GOPIKA SOLANKI, *ADJUDICATION IN RELIGIOUS FAMILY LAWS: CULTURAL ACCOMMODATION, LEGAL PLURALISM, AND GENDER EQUALITY IN INDIA* (Cambridge, UK: Cambridge University Press, 2011)

Stéphane Lefebvre*

People in Québec and elsewhere who have watched with fascination and trepidation the proceedings of the *Consultation Commission on Accommodation Practices Related to Cultural Differences* [CCAPRC], or read its 2008 final report,¹ will find this book refreshing and intellectually stimulating. Gopika Solanki, an assistant professor of political science at Carleton University, is a rare breed. Trained as a political scientist, she approaches her research question—“How do multireligious and multiethnic societies construct accommodative arrangements that can both facilitate cultural diversity and ensure women’s rights?”²—through an “ethnography of legal adjudication of marriage and divorce across formal and informal arenas in Mumbai.”³ While her book is being published as part of the Cambridge Studies in Law and Society, it could, arguably, easily have been published under another disciplinary imprint.

While it is common sense to want to study family law through the lenses of state law and its formal court proceedings and decisions, in a country as multireligious and multiethnic as India any observer would miss the everyday life reality of adjudication, which occurs not only in courtrooms but also in a multitude of other sites such as religious communities, civic organizations and women’s groups; in fact family law in India is not based on legal centralism but instead on legal pluralism, meaning that the family is governed through a sharing of authority between the state and ethno-religious groups. Adjudication is thus shared—for instance, the state governs interreligious marriages, allows citizens to opt out of religious laws, but retains the authority to enforce the division of property—and because of that it allows diversity, dialogue and negotiations within and between religious and ethnic groups. It is the process of negotiation that ultimately defines the boundaries of the autonomy enjoyed by religious groups and how far the law of the state will reach. Of course, it is not because group claims can be accommodated and multicultural policies implemented that there will not be any conflicts, confrontations or contestations. The challenge is to avoid the latter problems, as Solanki makes clear, through the construction of “policies that can facilitate equality *between and among* diverse ethno-religious groups while ensuring gender equality *within* these groups in the matter of religious family

* PhD candidate, Law Department, Carleton University.

¹ Gérard Bouchard & Charles Taylor, *Report. Building the Future: A Time for Reconciliation* (Québec: Consultation Commission on Accommodation Practices Related to Cultural Differences, 2008) online: Government of Québec <<http://www.accommodements.qc.ca/documentation/rapports/rapport-final-integral-en.pdf>>.

² From the book’s back cover page.

³ *Ibid.*

laws.”⁴ It is her central claim that a *de facto* and *de jure* acceptance of cultural pluralism in the adjudication of family disputes “can facilitate gender equality in law and prevent the ossification of religious identities.”⁵ Gender equality, just like adjudication in family law, is complex and negotiated.

To appreciate how different and perhaps rather unique this approach to family law is, it would perhaps be useful to contrast it with the United Kingdom’s. Although the United Kingdom has in the past embraced multiculturalism, its legal system is a centrist one which does not recognize the legality of religious law outside of the state. This issue flared up in 2008 when the Head of the Church of England suggested that one day in the near future *Sharia* law would be a source of law recognized by the state. Quickly, pundits rallied to decry such a suggestion, while reinforcing the notion that there would never be two systems of law in the United Kingdom for citizens to choose from. The idea that multiple legalities could operate simultaneously without one usurping the other or being continuously in conflict could not be contemplated.⁶ The singular/plural dilemma facing the United Kingdom is one that many other multicultural countries are facing, including Canada. This is why Solanki’s work does matter: there are ways to establish a functioning legal order(s) in multi-ethnic and multi-religious societies. However, Solanki’s should not be seen as a blueprint ready for replication elsewhere; instead it should serve as an inspiration to the development of new ideas and approaches appropriate to each particular situation. How any adjudication system would work is, after all, a highly contingent or context-dependent matter.

