

SOUTH ASIAN MUSLIM LAW TODAY: AN OVERVIEW

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The Indian subcontinent is home to the world's largest concentration of Muslims, now about 400 million people, but scholarship on South Asian Muslim laws has always been a minority phenomenon, marginalised between Middle East-focused Islamic Studies and Hindu-focused South Asian Studies. Today, more than ever, one cannot possibly understand South Asian laws without reference to Muslim law. The realities 'on the ground' point to complex interactions between various state laws, religious laws and local customary laws, all of which contain Muslim elements, not so much in their original Middle Eastern form as in South Asian adaptations.

Linking this scenario to the worldwide debates about 'tradition' and 'modernity', globalisation and regionalisation, ethnic plurality and national uniformity, not to mention issues of gender equality and human rights, one can easily see that the current debates about the place of Islamic laws in South Asia are extremely complex. This makes them very relevant for scholars of the Muslim legal world. South Asia today is a laboratory of the contemporarisation of Islamic laws. Careful study is repaid by insights which other jurisdictions in the world do not offer because their conceptual chemistry is so different. As in the Maghreb, such debates not only take up ancient discussions about the sources of traditional Islamic laws and the right to interpret them, they also concern the crucial interaction of religious and local customary traditions, as well as extremely instructive debates about the role of the modern state vis-à-vis Islam, the place of women, and the development of a modern Islamic economic system.

Such complex debates are today no longer restricted to South Asia and the developing world. Following World War II, the emigration of South Asian Muslims to many countries of the world, particularly in the West, has created new interaction patterns between various legal and social systems in Western countries and Islamic law. We are only just beginning to analyse this emergent field of legal reconstruction.² It is apparent that we are still confused about whether this field of study falls in the realm of law or of anthropology. In a forthcoming book on Muslim law,³ the new hybrid phenomenon of Muslim law in England is encapsulated in the term angrezi shariat. This refers basically to the now publicly emerging forms of British Muslim law which can only be observed if one relies not merely on textbooks, legislation and reported cases, but ventures out into the community to understand the legal issues that arise at the local and individual level, rather than as big political issues.

The present article examines the complex interactive South Asian scenario in a brief overview and then draws attention to several legal topics which have recently confirmed that South Asian Muslim legal scholarship remains one of the most exciting fields of study open to South Asianists and others. Particular attention is given here to the treatment of religious minorities, new conceptualisations of public law, and some contentious family law issues.

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²) See Michael King (ed.), God's Law Versus State Law. The Construction of an Islamic Identity in Western Europe. London: Grey Seal, 1995.

³) David Pearl and Werner Menski, Muslim Law. London: Sweet&Maxwell, 1997 (forthcoming).

Locating the Muslim presence: State law, religions and customs in South Asia

The interactive relations between state law, religious laws and local customary laws in South Asia were made more complex by the transition from the various colonial regimes (mainly British, also French and Portuguese) to independent nation states, all of which have been struggling with the treatment of religious and ethnic minorities. When the subcontinent was divided into India and Pakistan in 1947, Muslims became a large and thus powerful minority in India (now c. 12% of the population, well over 120 million people). Conversely, Pakistan was created as a state for Muslims but retained about 12% Hindu population, with particularly large concentrations in East Pakistan, now Bangladesh. The ethnic diversity of Panjabi-dominated West Pakistan and Bengali East Pakistan introduced numerous complications in working out the foundations of a new Muslim state, Pakistan, after 1947. Appeals to Muslim brotherhood, the ummah and other aspects of solidarity could not stop the emergence of Bangladesh, in 1971, as a new nation state with a large Muslim majority.

The presence of minorities, thus, has continued to be a legally relevant fact of life in South Asian states, despite gruesome ethnic cleansing after 1947 which involved many millions of people on both sides. This should be an important lesson for debates about ethnic cleansing anywhere in the world today. By the mid-1990s, the share of non-Muslim minorities in Pakistan and Bangladesh has decreased, largely by conversions in Pakistan and emigration in Bangladesh, while Indian Muslims have been increasing. Pakistan today is home to quite small minorities of Hindus, Christians and others (about 4% in total), while Bangladesh has a Hindu minority of c. 15 %, which is apparently under intense pressure.⁴

All three states have been pursuing particular policies to accommodate Islamic law and it is remarkable how widely these differ. India, aware from the start that it would be the home of a large Hindu majority as well as a huge Muslim minority and others, opted for a strategy of secularism which differs from Western conceptualisations of that strategic term. It focuses on equidistance from all religions, thereby taking explicit account of religious pluralism. Giving a defined place to the personal laws, it has been argued, creates much potential for conflict. But this arrangement also takes good care of pluralism, so that Indian Muslims remain today governed by shari'a, mainly in the sphere of family law, while the various elements of the general law apply to all persons irrespective of religion.

⁴) Taslima Nasreen's novel Lajja contains a powerful depiction of such pressures which have now been giving rise to asylum claims in Europe, some of which have been successful. On the legal position of non-Muslim minorities in Bangladesh see Werner Menski and Tahmina Rahman, "Hindus and the Law in Bangladesh", South Asia Research 8.2 (1988), 111-131.

