Constitution" in March 1996. Although the CEDAW has not been incorporated into Pakistani law, it has led to the enactment of various pro-women statutes, and it has also informed a few judicial decisions of superior courts regarding women's right to enter into a marriage and spousal right to citizenship.

Chapter 7 explores the origins and operations of sharia councils in Britain. Such councils are unofficial, extra-legal advisory bodies that provide alternative dispute settlement services such as mediation, reconciliation, and arbitration regarding family disputes. Over 90 percent of the cases before such councils relate to the issue of "limping marriages"—estranged wives seeking divorce. Ali observes that such councils apply a culturally constrained Islamic law that has been reformed in many Muslim countries but has found a new abode in Britain. To highlight this point, she gives the example of a Muslim wife's unilateral right to no-fault divorce (*khul'*). Many Muslim countries, including Pakistan and Egypt, have removed the requirement of the consent of the husband for *khul'*, but Britain's sharia councils still require it.

Chapter 8 focuses on internet fatawa. Ali describes fatawa as social instruments that have led to the development of Islamic legal principles from below by responding to the specific needs of Muslim communities in various parts of the world. She argues that internet fatawa challenge both tradition and modernity by democratizing knowledge and reviving historical formulations of legal interpretations. Her research on online fatawa finds that 95 percent of fatawa were sought

by women regarding their dress code and demeanor, rights within the institution of marriage, and divorce (242–43). She also finds that in internet fatawa, muftis expressed a unanimous view regarding the impermissibility of triple *talaq* (instant divorce) and *tahlil* (intervening) marriage. This, according to Ali, "testif[ies] to the dynamism of the Islamic legal traditions in responding to contemporary challenges by attempting to move beyond interpretative plurality when the situation demands unanimity" (261).

This is a fascinating book in both the variety of themes it covers and the debates it engages. While identifying modern challenges to Islamic law (sharia/*fiqh*), Ali goes beyond the prevalent scholarly discourse that portrays the modern nation state and international human rights law as antithetical to sharia norms and hence the key challenges to Islamic law. For Ali, the advent of the modern nation state is not a unique challenge to sharia because tradition has been challenged by new ideas and practices many times during the history of sharia. She refers to the rise of the rationalist movement during the early days of Islam as an example of a challenge of "modernity" to sharia during its formative period (37n69). Ali's analysis shows the ambivalent attitude of modern Western states toward sharia when they embrace Islamic finance wholeheartedly but are suspicious of Islamic family law. A similar attitude towards sharia is also evident in the conduct of majority-Muslim states such as Sudan and Pakistan, which have used *hudood* laws (Islamic criminal law) to achieve political objectives. In this way, Ali disproves the prevalent narrative built on the binary of modernity/tradition wherein sharia is portrayed as tradition while the nation state and human rights as modern (read Western).[1]

Being conscious of the conflation of modernity with Westernization, Ali uses the term *modern* to imply "current or contemporary" (4). She is well aware of the contested nature and multiplicity of meanings of the term *modernity* and points out that "some aspects of modernity can be found in every past and some traditions in every present" (4). For her, although modernity poses a challenge to traditional sharia by demanding clarity and uniformity, it also offers opportunities by democratizing knowledge through making it accessible to a wide audience who do not have to be the blind followers of *fuqaha* (jurists). The revitalization of the traditional Islamic institution of *ifta* (legal opinion) through internet fatawa provides the latest example of the opportunity offered through modernity to traditional sharia. The use of modern technology by ulama, however, is not unprecedented. During the colonial period in India, ulama used the printing press to reach Muslim masses.[2]

In the conclusion of the *Modern Challenges to Islamic Law*, Ali raises an important question about the lack of public knowledge and scholarly discourse on the Islamic doctrine of *siyasa sharia*, which justifies state law (*qanun*) for effective governance. She observes, "The critical aspects of the legal traditions as practiced for centuries is an important way forward for legislating in Muslim jurisdictions and sidestepping the ambiguity of the historical *sharia*. But this practice is not being flagged up to the lay population, arguably because of the challenge it brings to existing power structures and elites" (268). On the related issue of authority and authenticity in Islamic law, she raises the question of who is to determine "authentic" interpretation given interpretative plurality. After exploring the views of various scholars, she contends, "[d]efining what constitutes true Islam is

1 In his critique of the dominant historiography of Islamic law, Amr. Shalakany identifies the tradition/modernity dichotomy as one of its key features during the postcolonial period, whereby sharia is characterized as tradition and Western-inspired state law as modern. Amr. A. Shalakany, "Islamic Legal Histories," *Berkeley Journal of Middle Eastern and Islamic Law* 1, no. 1 (2008): 1–82, at 24–27.

2 For details see, Francis Robinson, "Technology and Religious Change: Islam and the Impact of Print," *Modern Asian Studies* 27, no. 1 (1993): 229–51.

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itself a struggle for authority and authoritarianism, a struggle evident since Islam's arrival fourteen centuries ago" (266).