To empirically support her claim, Solanki selected Mumbai as the site of her research. The selection of such a large city allowed her to further identify a series of legal forums where the micropolitics of adjudication in laws of marriage and divorce among Hindus and Muslims could be studied. The discovery of these forums also highlighted the heterogeneous, multicentered and culturally plural legal terrain that exists in a major city like Mumbai. Because of her own Indian background, she is reflexive of her social status and position and factors this in her own ethical approach to her research question. In addition to rich interview material, she also sampled case law in state courts and cases handled in informal courts. These materials led her to develop a taxonomy of organizations and actors involved in adjudicating activities: (1) formal legal organizations and actors: the lower courts (e.g., Family Courts, district and sessions courts), ethnic organizations (e.g., caste and sect councils) and interest-based organizations (e.g., religious and civic organizations, political parties, women’s groups, NGOs); (2) informal associations, groups and networks: the doorstep courts (e.g., non-state registered organizations, including collectives, residential committees, neighbourhood associations and other loosely-bound groups; and (3) individual legal actors (e.g., litigants, notaries, lawyers, clergy, family members, middlemen, politicians or strongmen). Across this taxonomy, non-states organizations and

⁴ Gopika Solanki, *Adjudication in Religious Family Law: Cultural Accommodation, Legal Pluralism, and Gender Equality in India* (Cambridge, UK: Cambridge University Press, 2011) at 5.

⁵ *Ibid* at xxii.

⁶ Emmanuel Melissaris, *Ubiquitous Law: Legal Theory and the Space for Legal Pluralism* (Farnham, UK: Ashgate, 2009) at 1-2.

actors counterbalance one another while they compete against the authority of the state, but also find grounds to cooperate, communicate and negotiate with the latter. In other words, the diversity of actors does not necessarily undermine the state; it can also strengthen it, for example through lawyers willing to extend state law for the benefits of their clients during adjudicative processes. The dynamics of the adjudicative process between state law and societal law that this taxonomy generates exhibit what Solanki calls a paradoxical legal movement, that is, a tension between the centralization of law and its decentralization (which occurs either through fragmentation or socialization). This happens because state law and societal law are mutually constitutive: “state law is both influenced by societal laws and determining of societal laws.”⁷ Justice, negotiated as it is between different legal sources, is therefore uneven. This has not prevented, as Solanki contends, the construction of “Hindu and Muslim families along similar, though not identical, lines.”⁸

Gender equality in this plurilegal and adjudicative context is no easy matter to achieve, especially given the fact that there is a substantial degree of inequality in social relations. To Solanki, it is “the outcome of reform processes in state and societal legal forums,”⁹ including the enforcement of state law. Equality is more difficult to achieve in lower courts, however, where judicial precedents from higher courts need to be supplemented, *inter alia*, by interactions between the legal system and civil society, and, importantly, the individual and collective agency of women as litigants when they are able to overcome structural and practical constraints and hence engage in lawmaking exercises and in the everyday practice of adjudication. Gender equality from below, therefore, is as, if not much more, important as equality imposed from the top. By the same token, progress towards equality can only be incremental as it is contingent and negotiated.

Having theoretically and methodologically grounded her project in the first two chapters, Solanki then proceeds with three empirical chapters. Chapter 3 is a study of state law and the adjudication process as they concern marriage, divorce, and the conjugal family in Hindu and Muslim personal laws. In this chapter, Solanki argues and demonstrates that “there are many commonalities between judicial bargaining, interpretation, and treatment of cases filed under distinct provisions of Hindu or Muslim religious laws.”¹⁰ In doing so, she shows that the rights accorded to Hindu and Muslim women do not differ as much as previously thought. This is generally so because of the centralization of law whereby both Hindu and Muslim lawyers and litigants adopt and “pursue similar strategies in state courts, and judges extend the Family Courts Act 1984 to all respondents.”¹¹

In Chapter 4, Solanki examines the making and unmaking of the conjugal family in Hindu law in Mumbai through the interactions between state and informal actors (including castes, women’s organizations, strongmen, and political parties) during adjudicative processes. Women’s organizations, for instance, play a dual role, serving as informal forums of justice and moral watchdogs against caste authorities, and as bearer of state law, which they tend to privilege in securing

⁷ Solanki *supra* note 4 at 60-61.

⁸ *Ibid* at 66.

