Alamgir Muhammad Serajuddin, **Cases on Muslim Law of India, Pakistan, and Bangladesh,** Oxford University Press, New Delhi, 2015, 490 pages, ISBN 0-19-945761-1

There is much controversy about the practice of Muslim law in the post-colonial context. To date, some states maintain Islamic criminal law and even more states maintain Muslim rules and customs in the ambit of family and inheritance law. The media often depict this Muslim "personal law" as patriarchal, backward and anti-women,[1] and tend to disregard court judgements *in favour* of Muslim women.[2]

Alamgir Muhammad Serajuddin paints a detailed and differentiated picture of Muslim (personal) law in the South Asian context, where it "governs the personal lives and family relations of about 500 million Muslims" and is therefore "an integral part of the South Asian legal system" (p. xxxii). The book's intention is to "stimulate interest in the study of Muslim law, provoke discussion and debate, and lead to a better understanding of this much misunderstood and misinterpreted subject" (p. xxxvii). This attempt is being carried out through an engagement with the interpretation, application and development of Muslim law in India (a secular republic), Pakistan (an Islamic republic) and Bangladesh (a people's republic with Islam as the state religion). While these three countries "have inherited the same legal history and tradition, legal institutions and laws" from former British India, the author ponders on whether they also share their "post-independence experiences" (p. 430).

After 1947, the constitutional setting as well as the legal and socio-political context in the three countries evolved in different directions. The Indian debate since the making of its constitution included whether to replace the personal laws with a Uniform Civil Code (UCC) [3] in order to achieve the constitutionally aspired secularism (which was included in the constitution in 1976) and gender equality (Article 14, 15) and fulfil the directive principle (Article 44), which calls for such a code. In Pakistan, all three Constitutions (1956, 1962 and 1973) had defined the state as an Islamic Republic and provided that all existing laws shall be brought in conformity with the Qur'an and the Sunnah (p. 447), but it was only Zia-ul-Haq's Islamisation in the 1970s that "significantly curtailed the independence of the judiciary" (p. 455). The Bangladeshi scenario presents a remarkable ping pong game regarding the state's relationship with religion: While initially the Constitution proclaimed that secularism was one of the fundamental principles of State policy while simultaneously providing that all existing laws (including personal laws) shall remain in place, the secular principle was dropped from the Constitution in 1977, Islam was declared the state religion in 1988 and in 2011 the principle of secularism was restored to the Constitution.

1 *Nadja-Christina Schneider*, Zur Darstellung von "Kultur" und "kultureller Differenz" im indischen Mediensystem: die indische Presse und die Repräsentation des Islams im Rahmen der Zivilrechtsdebatte, 1985-87 und 2003, Berlin 2005.

2 *Flavia Agnes*, Muslim Women's Rights and Media Coverage, Economic and Political Weekly 51 (2016) 20.

3 *John H. Mansfield*, The Personal Laws or a Uniform Civil Code, in: Robert D. Baird (ed.), Religion and Law in Independent India, New Delhi 2005.

Against these different backgrounds, how has Muslim law further evolved in the three states? In answering this question, the book makes the assumption that law is not only developed through legislative amendments (and these are interestingly more present in Pakistan and Bangladesh than in India) but also, according to the author, (bearing in mind that we deal with common law cultures here) through judicial interpretations, "activist, liberal, and forward-looking" judges "can act as engines of social change and progress" (p. 440). Serajuddin even goes as far as to state that "[t]he phenomenon known as judicial activism, was perhaps nowhere felt more than in the sphere of Muslim family law" (p. xxxiv).

The book provides us with a selection of 61 cases, perceived as "representative of the judicial trends in the four jurisdictions" (p. 430) - 13 from Colonial India, 17 from post-independence India, 16 from Pakistan and 15 from Bangladesh. The first part of the book briefly summarises each case (in no more than three pages) and intends to "explain case laws to students in a simple and intelligible manner" (p. xxxv). Each of the summaries is sub-divided into three sections: 1. issues of law, 2. case summary/court decision, 3. comments. The original judgments (fully or partly) are then reproduced in the second part of the book. Lastly, a concluding chapter assesses the judicial trends. This structure means that many cases are mentioned thrice (in each of the different parts of the book), and one wonders whether this is particularly useful and whether in times of online resources the paper version of the primary sources in part II of the book (which in total makes up 270 out of the 490 pages) is absolutely necessary. But while reading, it is actually quite handy to be able to immediately look up the full text of the cases that one is more interested in. This is certainly not a book that is designed to be read chronologically and in its entirety; rather it functions as a "handy reference book" (p. xxxv) for students, academics or practitioners and serves this purpose very well.