Writing in simple, clear, nontechnical language, Ali makes her book accessible to nonspecialists. She provides a comprehensive introduction and conclusion of the main themes and key findings at the beginning and end of the book. Although specialists will find the detailed footnotes and bibliography useful, they are not the primary audience of this book. Without undermining the valuable contribution of this book, in my view, specialists may question a few of Ali's generalizations. For instance, Ali states that the Hanafi school is distinct for "giving preference to *qiyas* over *ahadith*, laying emphasis on the principle of *istihsan* (juristic equity)" (26). Scholars of Islamic jurisprudence (*usul al-fiqh*) may find this description problematic because *istihsan* (juristic preference) applies to the exclusion of *qiyas* (analogy). For example, deferred sale (*salam*) is permissible on the basis of *istihsan* and endorsed by a hadith despite the fact that it involves *gharar* (uncertainty, risk, or speculation), which is prohibited.[3] Similarly, Ali's description of *ijtihad* (independent reasoning) and *taqlid* (following) as mutually exclusive because the latter has "the potential to be inhibitive of independent legal formulations" (25) may be qualified based on the research showing that, far from being mutually exclusive, these two concepts complemented each other during the post-formative period of Islamic law.[4]

A clarification needs to be added to Ali's description of the historical context of the Muslim Personal Law (Shariat) Application Act 1937 in British India. This act recognized Muslim women's right to inheritance, which was previously denied to them under customary law. Discussing its enactment, Ali observes, "[t]he 'collusion' of colonial rulers with India's Muslim landed gentry is evident here when 'questions relating to agricultural land' are excluded from the remit of the 1937 Act" (91–92). Indeed, the colonial history is replete with many instances of such "collusion," but the real reason for the exclusion of "agricultural land" from the 1937 Act was the constitutional set up under the Government of India Act 1935. Under this act, the "agricultural land" was a provincial subject listed under item 21 of the Provincial Legislative List, 7th Schedule. Only a provincial legislature could enact on agricultural land as the provincial legislature of the North West Frontier Province (current Khyber Pakhtunkhwa) had done under the Muslim Personal Law (Shariat) Application Act 1935. This Act did not exempt the "agricultural land" from the application of Islamic inheritance law and thus Muslim women were given their inheritance right in agricultural land in that province. Therefore, the exclusion of "agricultural land" from the 1937 Act was not an incidence of "collusion" between the colonial rulers with the landed Muslim elites. Rather, it was an example of what Julia Stephens calls "deft legislative maneuvering" of Muhammad Ali Jinnah, the leader of Muslim League and later founder of Pakistan, who used this act to "serve as a symbol of Muslim unity" without bringing any real change in the inheritance rights of Muslim women.[5]

In my view, Pakistani case law on *khul'* requires updating in Ali's book. In its judgment published in 2014, the Federal Shariat Court, while validating judicial *khul'*, observed that the

3 The critics of Imam Abu Hanifah charged him for his departure from ahadith by using *qiyas* or *istihsan*. Hanafi jurists, however, refuted this criticism. Ahmad Hassan, *Analogical Reasoning in Islamic Jurisprudence* (Islamabad: Islamic Research Institute, 1982), 420–22.

4 See Mohammad Fadel, "The Social Logic of Taqlīd and the Rise of the Mukhataṣar," *Islamic Law and Society* 3, no. 2 (1996): 193–233; Knut S. Vikør, *Between God and the Sultan: A History of Islamic Law* (London: Hurst, 2005), 160–61; Wael B. Hallaq, *Authority, Continuity and Change in Islamic Law* (Cambridge: Cambridge University Press, 2001), xii, 239.

5 Julia Stephens, *Governing Islam: Law, Empire, and Secularism in South Asia* (Cambridge: Cambridge University Press, 2018), 170–71.

injunctions of Islam regarding gender are based on "equality without any discrimination whatsoever."[6] This judgment reinforces the principle laid down by the Supreme Court in 1967.[7] Recent developments in case law[8] and statutes[9] have also protected divorced women's financial rights upon *khul'*. These developments may help Ali to revise her findings regarding Islamic family law reform in Pakistan, which is primarily led by the judges of the superior courts and for which the legislature plays a secondary but supplementary role.

The above are only minor issues in the book and do not affect its overall scholarly contribution. This book is likely to attract a wide variety of readership such as students, researchers, practitioners, human rights activists, judges, and journalists as it contributes to the contemporary debates about the role of Islam in the modern nation state and compatibility between sharia and international human rights law.

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6 Saleem Ahmed v. Government of Pakistan PLD 2014 PLD 43, 57.

7 Khurshid Bibi v. Baboo Muhammad Amin PLD 1967 SC 97.

8 Abdul Rashid v. Shahida Parveen 2013 YLR 2616 (Life spent by the wife with her husband could be considered consideration for *khul'*.). Nasir v. Rubina 2012 MLD 1576 (The period of wedlock of the spouses, the birth of the children during the wedlock and second marriage of the husband can preclude the courts to order the return of dower to the husband.).

9 In March 2015, the legislature in Punjab amended the Family Courts Act 1964 to provide that upon *khul'*, a wife must return 50 percent of deferred dower or 25 percent of her paid dower. Section 8 of the Family Courts (Amendment) Act 2015 amends section 10(5) of the Family Courts Act 1964.

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