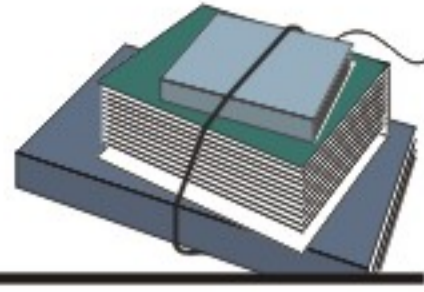


LAW BOOK REVIEW



RIDWANUL HOQUE

Impact of shari'a law

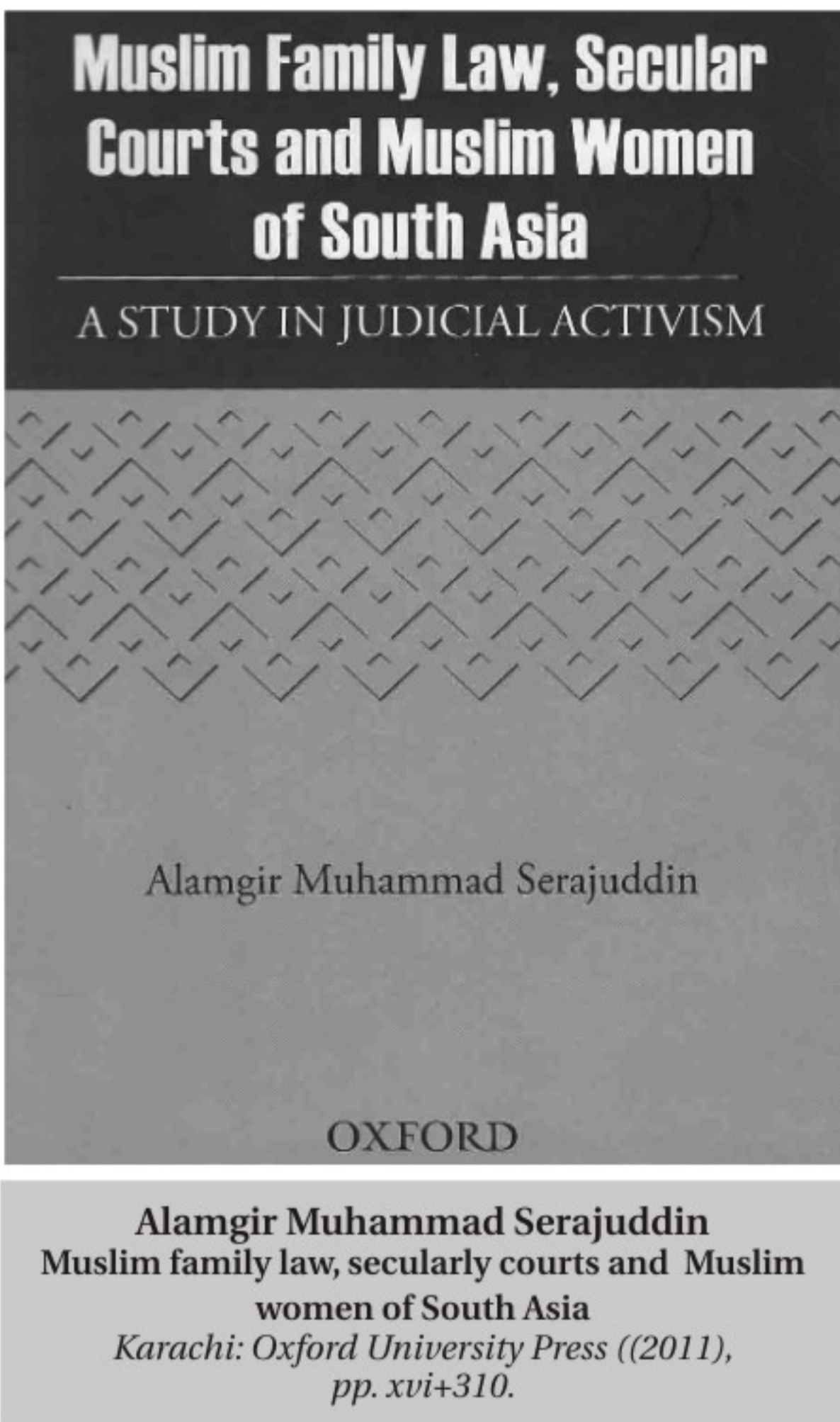
THIS is a book on 'law and society' and shows how the shari'a law has impacted on the lives of Muslim women in South Asian societies. In Bangladesh, laws are rarely analyzed, applied and read with reference to the changing needs of society. This is particularly true of religious/state-made personal laws. Bangladesh's legal system, although it is essentially pluralistic, is heavily oriented in state-centrism, often ignoring that people may make the 'law' and that the law itself lives amongst the people. The law is not merely certain dry black and white letters; it is a process and negotiation. The present book under review succinctly presents how the South Asian secular courts have negotiated the Muslim personal law to adapt it to the present day scenarios.