⁹ *Ibid* at 75.

¹⁰ *Ibid* at 91.

¹¹ *Ibid* at 173-174.

rights for women. In selecting three castes across caste hierarchy as the core of her empirical data for this chapter, Solanki shows that there are “variations in adjudicative processes under Hindu law,”¹² principally due to the castes’ internal democratic character and historical practices, but that the adjudicative process itself is fluid and also influenced by other factors, such as “state policies, economic activities, and the influence of informal actors, movements, and organizations.”¹³

In Chapter 5, Solanki turns her attention to juristic diversity, contestations over Islamic law and women’s rights in Muslim personal law in Mumbai. Like the preceding chapter, she contrasts the place occupied by state law (which is essentially to ensure economic rights) versus that of non-state law and highlights the interactions of a plurality of legal authorities. She observes that the adjudication process in Muslim personal law is characterized by contests between law-producing and law-legitimizing agents, and that it is often mired in debates between different understandings of the Muslim family (e.g., should there be gay, lesbian and transsexual families?), Muslim women’s rights and Muslimness. Muslim personal law, she notes, is more decentralized than centralized, and involves three categories of societal actors in adjudicative processes (individual actors; religious, women’s and sects’ organizations; and doorstep courts). Although this provides opportunities for women’s agency, these opportunities are not necessarily seized “given the asymmetrical position of women within the family, society, and the law.”¹⁴ In other words, while state law gives rights to divorced Muslim women—in fact more than divorced Hindu women—they have a hard time exercising these rights because they do not accord with religious views that they are un-Islamic and illegitimate.

In her concluding chapter, Solanki reiterate her problematique and, based on the accumulated empirical evidence, describes India’s strategy as one of regulated autonomy, that is, a strategy that “incorporates religious groups into the governance of the family and circumscribes their sphere of autonomy,” and which is the outcome of a desire “to shape the family and gender from above while balancing the plural demands of groups.”¹⁵ Has this strategy been successful? Given that “state authority is strengthened in some instances and weakened in other instances,”¹⁶ a proper answer could only be derived from an analysis of the state’s self-assessment of its strategy, juxtaposed with the assessments of all the other formal and informal actors involved in adjudicative processes. From what can be gleaned from Solanki’s effort, the strategy seems to be working, although it is a given that its boundaries are constantly challenged and shifting in the paradoxical movement of law noted above. Even more interesting is the shift observed by Solanki toward gender equality, even though equal rights are not granted by law. That there is such a shift, she attributes it to an increase in women’s bargaining capacity in adjudicative processes, the intermingling of religious, civil and criminal laws, the state enforcement of maintenance claims,

¹² *Ibid* at 252-253.

¹³ *Ibid* at 253.

¹⁴ *Ibid* at 267.

¹⁵ *Ibid* at 325.

¹⁶ *Ibid* at 326.

reforms in lower state courts, and the inclusion of civil society in adjudicative processes in state courts.¹⁷

Solanki also contends, perhaps without a necessary caveat, that a “pluralized legal sphere balanced by civic, religious, and lay sources of authority facilitates cultural accommodation and allow spaces from which to negotiate women’s rights.” That this is what she empirically observed in Mumbai is not doubted, but given that Mumbai is in India, this is arguably quite remarkable. As a multi-ethnic state where discrimination and social inequalities abound, India has, and still is, confronted with sporadic and violent sectarian outbursts.¹⁸ How fragile and unique, therefore, is pluralism in Mumbai? While this question is certainly valid, in all fairness to Solanki she did not have the intent to develop a testable theory. In many ways, her approach, which involves thick descriptions of everyday life interactions, is focused on law as a site of power relations, whereby local context and contingencies matter in the adjudication of rights. Although she makes no reference to Michel Foucault in her book, her approach can be seen as Foucauldian. Just like Foucault, Solanki is preoccupied in answering “how do things happen” questions. In this case, as she rephrases them in her conclusion,

How do accommodative arrangements advocating cogovernance by state and society in legally plural societies impact on the interactions between and within religious groups and other societal bodies? How do they shape gender equality in the family? What is the nature of state-society interactions in the adjudication of religious laws in legally plural societies?¹⁹

