

Book Review**AN ENGAGING RE-READING OF SHARI'A LAW**

Alamgir Muhammad Sirajuddin, SHARI'A LAW AND SOCIETY: Tradition and Change in the Indian Subcontinent, Asiatic Society of Bangladesh, Dhaka, 1999, page ix+388, price taka 500/-

Available books on personal law in the subcontinent currently go by the title of 'Muslim' Law while the earlier nomenclature was 'Mohamedan' – generated by D.F. Mulla's Principles of Mahomedan Law. Precursors of Mulla, for using the word 'Mahomedan' in titles, were N.J. Baillie,<sup>1</sup> W.H. Macnaghten,<sup>2</sup> and Syed Amir Ali<sup>3</sup>.

'Islamic' in the titles was popularised in the 1950s and 1960s by such scholars as J.N.D. Anderson,<sup>4</sup> N.J. Coulson,<sup>5</sup> J. Schacht<sup>6</sup>. More recently 'Islamic' has been used by Mallat and Connors,<sup>7</sup> while I. Goldziher's book, first published in German in 1910 and later translated into English in 1981,<sup>8</sup> was certainly another trend-setter, though this book does not seem to have found its way to this subcontinent.

'Muslim' is now the most commonly accepted nomenclature, particularly of books published in Bangladesh by such authors as Mujibur Rahman and the indefatigable late Gazi Shamsur Rahman. Prof. Tahir Mahmood in India,<sup>9</sup> and David Pearl in England,<sup>10</sup> have also used 'Muslim' in their books. Needless to say, Charles Hamilton's

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<sup>1</sup> A Digest of Moohummudan Law, 1875.

<sup>2</sup> Principles and Precedents of Moohummudan Law, 1825.

<sup>3</sup> Mahomedan Law, 1912 and 1928.

<sup>4</sup> Islamic Law in the Modern World, 1959.

<sup>5</sup> A History of Islamic Law, 1964.

<sup>6</sup> An Introduction to Islamic Law, 1964.

<sup>7</sup> Islamic Family Law, London, 1990.

<sup>8</sup> Introduction to Islamic Theology and Law.

<sup>9</sup> Muslim Law in Modern India, 1972.

<sup>10</sup> A Textbook on Muslim Personal Law, 1984 and now, with W.F. Menski, 1998.

translation of Hedaya in the full title used Mussulman<sup>11</sup> from which 'Muslim' can be seen to be a derivative.

The words 'Islam' or 'Shari'a' has, thus, not been used in titles of readily available books and the title of the book under review is, therefore, itself an intriguing nuance.

The available local books unfailingly begin with the sources of Shari'a law and then meander through confusing descriptions of norms, referring only to (very) old cases of the British Indian courts, and ending up as books for rote by undergraduate students. In such a milieu, Alamgir Muhammad Sirajuddin's book is a welcome one and more so because it investigates, analyses and comments on the changes in Shari'a norms relating to 'personal' matters over the last few decades, not only in this subcontinent but also in other Muslim countries.

Alamgir Muhammad Sirajuddin is a reputed professor of history and a former Vice Chancellor of Chittagong University. Though he is a Barrister-at-law, his scholarly writings are not generally well known in the legal community. It is a pity, as this book deserves to be read more by lawyers, legal academicians and students, rather than historians.

The Report of the Law Commission on Marriage and Family Law, which led to the enactment of the Muslim Family Law Ordinance, 1961, (MFLO) has not been scrutinised in detail, until this book under review. Prof. Serajuddin situates the debate within the Commission regarding its various reform measures and points out the 'opposition to reform' stance of the only 'ulema' in the Commission - Maulana Ihtisham-ul-Haq. Frankly, this reviewer was not aware that "[o]f the seven members of the Commission six were laymen, including three women and one, a religious scholar, namely, Maulana Ihtisham-ul-Haq" (at p. 35) and "[i]n a 113 page critique of the 36 pages report of the Commission, Maulana Amin Ahsan Islahi, an erudite scholar gave what is perhaps the most comprehensive and systematic exposition of the traditionalist viewpoint on modernist approach to the problem of legal reconstruction." (at p. 52).

