

ISSN 1991-8976

RAJSHAHI UNIVERSITY LAW JOURNAL



FACULTY OF LAW
RAJSHAHI UNIVERSITY
DECEMBER 2005

ARTICLES

Women's rights in the Nikahnama in Bangladesh : A critical study

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Prevention of Crime in Islamic Criminal Law: Perspective Bangladesh

যৌতুক : একটি সামাজিক ব্যাধি

সড়ক দুর্ঘটনা ও ট্রাফিক আইন : প্রেক্ষিত বাংলাদেশ

আদালত অবমাননা, সাংবাদিকতা-প্রকাশনা ও তথ্যের অধিকার : পরিপ্রেক্ষিত বাংলাদেশ

বাংলাদেশের রাজনীতিতে পঞ্চম জাতীয় সংসদের কার্যকারিতা : একটি পর্যালোচনা

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Rajshahi University Law Journal

FACULTY OF LAW
RAJSHAHI UNIVERSITY

December 2005

Published by:

Dean

Faculty of Law
Rajshahi University
Rajshahi- 6205
Bangladesh

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Cover Design & Printed by:

B T S Commercial Institute
Benodpur Bazar, Rajshahi

Printed at:

Barendra Printing Press & Packaging

Supora, Biman Bandar Road, Rajshahi. Mob.: 01715-361984

Subscription Rates

For Individuals: **Tk. 100.00 US\$ 20** (without postage)

For Organisation: **Tk. 150.00 US\$ 30** (without postage)

[Published in December 2006]

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An Application of Islamic Law in Bangladesh with Special Reference to Women

Dr. Gazi Omar Faruque*

Introduction

The aim of Shariah is to bring supreme justice in the society. Shariah is a gift and kindness of Allah to his creatures. Mercy is thus the keynote of Shariah. Three things are mentioned as gifts of Allah the book, the balance and iron, which stand as emblems of three things which hold society together, viz., Revelation, which commands good and forbids evil; Justice, which gives to each person his due; and the Strong arm of the law, which maintains sanctions for evil-doers. Justice is a command of Allah, and whosoever violates it faces grievous punishment¹ in this regard Allah says, "Allah commands Justice, the doing of good, and charity to kith and kin, and He forbids all shameful deeds and injustice and rebellion: He instructs you, that you may receive admonition."²

Shariah law is different from Islamic law as existed in the sub-continent of India. Mr. Mahmood J. observed that Mohammedan law is so intimately connected with religion that they cannot readily be dissected from it. There is in Islam a doctrine of certitude in the good and evil. Technically, good and evil, according to Muslim jurists are 'Husn' (Beauty) and 'Qubh' (Evil). In the ethical acceptance of the term, what is good or morally beautiful that must be done and what is evil or morally ugly that must not be done - that is law or Shariah. Shariah literally means the road to the watering place, the path to be followed. Technically means the canon law of Islam. The totality of Allah's commandments is Shariah. Each of such commandments is called 'Hukum'.³

Shariah embraces all human actions. For this reason it is not law according to some modern jurists. It contains an infallible guide to ethics. But their concept is not correct because Shariah covers both social and spiritual aspects of human life.

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¹ Abdur Rahman Doi I: Shariah the Islamic Law, London 1989, p.3.

² Sura An-Nahl-90.

³ Shariah the Islamic Law, London 1989, p.2.

There are two concepts of law. One is divine and the other is man made. The divine origin is Muslim Law or Islamic Law and the man made origin is Roman law or all modern legislations. Modern jurisprudence can be changed, as it is man made but Islamic law cannot be changed. According to Austin, 'Law is the command of superior which obliges a person or persons to a course of conduct.' But in Islamic Law Allah made the laws and the subjects are human beings. Islamic law or Shariah is wider in its scope because it covers social and spiritual aspects of life but the man made laws cover only the social aspects of life. Thus Shariah or sacred Law is totalitarian; all human activity is embraced in its domain. There is a difference between the morally enjoined from the legally enforceable aspect. Shariah is the code of obligations covering the legal and moral sphere, while Fiqh is the science of Islamic jurisprudence.⁴ It has been rightly commented that every moral obligation defined in the Shariah does not form a legal obligation under the Fiqh.⁵

Islamic family law reforms until now in Bangladesh have not been segregated from religion, nor is this likely to happen. The aim of this article is to explain that Bangladeshi Muslim family law remains firmly within the frame work of Shariah and finds its primary justification somewhere in the religious texts. The article also clarifies the equitable status of Muslim men and women as justifiable.

The dominant reasoning behind this appears to be that law is regarded in Islam as divine and in some sense unchangeable. So legal reforms were undertaken in four different ways. The first method sometimes affected is a procedural device ordering the courts not to apply Islamic law in specified circumstances, without changing the substantive law. The second way was employing *thakayur*, the picking and choosing from dicta or provisions of other recognised schools of thought. The third method was to reinterpret the Quran and the Sunnah through the technique of *ijtihad*. The reformers felt at liberty to go back to the Divine Text and reinterpret it according to the exigencies of modern time. The fourth technique was to introduce administrative regulations imposing the results reached by one or more of

⁴ A A Asaf Fyzee: Outlines of Mohammedan Law, 4th Edn, New Delhi, 1974, p.14-32.