Using the notion of legal pluralism as the basis of her shared adjudication model, Solanki would probably agree with Foucault’s conception of juridical power, which, in the words of Diana Young, is “a diffuse phenomenon whose shape is influenced by a variety of autonomous forces coming together.”²⁰ As Solanki noted state law and societal law (constituted by a variety of autonomous forces) are mutually constitutive when it comes to family law in Mumbai. Family law in Mumbai, in other words, “is contingent on the social forces that influence the emergence of a particular discourse of justice [e.g., think of the one from the lower state courts] from a vast array of discourses circulating throughout society.”²¹ Solanki’s thick descriptions of how family law works in Mumbai is also akin to an analysis of the legal complex²² in context, which is pervaded by non-legal forms of

¹⁷ *Ibid* at 328.

¹⁸ See, *inter alia*, Rowena Robinson, *Tremors of Violence: Muslim Survivors of Ethnic Strife in Western India* (New Delhi, India: Sage, 2005); Steven I. Wilkinson, *Votes and Violence: Electoral Competition and Ethnic Riots in India* (Cambridge, UK: Cambridge University Press, 2004); and Martha C. Nussbaum, *The Clash Within: Democracy, Religious Violence, and India’s Future* (Cambridge, Mass: The Belknap Press of Harvard University Press, 2007).

¹⁹ Solanki *supra* note 4 at 325.

²⁰ Diana Young, “Law and the Foucauldian Wild West in Michael Cimino’s *Heaven’s Gate*” (2010) 7 *Law, Culture and the Humanities* at 317.

²¹ *Ibid*.

²² Defined as “the assemblage of legal practices, legal institutions, statutes, legal codes, authorities, discourses, texts, norms and forms of judgement.” Nikolas Rose and Mariana Valverde, “Governed by Law?” (1998) 7:4 *Soc & Leg Stud* at 542.

knowledge and expertise.²³ In Foucauldian terms, such an analysis of the legal complex does not mean a clinical analysis of the law (that is, describing and interpreting what the law says), something which Solanki did not, but also did not need to do.

Where Solanki diverges from Foucault is by not using a genealogical approach²⁴ to describe and explain the contingent relationships that shaped the emergence of the shared adjudicative model. We have to wait to the very end of the book to get a sense that it had to do with political and religious pragmatic concessions. The current model, taking a diagnostic of the present as a starting point, was not inevitable. Briefly, Solanki acknowledges that, and recognizes as well that there are factors that could change the model, namely “religious fundamentalism and ethno-religious violence, demobilization of social movements, including women’s movements, and political instability.”²⁵

Given the different ways that state law and societal law assign the status of a legal person to a woman, how that status differs from the legal personhood of a Muslim man, and the claims, backed up with cultural, political or other resources, that women’s organizations are making to get their rights recognized, it would have been interesting to see Solanki engage in a short analysis of legal personhood. An approach similar to Sheryl Hamilton’s,²⁶ who problematizes the notion of a person by showing how much of a struggle it is to know how to define what a person is and what the boundaries of personhood are, would have sufficed. Mumbai, with Hindu and Muslim women in differentiated positions both involved in adjudicative processes in a context of legal plurality, is a fertile ground for such an effort. To comprehend women’s struggles in that context would make reference to the technologies of personification emanating from expert knowledge systems (women’s organizations, civil society organizations, religious groups, etc.), legal relations (the adjudicative process), and the story as the “preferred modality for thinking about persons.”²⁷

Looked at from a wider perspective, Solanki’s contribution falls within the legal pluralism perspective espoused by many legal scholars, especially since Leopold Pospisil published, in 1971, his landmark book, the *Anthropology of Law: A Comparative Theory*.²⁸ As Daniel Stouthes tells it, this perspective posits that society is composed of various functioning groups and subgroups at various “levels” of society, from small, less inclusive groups (such as families and schools) at the bottom levels to large and more inclusive groups (such as the state of Nebraska or the United States of America) at the top levels. Each of these groups has its own legal system, usually subordinate [but they could be in conflict or operate separately and complementarily] to the legal systems of the group or

²³ *Ibid* at 543.