In this arrangement, the secular state law, while respecting religion, still insists that it remains the dominant legal authority, rather than religion or custom, the other contenders for supremacy. India follows, thus, a Western model of political ideology while still not refusing to acknowledge the competing powers of religion and local customary laws. The result is a legal system marked by immense internal diversity, giving rise to unresolved and often quite confused debates about protection of human rights, equality before the law and the desirability of a uniform civil law which do not centrally concern us here. Let us note, however, that India has so far quite successfully countered the multiple pressures to abandon the secular path and to turn into an avowedly Hindu state. If we look beyond dramatised headlines about Hindu fundamentalism in the recent past, we see that Muslims actually have a secure conceptual place in the Indian political and legal system. This does not mean that there is no discrimination, but it is impossible for the state to overlook the presence of Muslims and others as minorities.

In Pakistani law, partly as a result of the common colonial heritage, the overall structural picture is quite similar to that in India. Within the personal law system, Muslim law became of course the majority law in 1947 but the minority laws also have a structural niche which cannot be simply defined away. While there appeared to be an early commitment to secularism in Pakistan, too, which needs to be researched further in the light of current South Asian debates, the Islamic nature of the entire legal system has subsequently been reinforced in a series of measures which can be summed up in the term 'Islamisation'. Public (and even private) commitment to Islam was ideologically established and reinforced by the Objectives Resolution of 1949, which provided that all Muslims should be "enabled to order their lives in the individual and collective spheres in accord with the teachings and requirements of Islam as set out in the Holy Quran and the Sunna".⁵ This declaration subsequently became the Preamble to the first Pakistani Constitution of 1956, then to the 1962 Constitution, and finally to the 1973 Constitution. During the heavily politicised movement towards Islamisation under General Zia-ul-Haq in the 1980s, Presidential Order No. 14 of 1985 turned the Objectives Resolution into a substantive provision of the 1973 Constitution, now found in Article 2A. This, by a stroke of the pen, changed the chemistry of the entire Pakistani state legal system. It now became clearer that being Pakistani and being a Muslim were still more closely linked and that the fundamental right to freedom of religion for non-Muslims would be impaired. This has had dramatic consequences particularly for the Ahmadiyya community in Pakistan, who have been declared non-Muslims.⁶

However, despite much lipservice to Islam and an explicit recognition of divine superiority in the Pakistani constitution, modern Pakistani and Bangladeshi laws, typical for state legal systems, still operate on the basis that the modern state law is the dominant legal authority. Pakistan and Bangladesh, too, therefore follow Western models of political ideology but try to match these, as best they can, with Islamic concepts. It is no surprise, then, that Islamisation has become a key element of debate and controversy.⁷ However, this politicisation of religion is hardly a new phenomenon, since concern about Islamisation precedes Pakistani independence.⁸ Still, the mandate of a new country created specifically for Muslims gave fresh impetus to thinking about what 'Islamic' means. Significantly, the Objectives Resolution respects the fact that being a Muslim is a matter for individuals, giving the state a supporting and enabling role, although the reference to the public sphere indicates the potential for pressure on individuals.⁹

⁵) See G. W. Choudhury, Constitutional Development in Pakistan. Second ed. Vancouver: University of British Columbia, 1969, 35.

6) See in detail Yohanan Friedman, Prophecy Continuous: Aspects of Ahmadi Religious Thought and its Medieval Background. Berkeley: University of California Press, 1989.

⁷) For a detailed study see Rubya Mehdi, The Islamization of the Law in Pakistan. Richmond: Curzon Press,

While in India the state has shied away from reforms of Muslim law, focusing instead on Hindu law reforms, the Pakistani post-Independence scenario empowered the state to introduce important reforms to Islamic laws. These reforms were, however, perceived as anti-Islamic especially by the ulema and fierce debates arose in the 1950s about the role of the modern state law vis-à-vis Islamic laws. Lots of compromises were made and the resulting legal reforms to Pakistani family law, found in the Muslim Family Laws Ordinance of 1961, have generated controversial debates which extend to the present day and will be discussed further below. Such controversial agenda of law reform also created some confusion among the few academics who studied South Asian Muslim laws and it is perhaps fair to say today that this field has remained imperfectly analysed. At the same time, the more prominent topic of Islamisation of laws took centre stage from the 1970s onwards.

Today, we are in a position to begin to analyse the interactions of modern, liberal reforms of the 1960s with the legal developments of the 1970s and 1980s. In the 1990s, it is becoming clearer that anti-colonial protest, i.e. the dissatisfaction of having to continue the colonial legal framework, was mixed with a search for ‘true’ Islamic roots which is so very typical of the South Asian scenario. The resulting islamised legal system of modern Pakistan has become fairly well-known in the West because of a series of Hudood Ordinances in 1979, which have led to miscarriages of justice against women, in particular.¹⁰ Thus, the conceptually complete but actually piecemeal Islamisation of the Pakistani legal system, merely replacing some provisions of the colonial laws with Islamic rules, has not been an unqualified success. In fact some experts argue that it has had no effect at all and appears to be more like political gimmickry.¹¹

A prominent example in this context is the old Indian Evidence Act of 1872, which was supplemented by the Quanun-e-Shahadat Order of 1984 to the effect that the testimony of two women should now be equal to that of one man. Not surprisingly, such reforms have led to much critical commentary, but the level of analysis and knowledge has remained low. To date, it is not quite clear whether these reforms were really much more than politicised chess moves to placate certain lobbies. One can say this so firmly because at the same time, when it comes to real courtroom situations, Pakistani law has very significantly relaxed the evidence requirements for women testifying in courts in their own cases. The judicial assumption in this regard is that Muslim women do not run to courts for every little matter. Thus, if a woman is ready to testify in court, there must be truth in her version of the story. As we shall see in more detail further below, this has recently achieved most effective changes in the Pakistani law on khula under section 8 of the Muslim Family Laws Ordinance of 1961, which is now very widely used by Muslim wives.¹²

1994.