The core premise of the book is whether or not modern scholars or, for that matter, the judges, can interpret the Islamic law or the original sources of it - for example, the Qur'an and sunnah. Throughout Islamic history, qadis (judges) and jurists have acted as agents of socio-legal change. Despite the uniformity of its basic norms, the Islamic legal system is essentially pluralistic as evident in the diversity of its schools of legal thought. This inevitably necessitates the exercise of finding the correct or more appropriate rule of the law in light of a given novel problem through what is known as ijihad. In the absence of consensus (ijma) on a particular point there is much scope in the law for juristic disagreement (ikhtilaf), allowing the use of "inferential reasoning" to formulate a situation-specific decisive rule. This interpretive diversity offers modern jurists or judges the opportunity to exercise ijihad or judicial activism. The view that the door (scope) for ijihad (bab al-ijihad) became closed fourteen hundred years ago with the authoritative and final interpretations of Islamic rules by ancient jurists, a view once judicially imposed by the then Privy Council (see also the famous Hefzur Rahman Case at the Appellate Division) has now been authoritatively overruled. In effect, most authoritative jurists expressed their views as individual theoreticians, many of them cautioning against implementing them as the only version of Shari'a (An-Na'im 1994). Debates notwithstanding, exercise of judicial activism in adapting the traditional Islamic family law rules to the current needs of the judges' own societies has become entrenched in all South Asian societies.

The author is a leading commentator in South Asia on issues on which he has produced the present mono-

graph, which is in sequence to his earlier landmark work on Shari'a law and society. By studying judicial decisions and modern day statutes, the author argues for a proactive judicial role in order to achieve genuine equality of rights between the sexes or to remove gender discriminations under Muslim family law. He shows that judicial activism in Muslim family law is not only legitimate but also necessary because, political and social contexts make it unlikely that the political lawmakers will legislate to remove gaps in this branch of law.

The book contains a total of six chapters. The first chapter introduces the complex concept of judicial activism firstly from the perspective of public law and then from the perspective Islamic law. In expounding the concept of judicial activism within the context of Muslim family law the author has, however, remained confined to views and analyses of modern-day judges, mostly from the Pakistani judiciary. There ought to be a little longer analysis of power, need, and legitimacy of judges' interpretations of Islamic law and that of course with reference to Islamic law scholars. Second chapter deals with the colonial courts' role in adjudicating Muslim women's rights. Set in a historical background, this chapter lays the foundation for the better understanding of nuances of judicial interpretations of



Muslim law in post-1947 South Asia. It is shown here how the judges of the colonial regime misinterpreted or gave distorted meanings both to shari'a and ancient texts like Fatwa e-Alamgiri with long-lasting precedential burden on the post-Independence judges of this region. Chapter 3 is about development of Muslim family law in India through courts since 1947 by way of interpretation of both unofficial shari'a law and official statutory law, which presents a fascinating account of the Indian judicial trend in interpreting statutes and traditional Muslim law rules to expand the ambit of women's rights.

Chapter 4 deals with Muslim family law in Pakistan and the courts' role thereunder. In this region, most notable instances of activist interpretations of Islamic family law are made by Pakistani judges. In Pakistan, the whole legal system at some point became Islamized with Shari'a courts being installed. The impact of this systemic innovation on the development of family law rules has been analyzed in this chapter, showing how progressive development of Muslim family law became arrested in Pakistan at some point of time. Chapter 5 is about the development of Muslim family law and the judicial protection of Muslim women in Bangladesh. The issues covered up here are validity of marriage, divorce, maintenance, restitution of conjugal rights, and importantly, the hotly debated issue of fatwa. Under the head of

'tyranny of fatwa', the author's excellent analyses of court cases and the law lead to a conclusion that what has come to be applied against women in the name of fatwa is unlawful.

Chapter 6 is the concluding chapter. In this brief chapter the author sums up his findings and reiterates that judicial activism under Muslim family law has significantly enlarged the women's rights and bridged the gap between their rights in book and their actual pitty position in society. Reading the conclusions, the reader may recall how the courts did a great job in establishing, e.g., the women's right to 'divorce' (or to take part in divorce), the right of maintenance, and the right against forced marriage under Islamic law. However, the author thinks that judicial activism is no substitute for systematic legislative action in this field but that it can mobilize the people's consensus that may eventually lead to political actions needed. One can not agree more with the author's conclusion.