The MFLO has changed certain parts of the Muslim Family Law rather drastically. However, it was refreshing to learn that these reforms were put forward not by lawyers but by the 'laymen'. Professor Serajuddin informs us that "[f]or the theoretical foundation of their

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<sup>11</sup> The Hedaya, or Guide: A Commentary on the Mussulman Law, 1791.

recommendations the Commission reopened the door of *ijtihad* which was considered to have been closed at the beginning of the tenth century." (at p. 35).

Not all the recommendations of the Commission were enacted into law by the MFLO, particularly those pertaining to polygamy. The stimulating aspect of the book consists in laying down both sides of the arguments and stating the various positions regarding issues and norms encompassed by the MFLO. Regarding polygamy, for example, the book quotes the relevant verse (IV:3) and offers the argument of, among others, Professor Fazlur Rahman, on the one hand, and Maulana Ihtisham-ul-Haq and Moulana Maududi, on the other. The book points out, relying on Rashida Patel's position, that the last part of Verse IV:3 i.e., "or (a captive) that your right hands posses", allowing any number of slave-girls to a man is irrelevant in modern times as slavery is no longer legally countenanced. Similarly, polygamy has also become irrelevant and obsolete in modern social conditions. Professor Fazlur Rahaman's argument that when Verse IV:20 says: "if you intend to replace one spouse with another...", it clearly assumes that if one desires to have another wife the normal method is to bring her in the place of the first wife rather than add her to the latter - illustrates one of the innumerable gems of logic and information which the book is full of.

Unlike conventional books on "Muslim" Law, it is divided into four main chapters woven around the areas of personal law which were 'reformed' by the MFLO - inheritance, polygamy, divorce and maintenance. The other three chapters cover the usual introductory, over view and concluding remarks. Such an arrangement itself indicates the approach of the author, i.e., that the book is not intend to be a mundane uncritical narration of rules of Muslim law superficially understood and normalised by the Privy Council or High Courts of British India. The book, instead, posits the philosophical, social and textual foundations of reform and it's impact.

Such a critical examination was over due, and more so in view of a number of recent judgements of our Courts which are often inattentive to the dynamic nature of Muslim Law and it's evolution in other Muslim countries. Nevertheless, the fact that our courts have begun to interpret different provisions in different manners are indication enough of such a dynamism of Muslim law. Examples of very recent judgements indicating different interpretations would include *Khadeja*

*Begum vs Md. Sadeq Sarkar*,<sup>12</sup> and *Md. Chan Miah vs Rupnaha*,<sup>13</sup> on restitution of conjugal rights, while an earlier case on the same issue with different rationale would be *Nelly Zaman vs Giasuddin Khan*.<sup>14</sup> Similar disagreements in interpretations of restitution of conjugal rights can also be traced back to a judgement almost a century and a half ago.<sup>15</sup> On polygamy, the recent judgement of the High Court Division in *Jesmin Sultana vs Md. Elias*,<sup>16</sup> has been overruled by the Appellate Division in *Md. Elias vs Jesmin Sultana*.<sup>17</sup> However, the Appellate Division seems to have over-looked a somewhat similar interpretation by another Division of the High Court on this issue of polygamy in *Makbul Ali and Others vs Munwara Begum*.<sup>18</sup> No less importantly, reverting back to the book under review, we are informed that Turkey, Cyprus and Tunisia, and among the Druzes of Lebanon and of Syria and the Ismaili Khoja community of East Africa, polygamy has been altogether prohibited (at p. 152).

Traditional Muslim Law issues such as custody of children<sup>19</sup> and past maintenance<sup>20</sup> have, over the last few decades, certainly found new interpretations which are very different from the past ones. The point, taking cue from the book under review, is that Muslim Law in this subcontinent, as in most Muslim countries, has traversed an interesting path of evolution.

The refreshing aspect of the book under review is, as indicated, that it situates the debate within the context of not only of textual positions but socio-economic reality of the country. The MFLO, even after almost four decades of its enactment, has not drawn as much 'official' support as it should have, particularly in terms of legal awareness of the reforms engineered by the Ordinance. More importantly, in discussing

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<sup>12</sup> 18 (1998) BLD 31.