⁸) See in particular the Muslim Personal Law (Shariat Application) Act, 1937 with its several amendments.

⁹) Indeed, this kind of legal regulation has also justified police intrusion into the private sphere and has given rise to much-resented abuses of such powers in Pakistan.

¹⁰) On this see in particular Mehdi, as n.7.

¹¹) So, in essence, Charles Kennedy, Islamization of Laws. Islamabad: IPS, 1996.

¹²) This has put the otherwise leading case of Khurshid Bibi (PLD 1967 SC 97) into perspective, for the majority of cases on khula now appear to be decided under section 8 of the 1961 Ordinance, no doubt inspired by the trail-blazing Khurshid Bibi judgement of 1967.

Apart from constitutional law, the focus of Pakistani legal debates has been on family law, on zina and inevitably on riba. Such debates have resurrected old conflicts and tensions in Islamic jurisprudence.¹³ Official attempts to islamise the law threw up the problem of the internal diversity of conceptualisations about Islam. Being a Hanafi Sunni majority country, Pakistan could not claim to be uniform in its understanding of shariat beyond the very basics of submission to Allah and belief in the Qur'an as God's word. The Ahmadiyya problems of Pakistan signify this most clearly, for most Ahmadiyyas view themselves as Hanafi Sunnis. Unfortunately such problems go further, with frequent reports of Sunni/Shii violence and even killings. This partly explains the growing public disgust in Pakistan today about how law and religion are being abused for political gain.

In my view, one can explain some of this self-inflicted violence in Pakistan as the indirect consequence of a misguided approach to uniformity which underlies this particular nation state. Differently put, a key problem appears to be the reluctance to accept and admit plurality, in a political as well as a religious sense, as an integral part of human life. In terms of more recent ethnic analyses, it could be said that the unwillingness and inability to recognise 'the other', even the Muslim 'other', lies at the core of such continued violence. We see here that the starting point of Pakistan as a country for 'the Muslims' is continuing to cause enormous problems. For, this idealised aim was never absolutely attainable. Thus, in modern Pakistan, lingering resentment against the continued presence of religious minorities hits not only non-Hanafi Sunnis, but all kinds of 'others'. Since religion does not operate in a closed field, socio-economic tensions interfere in this minefield of conflicts, too. The obvious religious and ethnic dimensions of such conflicts intersect and magnify the problem from time to time.

The impact of religions on constitutional laws

We have already seen that South Asian state legal systems claim overall control, while recognising the key element of religious authority. Despite Islamisation, Pakistan is certainly not a theocracy. Today, the sometimes desperate desire among politicians to Islamise the legal system comes out in new rules which make eating in public places during Ramadan a crime for any person, whether Muslim or not, thus imposing an Islamic order on everyone present in that state. Let us note here that precisely this kind of official legal pressure is opposed today by Muslims in European countries when they protest that the secular legal rule systems force them, or their children, as it were, to conform to non-Islamic patterns of actions, behaviour and dress. Islamisation in Pakistan, and to some extent in Bangladesh, thus, has placed religion at the core of debates about the future of the respective legal and social system and any spokesperson finds it easy to use religion as a support mechanism for his or her private views.

¹³) See in particular Noel J. Coulson, Conflicts and Tensions in Islamic Jurisprudence. Chicago 1969. Coulson was certainly aware of Pakistani debates at the time.

If we contrast the Indian scenario with developments in Pakistan, we see that secularisation in India appears to have made religion more invisible, which has been welcomed by many commentators. However, religion has certainly not become non-existent; it resurfaces in unexpected quarters. Thus, the secular Indian Constitution, virtually prohibiting religious discourse, has been promoting a human rights language which appears to be religiously neutral and certainly forces judges to conceal their private religiosity. Indian judges have become masters at discussing religious and moral aspects of the law while leaving religious terminology out of their discourse. As one famous member of the old guard of leading judges in India, Mr. Justice V. R. Krishna Iyer, told an audience of law students in London a decade ago, in his position it was meritorious to cite American cases but still essential to think like an Indian. In the current re-assessment of modern South Asian public laws and their revolutionary approach to securing legal justice for millions of people who do not even have enough to eat, such revealing comments disclose the continuing strong link between law and religion, and law and morality, while the language chosen is that of rational secularism. It only strikes analysts who know enough about South Asian religions and their conceptual underpinnings that this language can in fact be read as a code for a universalistic duty-focused philosophy, based on the key concept that all life forms are invisibly interlinked. Thus, any human action involves an inherent element of accountability to the whole, whether it be one's spouse or family, the local community, the state, or ultimately superhuman powers, however defined. In their own ways, all South Asians can make sense of this, it is a basic part of their culture, and thus remains unexpressed in formal legal discourse.