The book under review follows the presentational style which is quite uncommon. Instead of presenting Muslim family law issues one after another or writing the book in the format of 'Sections' which most lawyers and judges are perhaps accustomed with, the book presents the issues with both historical and factual underpinnings and insights. The most outstanding aspect is that, the author presents the court cases relatively in factual detail and in their actual social context so that the law is not understood mundanely, divorced from its social, legal, cultural and economic contexts and background. In the recent history of academic wisdom no other book on Islamic family law has been written in such a social and anthropological setting.

I do not really find any major point for criticism. As a Bangladeshi reviewer with a deep interest in the subject myself, I would expect more detailed comments on the leading judicial decisions on the subject by the Supreme Court and a separate chapter on how trial court judges interpret the Muslim family law rules in Bangladesh. Also, in the concluding chapter the author would have profitably made a section by independently comparing the attitude and prejudices of the Bangladeshi, Indian, and Pakistani judges.

The book is an outstanding contribution to the field of comparative Muslim family law in South Asia and will undoubtedly sway the filed for many years to come. I wish, the book will be warmly welcomed by every one interested in Islamic family law of South Asian societies or in the study of law and society generally.

The writer is Associate Professor of Law, University of Dhaka.

LAW EVENT



Constitutional Law Moot Court

FARHAAN UDDIN AHMED

TO commemorate the Constitution Day on 4th November, this year the Moot Court Society of BRAC University organized the Constitutional Law Moot Court Competition 2011, it was the first of its kind and was a success to a great deal. The event was held between 11th and 12th November, 2011. A total of fourteen universities both public and private from all over Bangladesh participated. The participating universities were ASA University Bangladesh, BRAC University, Daffodil International University, Dhaka International University, Eastern University, Jagannath University, Leading University (Sylhet), Premier University (Chittagong), South East University, Stamford University, Sylhet International University, University of Chittagong, University of Dhaka and Uttara University. Each team consisted of two members; one was the petitioner and the other respondent.

This year the Moot Problem was based on the issue of Secularism which is now a topic of debate in our country. According to the moot problem, article 2A of the Constitution of the People's Republic of Bangladesh which recognizes Islam as the state religion was challenged by a writ petition issued by the petitioners for being in violation of the Principle of Secularism, Supremacy of Constitution, Fundamental Principles and the Basic Structure Doctrine.

The first day took off in BRAC University with the registration of the teams followed by two rounds of submissions by the mooters one by one. Each team got a chance to make their submissions as the petitioners and respondents. Each mooter was given seven minutes to make his or her submissions and then he or she was questioned for about three to four minutes by the judges for clarification. Mr. Justice Obaidul Hasan; Mr. Justice Dr. Quazi Reza-ul Hoque and Mr. Justice Md. Ruhul Quddus were the judges for the first round. Mr. Justice Dr. Syed Refaat Ahmed and

Madam Justice Dr. Naima Haider judged the second round.

The first day saw a great show by the mooters and was a great learning experience for all, as the honorable judges gave valuable advices to the mooters. At the end of the day the top four teams were announced who were going to compete in the final rounds the following day. Amazingly two teams from BRAC University and two teams from Dhaka University made it to the finals.

lowed by a speech by Dr. Shahdeen Malik the Director of School of Law, BRAC University. Then the Judges gave away the certificates of participation to the teams. Then the Chief Guest Dr. Ainun Nishat the Vice Chancellor of BRAC University shared a few words with everyone.

After the wonderful speech, the moment had arrived for the declaration of the results. Dr. Tureen Afroz announced the results and the Chief Guest gave away the awards. The



The next morning the audience and the mooters geared up and took their places at the Auditorium of BRAC Center Inn for the extremely high quality submissions that were to be made by the mooters from both the petitioner's and the respondent's side. The Chief Guest for the day was Professor Ainun Nishat, the Vice Chancellor of BRAC University. The finals consisted of two rounds where each team got a chance to make submissions as the petitioners and respondents. The finals were judged by Mr. Justice Mirza Hussain Haider; Mr. Justice Tariq-ul Hakim and Madam Justice Farah Mahbub. They adjudged the finals in an exemplarily fashion, providing valuable advice and suggestions throughout the two rounds. After a short break at the end of the finals, the closing and prize giving ceremony began with much anticipation among all. Dr. Tureen Afroz the Advisor of MCS-BU welcomed all, followed by an enthusiastic speech by M. Sanjeeb Hossain, former President and life-time member of MCS-BU. The Honorable Judges gave everyone a few words of encouragement, fol-