The author provides objective descriptions of the cases, sometimes with brief references to other precedents, and refrains from harsh critique. It therefore lies in the hands of the reader to judge the outcome of the cases and place them in the historical or political context. The book groups the cases according to the country in which they were decided, and not according to the topic they deal with. Consequently, it provides an overview about the dominant themes in the particular national contexts rather than a cross-country comparative description about specific topics. Unfortunately, even in the concluding chapter, the author also summarises country-wise and thus juxtaposes the different trends only to a limited degree. Hence, comparisons must be drawn by the reader. Flipping back and forth through the pages, the reader will find some interesting aspects:

Valid marriage and polygamy. Unlike in Hindu law, marriage in Islam is regarded not as a sacrament but as a purely civil contract (stressed for instance in Colonial India in *Abdul Kadir v. Salima*, 1886).[4] The question of the circumstances in which such a contract is valid

4 Flavia Agnes argues that the Islamic legal premise of contractual marriages along with other aspects such as dispute resolution through mediation, and the breakdown theory of marriage made Muslim law very progressive compared to Hindu or Christian law. Flavia Agnes, Family Law Volume I: Family Laws and Constitutional Claims, New Delhi, 2011.

was subject to debate in several cases in Colonial India. In particular, can a Shia and a Sunni Muslim legally be married? (*Aziz Banu v. Mohammad Ibrahim Husain*, 1925); and what are the essentials and formalities of a valid marriage? (*Ghulam Kubra Bibi v. Mohammad Shafi*, 1939). The Pakistani courts dealt with the question of whether the marriage of a fifth wife - the Qur'an allows Muslim men to marry up to four wives - is valid and whether the children born out of this wedlock are "legitimate" (*Iftikhar Nazir Ahmad Khan v. Ghulam Kibria*, 1967). The prohibition to marry a fifth wife, stated the court, is relative and temporary: while the wife is not entitled to succeed the estate of her deceased husband, the children born out of the marriage are legitimate and lawful heirs of the father. The courts also engaged with the legal effects of a second marriage contracted without the necessary permission of the Arbitration Council (no invalidity of the marriage but a punishable offence, see *Syed Ali Nawaz Gardezi v. Muhammad Yusuf*, 1962).

Restitution of conjugal rights and wife's maintenance. Another important and prominent topic is the issue of restitution of conjugal rights.[5] In a common case constellation the wife moves back to her parent's house after disputes in the marriage and files a maintenance claim against her husband and he responds by filing a suit for restitution of conjugal rights. In this context, the courts deal with whether a contract in which a husband and wife agree that she may live separately in the case that he marries a second wife is valid or if it is against public policy as it encourages the separation of the couple (*Mansur v. Azizul*, 1928). In post-independence India, courts have frequently decided in women's favour. In *Itwari v. Asghari* (1960), the court refused the restitution order by arguing that Muslim law tolerates polygamy but does not encourage it and does not grant the husband any right to compel the first wife to share his consortium with another woman under all circumstances. The court further held that if the husband pursues the restitution case only to defeat her maintenance claim, then his suit is *mala fide*.

Triple Talaq and other forms of divorce. *Talaq* - unilateral divorce by the husband - can occur in different forms; some of them are approved of and others are disapproved of by the Qur'an. Against this background, colonial courts considered whether a *talaq* pronounced under compulsion or in jest is valid (yes, stated the court in *Said Rashid Ahmad v. Anisa Khatun*, 1931); whether a *talaq* is valid if the husband does not show any reasonable cause for the divorce, but pronounces it at his mere whim and caprice (yes, see *Ahmad Kasim Molla v. Khatun Bibi*, 1931); and whether a *talaq* is valid even if it is not pronounced in the presence of the wife or not brought to her knowledge (yes, *ibid*). Later, the courts of India became a bit more sceptical in this regard. In *Zeenat Fatema Rashid v. Md Iqbal Anwar* (1993) the Gauhati High Court held that the Qur'an discourages divorce and permits it only in extreme cases after pre-divorce reconciliation efforts. In *Dagdu Chotu Pathan v. Rahimbi Dagdu Pathan* (2002) the court held that a *talaq* can only be given under certain circum-

5 While some scholars argue that the concept of restitution of conjugal rights is alien to Islamic legal ideology (*Tahir Mahmood*, Islamic Law in Indian Courts since Independence: Fifty Years of Judicial Interpretation, New Delhi, Institute of Objective Studies, 1997: 380), all four jurisdictions apply it.

stances, namely where the wife is disobedient, incompatible, unfaithful, uncaring, refuses to cohabit with her husband or engages in cruel behaviour. Also, there is a certain procedure for giving *talaq*: the wife must first be given time to change her behaviour; if she does not change, two arbitrators (one representing the wife and one representing the husband) should be appointed to bring about a settlement between the spouses. Only if this fails does the husband have the right to *talaq*.