Modern Indian jurisprudence, thus, is certainly not an avowedly Hindu jurisprudence; it is, however, a Hinduism-inspired jurisprudence with a guilt complex. Not surprisingly, the current fashion to view everything on earth in human rights terms has been very eagerly copied in India because it allows Indian lawyers, that little bit longer, to paper over the immense conceptual differences which distinguish Western model jurisprudence from the immensely hybrid South Asian jurisprudential concepts which involve recourse to Hindu as well as Muslim belief structures. In the near future, this rapidly emerging current discourse will be forced to address much more openly the key issue that religion cannot be left out of debates on future legal development.

In contrast, Pakistan's Islamisation process has had the opposite effect, propelling debates about law in a language that uses Islam and shariat all the time. Since everything under the sun can be discussed in terms of a religion that is a way of life, too, functionaries of the law are encouraged to produce public declarations of private belief and to rephrase their own religious views as legal opinions. We find the familiar concept of ray in full action. In Pakistan, this has been further promoted by the institution of the Federal Shariat Court.¹⁴ We should not expect, thus, that any aspects of Islamic law have become clearer through the Pakistani case law. In fact, because there is so much scope for private and individual Muslim opinion, dressed as legal authority through the voice of judges, Pakistani case law constantly throws up remarkably controversial judgments, at all levels.¹⁵ This, however, seems typical of Islamic legal discourse generally.¹⁶

¹⁴) A prime example of this phenomenon has been Mr. Justice Tanzil-ur-Rehman, who for many years used his platform in the Karachi High Court to produce important judgments on all matters of Islamic law and then, on his elevation to the Federal Shariat Court, continued that policy with great vigour. Since his retirement from the Bench, such well-researched judgments have become markedly rarer.

¹⁵) One remarkable judgment concerns riba. It would appear to direct that the entire Pakistani economic system should be Islamised and freed from riba. It is found reported at PLD 1992 FSC 1.

Social conflict in the judicial arena

The most recent example of this kind in Pakistan, typically in family law, concerns the case of an adult Hanafi woman whose father was unhappy about her choice of life partner and pleaded in court that Muslim women of any age do not have the right to give themselves away in marriage. This so-called Saima case is still pending in early 1997, but press reports of the proceedings (which immediately went around the world) strongly confirm old prejudices about the patriarchal structures of Pakistani Muslim society and the lack of freedom for women to make important decisions about their own life. While it is undoubtedly worrying that such cases are brought to courts in the first place, one needs to be aware that litigation in South Asian countries serves multiple functions. Particularly in Pakistan, religious discourse is likely to be a cover for some social conflict.

Recently, I debated this case with a class of law students in Pakistan.¹⁷ It quickly became apparent in our discussion that the traditional Hanafi Muslim law would actually grant the woman an almost unqualified right to dispense with the wali. Muslim religious tradition here obviously sided with the woman, so why all the fuss? The fact that her father protested and even went to court, and that the judge gave signals that he would concur with his view, can be read as an attempt to impress on Muslim women in Pakistan that they should listen to males. It is also strong evidence of social - rather than religious - concern that so many young people in Pakistan today appear to be choosing their spouses without the involvement of their families. It is too simple, then, to view this case and its underlying debate merely as an indication of a struggle between traditional religion and modern society, it is a struggle within modern society itself. The father and the judge, two males, speak here as members of a Muslim society today which sees itself overrun by foreign influences of a perceived immoral nature. The criticism is a general social one, therefore, directed as much at the young man who enticed the woman away than at the woman herself. The attempt is to protect modern Pakistani society from media-induced patterns of self-centred Western life styles. The medium chosen is, significantly, a public one, the courtroom. The judge's message is intended to be a public sermon: Do not follow the West, stick to Islamic traditions, which in this case so obviously involves an appeal to local customary, rather than strictly speaking Islamic rules.

However, this judgment is still under appeal to the Supreme Court and so has not become effective. This confirms the politicised nature of this particular debate, in which the legal process is used as a bargaining tool rather than a means to decide the issue in hand.

¹⁶) On the continuing Islamic debates about major issues like abortion, garar and riba, see now Rüdiger Lohlker, Schari'a und Moderne. Diskussionen über Schwangerschaftsabbruch, Versicherung und Zinsen. Stuttgart: Kommissionsverlag Franz Steiner, 1996 [Abhandlungen für die Kunde des Morgenlandes, Band LI.3].

¹⁷) I must acknowledge here my gratitude to the British Council in Pakistan, which promotes educational exchange visits and frank discussions about contentious legal issues. A group of brainy law students at the Pakistan College of Law in Lahore will find some of their arguments reproduced here. It is therefore my pleasant duty to record their input into this debate.