²⁴ Nietzsche used the genealogical method as a critique of morality before Foucault used it, but Foucault is the one who gave it general applicability.

²⁵ Solanki *supra* note 4 at 335.

²⁶ Sheryl N Hamilton, *Impersonations: Troubling the Person in Law and Culture* (Toronto: University of Toronto Press, 2009).

²⁷ *Ibid* at 9.

²⁸ Leopold Pospisil, *Anthropology of Law: A Comparative Theory* (New York: Joanna Cotler Books, 1971). Credited by, *inter alia*, Daniel P Strouthes, *Law and Politics: A Cross-Cultural Encyclopedia* (Santa Barbara, CA: ABC-Clio, 1995) at 46, 146, 173.

groups at the next higher level, until one reaches the top level of the nation and its supreme legal system.²⁹

Legal pluralism presents itself as the anti-thesis of legal centralism, which has state law as the sole law-producing and law-legitimizing agent. It thus recognizes and acknowledges that “organised groups exist alongside and within the state, with their own autonomous ‘legal’ orderings which can call into play psychological and physical coercion [...]”³⁰ This is certainly not a situation unique to the modern era which has seen the formation of states by colonizers on the basis of boundaries negating the consequences of their divisions and exclusions. In fact, the “complexity or competing jurisdictions borne of increasing numbers of legal systems [...] has parallels with the medieval social condition” [you can think here of the tension between the imperial and the papal systems].³¹ Solanki’s legal pluralism situates itself between this old legal pluralism and the new legal pluralism, which is focused on the interactions between the local, national and global legal orders.³² It is at the national and sub-national levels, and encapsulates the concomitant coexistence of two distinguishable legal orders—state laws and colonial laws, and non-state or societal laws. The two legal orders are intertwined and not always in a hierarchical relationship.³³ Interestingly, there is a parallel here with Canada, where state law as a legal order must now take into account the contextual particularities of Aboriginal communities as a result of changes in “substantive law, in evidence doctrine, including judicial notice, and a posture of careful interest in information from other disciplines [generally through the testimony of expert witnesses].”³⁴ This type of evolving arrangement and the plural legal system in India, albeit diametrically different from one another, share the fact their boundaries between law, customs, norms and morality are not necessarily precise, which does not help fully explain the interaction between law and society.³⁵ As Solanki puts it: Is law “what people in a given social arena classify as law[?] [And does] legal pluralism exists when people identify with more than one kind of law in a social arena?”³⁶

In posing the question, she rejoins Brian Tamanaha in identifying one of the glaring weaknesses of legal pluralism, that is, the lack of an agreement on what law is.³⁷ But this is a question whose answers she does not debate, although she obviously conceives of law in instrumentalist terms. In that sense, and contrary to

²⁹ Strouthes, *ibid* at 173.

³⁰ David B Goldman, *Globalisation and the Western Legal Tradition: Recurring Patterns of Law and Authority* (Cambridge, UK: Cambridge University Press, 2007) at 37.

³¹ *Ibid* at 38.

³² For a good overview of the intellectual evolution of legal pluralism, see Brian Z Tamanaha, “Understanding Legal Pluralism: Past to Present, Local to Global” (2008) 30 *Sydney L Rev* 375.

³³ Solanki *supra* note 4 at 43.

³⁴ Christine Boyle & Marilyn MacCrimmon, “To Serve the Cause of Justice: Disciplining Fact Determination” (2001) 20 *Windsor YB Access Just* at 85. “Judicial notice is a means by which something can be established without offering evidence.” *Ibid* at 78.

³⁵ Solanki, *supra* note 4 at 44.

³⁶ *Ibid* at 46.

³⁷ Brian Z. Tamanaha, “A Non-Essentialist Version of Legal Pluralism” (2000) 27 *JL & Soc’y* at 302.