The Pakistani courts deal with the wife's right to *khula* in various cases - the dissolution of the marriage at the wife's request (p. 470) - and the question of whether a wife is entitled to *khula* despite the unwillingness of her husband to release her from the matrimonial tie. In *Bilqis Fatima v. Najm-ul-Ikram Qureshi* (1959) the court refused to accept the classical Hanafi rule that the consent of the husband is necessary for a *khula* divorce. In *Khurshid Bibi v. Muhammad Amin* (1967) the Pakistani Supreme Court even accepted a divorce in cases of irretrievable breakdown of the marriage. Both Pakistan and Bangladesh have intervened in the law of *talaq* through a legislative approach: Section 7 of the Muslim Family Laws Ordinance (MFLO) officially abolished the arbitrary and instant triple *talaq* and provided that after the pronouncement of (regular) *talaq* the man should give the Union Council Chairman written notice. But even in case of a failure to give notice, the marriage between the parties subsists (*Syed Ali Nawaz Gardezi*, 1962).

In-between marriage. According to a (for European readers somewhat odd) provision in classical Muslim law, after a divorce through triple *talaq*, the same couple can only validly remarry if the wife has married another man in between times and the latter has divorced her or died after consummation of the marriage. If this in-between marriage does not take place and the couple marries again, the "wife" might be accused of living in adultery with her "husband" and the children born during this time are illegitimate (p. 39). In the Indian context the Kerala High Court decided in *Khadissa v. Muhammed* (1979) that if a remarriage is solemnized without an intermediate marriage, it is only an irregularity and the marriage is not void; so the wife is entitled to maintenance. In Pakistan and Bangladesh, the problem was solved on the legislative level. With S. 7(6) of the MFLO the obligation of an in-between marriage was set aside.

The concluding chapter of the book gives an overview of the trends and topics but does not provide new information for readers who are familiar with Serajuddin's earlier book on Muslim family law and judicial activism.[6] As in the earlier work, the argument here is that contrary to the expectation that "in secular India judicial interpretation of Muslim law would take the path of activism and liberalism, and in Islamic Pakistan, passivity and conservatism [...] in the first thirty years after independence, the reverse was the case. [...] [W]hile the Indian courts held that they were bound by the doctrine of *stare decisis* [...] the Pakistani courts refused to abide by these decisions and exercised their right of independent interpretation of the rules of sharia law" (p. 437). As a result, "Muslim law remained more

6 *Alamgir Muhammad Serajuddin*, Muslim Family Law, Secular Courts and Muslim Women of South Asia: A Study in Judicial Activism, Karachi 2011.

or less rigid and conservative in India in those years but became flexible and progressive in Pakistan" (p. 437). Later, with Pakistan's Islamisation in the 1970s, the Pakistani courts became more circumspect in activist interpretations of Muslim law, and the "Indian courts abandoned their dependence on colonial precedents and took an activist and liberal stance" (p. 440).[7]

The case selection shows that these countries deal with similar issues and decide them in a similar manner. Courts sometimes even cite each other (Pakistani and Bangladeshi courts cite Indian cases rather than the other way round). Some issues, such as the *talaq*, have been tackled through legislation in Pakistan and Bangladesh with the introduction of the MFLO, which the author regards as "unquestionably the most progressive reform in the sphere of family law" (p. 450) while India has tackled them through "judicial interpretation of the Qur'anic and Hadith texts and subsidiary sources of law" (p. 465). Hence, interestingly, in the end the differing constitutional provisions referring to secularism, Islam or gender equality in the three countries seem less important for an engagement with Muslim law.

It would have been interesting to read even more about how the jurisprudence is embedded into the social and political context and to be provided with some theorisation explaining the similarities and differences in handling the cases. For example, when it comes to changes in interpretation, what role did the socialisation of the individual judge, the work of interest groups or social movements, media coverage or the international community play? Did the decisions of the courts of the neighbouring countries (or other Muslim countries) on a similar issue (and made in a specific manner) influence the court decisions? And lastly, what are the future trends in this field? Is a UCC still likely to be introduced in India or have the judges taken up the role of the legislator in this regard and made legal reforms unnecessary? These questions could well be tackled in future scholarship, which can surely take this book as a brilliant starting point.

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7 Similarly in Serajuddin, 2011: 41- 53.