It transpires, therefore, and is of relevance much beyond this particular case, that there is growing awareness in South Asia today that the West does not offer adequate and sustainable models for social and legal development. This realisation is not new but has become immensely strong during the 1980s in India and the 1990s in Pakistan and Bangladesh. It has propelled an ongoing search for indigenous models of development, be they Hindu, Buddhist, Sikh, or indeed Islamic. Many books have been written in the past few years, particularly in Pakistan, trying to throw light on how early Islamic structures regulated important socio-legal issues which continue to arise today.¹⁸

New South Asian constitutionalism and halal constitutional law

Significantly, this kind of search is conducted both in the spheres of private and of public law. Before we turn to family law issues, two matters of ‘public importance’, the key phrase under Article 184(3) of the 1973 Constitution of Pakistan, need to be discussed briefly. Firstly, in the Muslim-dominated, islamising legal environment of Pakistan, more so than in Bangladesh, religious minorities have not been given adequate representation within the political and legal system, in fact within the state system as a whole. It helps the dominant Muslim group that the minorities themselves are deeply divided over how to achieve more adequate representation. While Pakistan does not have, as far as I know, a single non-Muslim in a higher judicial position, a recent Chief Justice of the Indian Supreme Court was a Muslim and a female Muslim former Judge of the Supreme Court is now the Governor of one of the major Indian states. There is Muslim representation at all levels which is more than tokenism, it reflects a plural reality and its official acceptance as a basis for democratic governance. Secularisation and Islamisation, thus, concern not only the relative power of law and religion, they have definite implications on who can, and who can not, speak on behalf of the law and represent the public. It is not possible here to elaborate on discrimination, but this is obviously a key issue and the differences between India and Pakistan are stark, with Bangladesh placed somewhere in the middle

¹⁸) See for example Liaquat Ali Khan Niazi, Islamic Law of Tort. Lahore: Dayal Singh Trust Library and Nasim Hasan Shah, Law, Justice and Islam. Lahore: Wajidalis, 1989.

Discrimination is not restricted to the religious sphere alone. No legal example shows this better than the recent debates in South Asia about the role of judicial activism and public interest litigation, which is a new technique of vindicating basic rights and enforcing accountability of those in positions of power.¹⁹ In post-colonial countries which adopted Western-style constitutions promising equality before the law but overlooking social inequalities, the past few decades have shown a growing gulf between the privileged few and the virtually rightless masses. Justice-focused public interest litigation techniques have highlighted severe abuses of the law and of human rights in all South Asian countries and have thus led to a reassessment of the role of law in the process of governance. Much more so - - and ten years earlier - - than in Pakistan, Indian public interest litigation has revolutionised the way in which we look today at fundamental rights. In essence, this is a pro-poor law, taking away well-established privileges from those 'men with long purses' who can afford to make the law work for themselves while overlooking the basic rights of others. It is obvious that such legal revolution will not go unchallenged and unopposed but the remarkable trend in India has been that activist judges, rather than pro-establishment judges, have seen themselves promoted to higher posts. By now, this has created its own establishment structure.

In Pakistan, and now also in Bangladesh, the courts have been aware of developments across the border but have not wanted to copy Indian law as such. The result has been a very successful Islamisation of public interest law by swiftly declaring it halal, through the simple reasoning that Islam stands for justice, so public interest litigation itself must be Islamic.²⁰

Notably, this form of justice is not based on the understanding that equal rights are just. Thus, South Asian legal systems, operating a hybrid of Western concepts and non-Western ideas and structures, are forever debating not only human rights, but also what the precise role of Islamic law today should be in working out sustainable legal systems for the next century. In that context, it is noteworthy that modern South Asian states are claiming to be welfare states, in the sense that they will guard the welfare of their citizens, but will not actually make financial provisions for citizens who are indigent. Given the demographic realities and socio-economic facts, that would be an impossible task for any South Asian state today. Thus, the modern developments of South Asian jurisprudence, inspired by Hindu and Muslim concepts of good governance, use the mechanisms of state law to induce and where necessary enforce, self-control mechanisms. In real terms, this means pressure on families, for example, to maintain members who are in need of support. It means that the social services provisions which Western countries have become accustomed to are not even going to be built up in South Asian jurisdictions. Rather than wasting energies on deploring this, modern analysts need to consider how this can be done more effectively. Muslim concepts of charity, whether in the form of zakat or waqf, need to be re-assessed in this respect.

¹⁹⁾ I understand that Dutch law has some interesting things to say on standing and justiciability, but we must restrict ourselves to South Asian law.

²⁰⁾ This is also reiterated in the most recent Bangladeshi case on public interest litigation, which even tries to claim, very patriotically, that this is a Bangladeshi invention based on Islamic principles. This case is not yet reported officially.

Significantly, Bangladesh has been taking a middle position between avowed Islamisation as in Pakistan and secularism à la India. Starting off from socialist, secular rhetoric and principles, Bangladesh has moved some way towards Islamisation, but has faced much more opposition in that respect from local cultural forces as well as religious minorities, who rightly feel threatened by such moves. Thus, today, the laws of all three countries discussed here remain similar, coming from the same roots, but they vary enormously in detail. This is most obviously manifest in family law.