lowed by a speech by Dr. Shahdeen Malik the Director of School of Law, BRAC University. Then the Judges gave away the certificates of participation to the teams. Then the Chief Guest Dr. Ainun Nishat the Vice Chancellor of BRAC University shared a few words with everyone. After the wonderful speech, the moment had arrived for the declaration of the results. Dr. Tureen Afroz announced the results and the Chief Guest gave away the awards. The

first award was for the Best Fighter for 2011 it was given to the team which gave a tough competition but could not make it to the finals, the best Fighters were adjudged to be the Southeast University, who were ranked fifth, overall. Dhaka University Team 1 was adjudged the 3rd Runner-up, Dhaka University Team 2 was adjudged the 2nd Runner-up and BRAC University Team 2 was the 1st Runner-up. Then the champions were announced to be BRAC University Team 1 consisting of Kazi Tuney Binte Zinnat and Monira Nazmi Jahan. The 'Advocate of the Year 2011' was adjudged to be Kazi Tuney Binte Zinnat of BRAC University. Thus the event came to an end.

The event brought a new dimension to mootings in Bangladesh and it was the first of its kind dealing with Constitutional law. The competition strengthened the intellectual partnership among the law students and faculty members of various universities in Bangladesh. Everyone took something valuable away from this tournament most notably, the experience to treasure for the rest of their lives

LAW WEEK

HC asked DU to e-evaluate answer sheets

The High Court on December 1 directed the Dhaka University authorities to re-evaluate the answer sheets of 'Ga' unit admission test without holding a fresh admission test. Passing the order on a writ petition, the court said the answer sheets will be re-evaluated by a three-member committee headed by Dr Zafar Iqbal of Shahjalal Science and Technology University (Sust). Two other members of the committee will be appointed from Dhaka University, it said. The committee will submit the results to the vice chancellor of Dhaka University as early as possible, the court said. It also asked the authorities to immediately remove Prof Jamaluddin from the post of dean of business faculty and to appoint another competent teacher to the post. The writ petition was filed after the DU authorities decided to cancel the results and hold a fresh test on December 9. -*The Daily Star online edition December 1 2011.*

Mayor Khoka challenges DCC split

The High Court on November 30 questioned the legality of splitting Dhaka City Corporation (DCC) into two. Parliament on November 29 passed a bill to split the DCC ignoring widespread criticisms and protests. In response to a writ petition filed by outgoing DCC Mayor Sadeque Hossain Khoka challenging the legality of the bill, the HC issued a rule upon the government and the Election Commission (EC) to explain in four weeks why the bill should not be declared illegal and unconstitutional. An HC bench comprised of Justice Farid Ahmed and Justice Sheikh Hassan Arif came up with the rule. The two judges, however, differed over ordering a status quo as regards the holding of offices by the DCC mayor and councillors. -*The Daily Star December 1 2011.*

Suspect Faruque confesses to his involvement

Hazi Faruque, a suspect in Narsingdi municipality mayor Lokman Hossain murder case, on November 30 confessed to his involvement in the sensational killing. Faruque made his confession in a detailed statement before Narsingdi Senior Judicial Magistrate Shihabul Islam. His confessions came at the end of ten days in remand. Meanwhile, three other suspects in the case were placed on different terms of remand after they were produced before a Narsingdi court on November 30. -*The Daily Star December 1 2011.*

Porimol's bail prayer rejected again

A Dhaka court on November 30 again rejected a bail petition of Porimol Joydhar in a case filed against him for molesting a female student of Viqarunnisa Noon School and College at his coaching centre in the city's Badda area. Judge Mohammad Arifur Rahman of the Fourth Special Tribunal for Prevention of Women and Children Repression of Dhaka passed the order as there were no cogent grounds to grant bail to the accused. Earlier, different courts had rejected his bail petitions for several times. -*The Daily Star December 1 2011.*

Sayedee's plea dismissed

The International Crimes Tribunal has dismissed Jamaat-e-Islami leader Delawar Hossain Sayedee's plea that its chairman Justice Nizamul Huq can become biased against him in the ongoing war crimes trial. In its order on November 28 the three-member tribunal called Sayedee's petition against its chairman "contemptuous, outrageous, and unheard of". Sayedee, Nayeb-e-Ameer of Jamaat, is the first to stand trial from among the seven Jamaat and BNP leaders facing charges of crimes against humanity such as genocide, murder, rape, arson and torture during the Liberation War. The ICT charged Sayedee with 20 counts of crimes by the tribunal on October 3. The charges include genocide, killing, rape, arson, abduction and torture of civilians during the war, which Sayedee denies as "politically motivated". The court also observed that submitting such a petition seeking explanation on a judge's continuing to discharging functions is unprecedented in the history of judiciary in the country. -*The Daily Star November 29 2011.*

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The writer is a Law Student at BRAC University.