Tamanaha, she finds Gunther Teubner's approach to legal pluralism convincing.³⁸ Teubner advocates the view that law is self-reflexive and that decentralized self-regulatory institutions (such as castes and sects for Solanki) are necessary for change. Law, in his view, "restricts itself to installation, correction, and redefinition of democratic self-regulating mechanisms' of societal legal orders."³⁹ To Solanki, her empirical data and observations match Teubner's conception of law. Tamanaha is critical of Teubner's view, and he would of Solanki's, because he believes that law and its effects are not necessarily contingent on its function. What people code as law, he argues, is contingent on other factors than functionalism, namely social and historical.⁴⁰ What he proposes instead is in my opinion very vague and fails to answer what law is, except that it is nothing and everything depending on who you ask: "Law is whatever people identify and treat through their social practices as 'law',"⁴¹ and you have legal pluralism when more than one kind "of law is recognized through the social practices of a group."⁴²

Solanki's approach is also reminiscent of another important stream in socio-legal studies: law in everyday life, which starts with society instead of the law in analyzing societal issues. In her book, Solanki approaches the issue of adjudication in family law from society first and not from formal law, cognizant of the fact that she could not answer her "how are things done" questions by looking through the lenses of state legal sanctions and inducements—the simple effectiveness of law in terms of its aimed at outcomes—or the influences alone of law on ways of thinking. As Austin Sarat and Thomas Kearns suggest, she chose a social practice, the adjudicative process used to resolve family disputes, and then studied law in connection with it.⁴³ In doing so, she "emphasizes particularity and specificity [...] looking at the way people in [Mumbai] come to terms with, use, or ignore law as they construct their own local universe of legal values and behavior."⁴⁴ Put differently, she maps out the variety of law in the everyday lives of Hindu and Muslim women as they try to have their family problems adjudicated.⁴⁵

Solanki's description and explanation of the shared adjudicative model cannot leave Canadians indifferent. The Quebec "problem" with accommodation practices is not unique to that province, if more acute there than anywhere else. When it comes to family law, this is compounded by the fact that it is of provincial jurisdiction. Secular legal pluralism, we do have already, at least horizontally across the country. When plans by the Society of Canadian Muslims to use *Sharia* law to arbitrate family-related and personal status-related disputes became known a decade ago, such horizontal pluralism province wide in Ontario could not be

³⁸ Gunther Teubner, "Substantive and Reflexive Elements in Modern Law" (1983) 17 *Law & Soc'y Rev* 239.

³⁹ *Ibid* at 239, quoted by Solanki, *supra* note 4 at 346.

⁴⁰ Tamanaha, *supra* note 37 at 309.

⁴¹ *Ibid* at 313.

⁴² *Ibid* at 315.

⁴³ Austin Sarat & Thomas R Kearns, "Beyond the Great Divide: Forms of Legal Scholarship and Everyday Life" in Austin Sarat & Thomas R Kearns, eds, *Law in Everyday Life* (Ann Arbor, MI: The University of Michigan Press, 1995) at 41.

⁴⁴ *Ibid* at 60.

⁴⁵ Patricia Ewick & Susan S Silbey, *The Common Place of Law: Stories from Everyday Life* (Chicago: The University of Chicago Press, 1998) at 17.

contemplated (although Jewish faith-based arbitration already existed), lest it promotes Islamic traditionalism or, worse, Islamic fundamentalism.⁴⁶ While the scope of this review prevents a full discussion of that issue, would not a model like Solanki's shared adjudicative process be worth exploring in the context of an advanced multicultural and rich democracy? Provincial law could limit itself to the adjudication of maintenance (resource) claims and abuse charges of a criminal nature, and leave the remaining issues to faith-based organization (atheists/agnostics would remain covered by provincial law). Or is it only workable in very highly diverse—religiously, culturally and politically—societies like India? As Solanki notes, countries like Turkey with uniform laws cannot ensure legal centralism. Are we to believe that in a multicultural and multireligious country like Canada parallel, non-official faith-based adjudicative processes do not already operate out of the public view alongside state law? Solanki has shown us the method by which we could study adjudication in religious family law. The question, therefore, is not whether one day such a study of the Canadian adjudicative process will be needed, but when.

⁴⁶ See, *inter alia*, Jean-François Gaudreault-DesBiens, "Constitutional Values, Faith-Based Arbitration, and the Limits of Private Justice in a Multicultural Society" (2005) 19 NJCL 155.