South Asian debates about Muslim family laws

We saw that post-colonial South Asian states have primarily given reformatory attention to their respective majority personal law. Thus in Pakistan and Bangladesh, Muslim law received much and early attention. After fierce debates during the 1950s, the Muslim Family Laws Ordinance of 1961 was promulgated by a benevolent dictator. In India, by contrast, the Muslim personal law has been left almost untouched by the modern state law, while Hindu law has been subjected to wide-ranging legislative reforms in 1955/56 and again in 1976. This brief overview concentrates on three issues of particular relevance, polygamy, divorce and maintenance for Muslim wives during and after a marriage.

Readers will be aware of the Qur'anic foundations of Muslim polygamy and the ensuing debates over the extent of the husband's discretions with regard to having up to four wives at the same time. While Indian law criminalised and outlawed polygamy for Hindu men in 1955, Muslim men in India can continue to have up to four wives. This position is constantly challenged in politicised debates and occasionally comes up in court cases, but it is now something of an 'old hat'. There has not been a serious political will in India for the total abolition of polygamy, among Muslims or any other community, because social concerns continue to show that in many situations women actually benefit from polygamous arrangements.

In contrast, so it appears at first sight, Pakistan and Bangladesh have outlawed Muslim polygamy through section 6 of the Muslim Family Laws Ordinance, 1961. However, close analysis of that section and the case law under it shows this to be a figment of imagination. The effect of the various provisions under section 6 is that (i) a Muslim husband ought to ask his existing wife or wives for permission if he wants to marry another woman; (ii) he should also ask the permission of a kind of local authority; and (iii) he should be punished with monetary fines and/or imprisonment if he violates the requirements under this section. In reality, as numerous court decisions prove, almost all Muslim polygamists in Pakistan and Bangladesh remain unpunished and husbands are not put to rigorous tests over the issue of permission of an existing wife or wives. The modern state law, based on Islamic and local cultural values, does not achieve what a plain reading of the statute would seem to suggest.

Thus, polygamy in all South Asian countries continues to be an ambiguously viewed fact of life. From a Western perspective, this is regularly seen as unacceptable, but now Muslims in Europe, too, are claiming that in certain situations the Islamic allowances for polygamy are more appropriate today than the dishonest ban on polygamy for ideological reasons, which pushes individuals into illegality and forces couples to divorce rather than making mutually convenient arrangements with third parties. Such arguments may not take account of the fact that many women may be forced into such arrangements. However, the current debates have also not paid enough attention to the protective mechanisms for polygamously married women who do not want to complain. Islamic law itself, as well as the modern state laws of South Asia, contain safeguards for unhappy wives, while the modern state laws do not really side with the idealised model of legal monogamy and refuse to implement their own rules unless women vigorously complain. This particular debate will not go away in South Asia and the strong South Asian Muslim presence in many European countries has already given it fresh impetus.

Coming to Muslim divorce, the traditional Islamic law on talaq will be familiar to readers. The South Asian predilection for the talaq-al-bida, the instantly effective form of talaq, is a well-known fact.²¹ Modern Indian law, again, has not interfered in this aspect of Muslim law and thus offers Muslim wives no protection against being thrown out of a marriage without any defence. However, as shown below, Indian law has sought to establish some protective mechanism for women through maintenance laws. Indian law generally has moved more and more towards the 'irretrievable breakdown' model of divorce. This is of course remarkably similar to the Muslim system of divorce, in that the spouse whose partner wants to terminate the marriage contract really has no meaningful defence. Debates about Muslim divorce law in India have often been dishonest, therefore, in failing to mention that a talaq, after all, is not so different from a modern divorce.

²¹) See David Pearl, A Textbook on Muslim Personal Law. London and Sydney: Croom Helm, 1987, 101-102. The most recent study on Muslim divorce law in India is Furqan Ahmad: Triple Talaq. An Analytical Study with Emphasis on Sociological Aspects. New Delhi: Regency, 1994.

Pakistani Muslim law, in the still idealistic reformative mood of the 1950s, seriously sought to place some procedural impediments in the path of a Muslim husband who wanted to get rid of his wife with minimal fuss. In effect, section 7 of the Muslim Family Laws Ordinance, 1961 stipulates that a Muslim husband may still pronounce talaq in whatever form he pleases, but it would not have instant effect and would be subject to reconciliation and notice requirements. In other words, it would really be rather like a talaq-al-ahsan. By the 1990s, we know that these rules were just clever legal fictions. The case law of the 1960s still held that a talaq without notice to the wife and the local authority would be invalid.²² However, already by the 1970s, cases of abandoned Muslim wives who had married another man began to come to the notice of courts. Soon after the introduction of the Zina Ordinance in 1979, prosecution cases for zina began to appear in which ex-husbands who had simply discarded their wife earlier suddenly 'remembered' that they were still married according to the official law.²³ Looking at the facts of such cases, courts in Pakistan decided swiftly that, in certain circumstances, written notice of the Muslim divorce would not be an essential prerequisite for legal validity. Then, by the mid-1980s, Pakistan's Islamisation had the effect that a husband's talaq was now held to be instantly valid because this was so under shari'a.²⁴ By the 1990s, section 7 of the 1961 Ordinance is still on the statute book but its provisions are more or less totally superseded by the re-assertion of shari'a law in Pakistan. This development has not yet been properly analysed and therefore has not yet been vigorously criticised. However, something else has happened in Pakistani law (not, however, officially in Bangladeshi law) in the meantime and has also escaped notice of the outside world: As indicated above, Muslim wives in Pakistan can now effect a virtually instant divorce as well, although they have to go to a court to claim that right officially. A huge list of cases confirms what nobody has as yet analysed in detail.²⁵ Pakistani Muslim wives today can divorce their partner with almost the same ease as the man. Apparently, no court will query a statement by a Muslim wife that she cannot live with her husband "within the bounds of Allah".²⁶ Thus, in the 1990s, attention has shifted from the earlier prominent Dissolution of Muslim Marriages Act, 1939 to the tiny, innocuous section 8 of the Muslim Family Laws Ordinance, 1961. Both legal provisions have been applied for the benefit of Muslim women in Pakistan. This shows that liberal Muslim interpretations and Islamisation can and do co-exist in modern South Asian Muslim laws, which richly repay further study in this field.