<sup>13</sup> 18 (1998) BLD 329.

<sup>14</sup> 34 (1982) DLR 221.

<sup>15</sup> *Moonshee Buzloor Rahman vs Shumshoonnissa Begum*, 11 (1867) Moore's Indian Appeals.

<sup>16</sup> 17 (1997) BLD 4.

<sup>17</sup> 19 (1999) BLD (AD) 122.

<sup>18</sup> 39 (1987) DLR 181.

<sup>19</sup> in *A. Baker Siddiqui vs S.M.A. Baker*, 38 (1986) DLR (AD) 106.

<sup>20</sup> in *Jamila Khatun vs Rustom Ali*, 48(1996) DLR (AD) 110.

various view points, the author certainly provides arguments for further reform, particularly in light of those advanced in other Muslim countries.

Of the concluding remarks of the book, the author's summation that "the actual changes in the traditional law have been minimal and the rights and protection enjoyed by women in Bangladesh and Pakistan fall far short of those enjoyed by their Arab sisters" (at p. 314) deserves particular attention. The author's comment that "superior courts of Bangladesh and Pakistan have been liberal, enlightened and activist in the interpretation and application of the provisions of the MFLO" (at p.316) is somewhat placid, particularly in view of the more recent judgements in *Hefzur Rahman vs Shashun Nahar*,<sup>21</sup> and *Md. Elias vs Jesmin Sultana*<sup>22</sup> which were evidently not delivered before the book was completed.

Recent judgements of our highest court indicate a mixed if not uncertain attitude towards the issue of 'ijtihad'. Though the most renowned current authority on ijtehad, Professor Wael B. Hallaq, has been referred to in the bibliography,<sup>23</sup> this reviewer would have preferred a bit more on the controversy regarding the 'closing of the door of ijtehad' to better situate the meandering approach of our highest court to the question of interpretation of Mulla's 'sections'.

Almost a quarter of a century ago Professor Tahir Mahmood had argued that "Mulla is not an Act or Code; in any case it is not 'Muslim Law' ..... The words, phrases and clauses in Mulla need not be construed with the aid of those principles of interpretation which are generally used in the construction of statute law."<sup>24</sup> Elsewhere, Tahir Mahmood had also stated: "Poor Mullah had never read even the most elementary of the original treatise on Islamic Law; nor did he ever claim to have done so. He only honestly codified that law as understood and interpreted by the British-Indian judges with their prejudiced brains and sinister designs."<sup>25</sup>

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<sup>21</sup> 19 (1999) BDL (AD) 27.

<sup>22</sup> 19 (1999) BLD (AD) 122.

<sup>23</sup> though understandably not his latest book The History of Islamic Legal Theory, which probably became available only after Prof Serajuddin's manuscript was completed.

<sup>24</sup> Annual Survey of Indian Law, vol. X, Delhi, 1975, at p. 375-76.

<sup>25</sup> Personal Law in Crisis, Delhi, 1986.

No one, as yet, had written a book which could be substantive and convincing enough to begin the process of moving away from the uncritical reliance on Mulla. Professor Serajuddin has certainly done that admirably. The issue now is whether the law students, law teachers, judges and we the lawyers would be up to the task of picking up the book and going through it attentively. More importantly, those who are interested in the dynamism of Muslim Law and the possibilities of an egalitarian and more equitable development of our society through new *ijtihad* need this book on their book shelves immediately for informed reference and critical encounters with Muslim Family Law Ordinance.

The book has been well produced by the Asiatic Society of Bangladesh. If I were teaching a course on Muslim Law for undergraduate law students, I would have requested the Asiatic Society to produce a cheaper 'paperback' version for students and would have used this book as the standard text book, at least for the MFLO part of the course. I am sure the book would stimulate debate and discussion among students and teachers, facilitating an informed understanding of Muslim personal law, rather than rote learning of Mulla's version of Muslim law, often (almost!) faithfully reproduced in Bangla by many a local 'authors'.

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