Maintenance law in South Asia is a fascinating area of new developments, much politicised and misunderstood so far. The key point to emphasise here is that modern South Asian Muslim law is today well-advanced in recognising a divorced Muslim wife's right to permanent maintenance from the ex-husband well beyond the classical idda period.

²²) The leading case on this is Ali Nawaz Gardezi PLD 1963 SC 51.

²³) The clearest possible case on this is Noor Khan PLD 1982 FSC 265.

²⁴) In this regard, there are several important cases decided by Mr. Justice Tanzil-ur-Rehman (see above, note

14). Most useful among these is perhaps Mirza Qamar Raza, reported at PLD 1988 Karachi 169.

²⁵) For the list of relevant cases and some details see now Balchin, Cassandra (ed.): A Handbook on Family Law in Pakistan. Lahore: Shirkat Gah 1994.

²⁶) This phrase comes from the leading case of Khurshid Bibi, reported at PLD 1967 SC 97.

Significantly, and this has caused the politicised confusions in worldwide legal scholarship on this topic, this innovation came from the secular Indian law. Thus, it was immediately perceived as anti-Islamic and biased. Because of this, hardly anyone bothered to notice that in fact liberal Muslim scholarship, and now socially conscious Muslim judicial opinion, too, have come to the very same result.

The best starting point to analyse this development briefly appears to be the law concerning a Muslim wife's maintenance during the subsistence of a marriage, which is an obligation on the husband. In the frequent cases where Muslim husbands failed to honour that obligation and the wife then went to court to claim maintenance under section 488 of the old Criminal Procedure Code of 1898, the husband's easiest remedy was to simply divorce the wife. He would then be liable only for any unpaid dower (mahr) and the iddat money. It was to stop such mischief, namely the desertion of married Muslim women by careless husbands,²⁷ that the Indian law makers introduced a new definition of 'wife' for the purposes of the secular maintenance law. The revised law is found under sections 125-127 of the Criminal Procedure Code, 1973. As we know with utmost clarity today, this was a well-planned social security measure which exonerated the state from having to look after the victims of broken marriages and put the onus for maintenance on social support networks, in particular husbands and fathers. The new definition of 'wife' had a drastic impact as gradually, in a series of instructive cases involving mainly Muslim spouses, Indian law developed the principle that any divorcing husband would have to make adequate arrangements for the maintenance of his former wife.²⁸

Then, in 1985, came the famous case of a 75 year-old lady, Shah Bano, who had been thrown out of her comfortable home after more than 40 years of marriage and had been left without adequate provision for her old age.²⁹ Remarriage being out of the question, she would have to turn to her children or natal family for support. As so often, these were comfortable middle-class people fighting over a principle. The Supreme Court of India decided, quite in line with earlier cases, that the ex-husband would have to provide the lady adequate maintenance until her last breath. The Court, composed of five Hindu judges, had also looked at the Qur'an and had found no contradiction between its admonishment to be generous to a divorced wife (as in Qur'an II.240-242) and the provisions of modern, secular Indian law. Because of some rather unwise comments about the need for a uniform civil code in India (and thus the end of Muslim personal law), this decision caused riots and much uproar. The government, evidently concerned to undo the damage, very quickly passed a new Act for Indian Muslims alone, apparently -- so everyone thought -- taking them out of the protective ambit of the 1973 Criminal Procedure Code. While this violated the policy directive of legal uniformity, about which everyone concerned raised a big storm, nobody seems to have bothered to read the Act carefully. It is called the Muslim Women (Protection of Rights on Divorce) Act, 1986 and it does exactly what its name says, it protects the rights of Muslim divorced wives. But in which way?

²⁷) This is today a grave social problem among Muslims, especially in Bangladesh, as discussed further below.

²⁸) The key case in this respect is Bai Tahira, reported at AIR 1979 SC 362.

²⁹) The case is reported as Mohammed Ahmed Khan AIR 1985 SC 945.

In the politicised confusions which ensued, the Act was vigorously attacked as a law which takes away important rights from divorced Muslim wives. However, this is nonsense, as a study of the case law under the 1986 Act clearly shows.³⁰ This Act re-constituted precisely the liberal Qur'anic interpretation of the Indian Supreme Court and thus reiterates the position of the Shah Bano case: A divorced Muslim wife's first port of call for support is still the ex-husband. It is only when he is unable to support the woman that she has a claim on her own heirs and relatives and, if those are indigent, too, on the various Waqf Boards which exist in India.³¹

By now there are several dozens of decided cases under section 3 of the 1986 Act, the material provision concerning the ex-husband which every campaigner for women's rights conveniently overlooked. With two exceptions, all those cases hold that Muslim ex-husbands have an obligation to make adequate arrangements for their ex-wives for the time beyond the iddat period. The fascinating new development here is that such arrangements have to be made during the iddat period itself. Thus, if a husband has not done so, a Muslim wife in India today has an instant claim in a court of law, initially a Family Court. What a woman can claim obviously depends on circumstances (another instance where traditional shari'a law and modern secular law agree, quite sensibly), so an impoverished wife will get nothing from a husband who is himself starving, while the former wife of a millionaire, even if she already has a million, may get yet another.

Again, thus, the modern South Asian Muslim law relies on the woman to make a claim, and it will obviously help the claimant if she has a good cause. The main point, from the state's perspective, of course, is that the state itself does not figure at all among those who are legally or morally liable for the financial support of Muslim ex-wives. During the past few years, these significant Indian legal developments have had a spin-off in Bangladesh which must be of prime interest to scholars of Islamic law. As indicated, that country faces the huge social problem of desertion without proper divorce. In 1995, without a word of reference to Indian law, the High Court of Dhaka decided that under Muslim law, as found in the Qur'an, a husband who wishes to abandon his wife is responsible for her maintenance beyond the narrow time of the iddat, especially if there are children involved.³² This case confirms that Muslim law in South Asia is capable of self-expiatory reforms by reference to the shari'a, in this case the Qur'an itself rather than the less positive jurists' opinions on the matter. But this important case has not even been noticed outside Bangladesh, because it decided in favour of women, and in Europe we only appear to hear bad news about decisions that go against women and their interests. A more balanced assessment seems now possible.

³⁰) Werner Menski, "Maintenance for Divorced Muslim Wives", Kerala Law Times, Journal Section, 1994(1), 45-52.

³¹) A very recent case on this, actually the first Supreme Court case under the 1986 Act, is Tamil Nadu Wakf Board, at 1996(2) Kerala Law Times 410 (SC).

³²) The case is Hefzur Rehman, reported at 15 Bangladesh Legal Decisions (1995), 34.

In stark contrast, Pakistani law still takes the ijma-focused juristic view that Muslim divorced wives are only entitled to maintenance during the iddat period. In real life, as fieldwork quickly confirms, even that is very often not given. There seems to be a social contract in Pakistani society that a woman's natal family will provide for her in the eventuality of a divorce. Looking at the Bangladeshi example, however, it appears that the door on reforms is not closed, since this would not in fact go against the spirit of the shari'a and, equally important, does not necessitate explicit adoption of Western or Hindu legal models.

Both in the field of public law and family law, therefore, modern South Asian Muslim law increasingly emphasises the historic justice-orientation of Islamic law and uses it to back up recent law reforms with significant positive impact on women and other structurally disadvantaged sections of the community. There is as yet no coherence in such reforms and, as always, daily implementation of such laws remains a problem, but the conceptual avenues for modern South Asian law reforms which do not violate the spirit of Islamic law have been sketched out and are actually used in daily legal practice in these countries.

In this context, two other recent developments deserve a brief mention here. Firstly, a prominent area of concern among writers on Pakistani law has been that female victims of rapists were convicted for zina on the evidentiary basis of their pregnancy, while the men were let off on the ground of insufficient evidence. One could of course have used the new DNA techniques to pin down such rapists, but in the heated debates about the injustice to women this has been overlooked. I see an absence of legal interest in convicting men for rape, while it remains obvious that even strict penalties, as stipulated in the law, will not protect women against rape. The fact that it cannot be just and proper, under any legal system, to convict the victim of rape rather than the rapist has been addressed in a powerful very recent judgment.³³ Significantly, the learned judge, Dr. Ghous Mohammed, used Islamic rhetoric as well as comparative legal techniques to come to a justice-focused assessment of this difficult socio-legal problem in a contemporary Muslim society.

Finally, among the growing population of South Asian Muslims in Europe, all the issues discussed in this article are of great interest. It is indeed a fact that South Asian migrants in Europe have not abandoned their adherence to shari'a, or what they imagine it to be. They operate today, as ongoing research in Britain and other countries demonstrates with increasing clarity, an intricate combination of adherence to South Asian legal traditions (which are not necessarily those of the statute law, but are mainly inspired by custom and religious traditions) and of the respective official state law. So a Pakistani Muslim living in Britain may cleverly arrange a polygamous marriage without falling foul of English law, will still divorce his wife by talaq first and then go to the English law. He will also seek to rely on Muslim traditions which allow him not to pay maintenance to his ex-wife unless modern state law reminds him of such an obligation which is not, as we saw here, unknown to Islamic law after all. In this way, detailed knowledge about South Asian legal developments today is also becoming increasingly important for lawyers and social scientists anywhere in Europe. Today, South Asian Muslim law is not some quaint Orientalist hobby, it has become a direct part of our own legal experience in Europe and it deserves much more detailed study in the future.

³³) The judgment is reported as Rani PLD 1996 Karachi 316.