⁵ *Ibid.*

the other three devices.⁶ It is relevant to note here that the legislative reforms, which took place in Bangladesh, fall squarely under any one or more of these devices.

Legal basis of family law in Bangladesh

Legal basis of application of personal law can be inferred in the constitutional theory. It is to be mentioned that there is no direct provision in the Constitution of Bangladesh to say that 'each and every citizen is entitled to observe his or her personal law' but what the law provides is the constitutional position of religions, right to freedom of religion and religious institutions, protection of law and equal treatment of all citizens etc.⁷

A *brief* attempt is made here to understand the problem in the context of situation of Bangladesh. First of all, the Constitution of Bangladesh states under Article 149 that all existing laws shall continue to have effect but may be amended or repealed by laws made under the Constitution. Thus the personal laws as existing laws continue to have effect and it is doubtful whether the Constitution can override the personal laws. Secondly, the constitutional clause of sexual equality under Article 28(2) only applies to the public sphere and is not applicable to the private sphere. Thirdly, personal laws cannot be considered inconsistent with the Constitution when one of the fundamental rights under Article 28(1) provided that the state shall not discriminate against any citizen on the ground of religion.⁸ This provision ensures freedom of religion and also safeguards the personal laws based on religion. Finally, the directive principles of state policy, fundamental for the governance of the country although not enforceable, do give preference to the religion of the majority of the population.

Women in Islam

The provisions of Islamic law as found in the Holy Quran and the Sunnah can

⁶ Anderson J.N.D: Family Law in Asia and Africa, London 1968, pp. 221-234. (The eclipse of the patriarchal family in contemporary Islamic law); Taslima Monsoon Family Law and its impact on Women in Bangladesh, Dhaka 1999, University Press Limited, p.225.

⁷ ABM Mahbubul Islam: Freedom of Religion in Shariah: A Comparative Analysis, International Islamic University of Malaysia, p.406.

⁸ The Constitution of the Peoples Republic of Bangladesh, 1972.

be construed as conferring new rights on women. In fact, there is a large volume of literature asserting that early Islamic law in Arabia explicitly conferred rights on women.⁹ The male-female dynamics in Islam are such that there is equality of the sexes in the spiritual sphere. The Quran implies equality of all believers in terms of equal obligation to pray, to give alms and prohibition from evil. There is no concept of vicarious liability in Islam and individual persons are responsible for their acts and deeds. However, Islam contains an ambivalent message concerning equality of the sexes. At the higher level, in the individual's relationship with the Creator, there is absolute equality among Muslims. At the levels of worldly affairs and social relationship between people, there is inequality. Thus, concerning the relationship with a husband, competence of evidence, there seems to be gender inequality. This is implied by the several verses of the Quran. Thus verse 2: 228 indicates that women have similar rights as men, according to what is equitable, but men have a degree of advantage over them.¹⁰ According to this verse, Allah set men over women as their superiors, but women have the right to care and maintenance."¹¹ In other words, the difference in economic position between the sexes makes the man's rights and liabilities a little greater than the woman's. Al Quran (Q. IV. 34) refers to the duty of the man to maintain the woman, and to a certain difference in nature between the sexes. Subject to this, the sexes are on terms of equality in law, and in certain matters the weaker sex is entitled to special protection.¹²

The basic philosophy behind the difference between men and women, in different positions, is justified on the ground of creation and nature. According to Islam, social laws must be framed in accordance with human nature.¹³ Islam qualifies and defines gender equality with the assertion and

⁹ Aftab Hossain: *Status of women in Islam*, Lahore 1987, pp.88-140; Qamaruddin Khan: *Status of women in Islam*, New Delhi 1990, p.13; Abdur Rahman Dot 1: *Women in Shariah (Islamic Law)* London 1989, pp.7-10, Muhammad Pickthall Mannaduke: *Islamic Culture*, Lahore 1958, and p.134.

¹⁰ A Yusuf Ali (Tram.) *The Holy Quran*, Amana Corp. Maryland, 1983, p.90.

¹¹ Mohammed Mazaheruddin Siddiqui: *Women in Islam*, Lahore 19, 66, pp.15-24.

¹² An-Nesa, Verse no. 34 (A Yusuf Ali (Trans.), p.90).

¹³ Mohammad Misbah Taqi: *Status of women in Islam*, London 1990, pp.10-11; Murtada Muthhari: *The Rights of women in Islam*, Tehran 1981, pp.113-123.

this is not an absolute and undifferentiated equality but on involving special rights and duties for men and women, Islam does not believe in the conception of sexual equality but regards men and women as complementary to each other and thus as equitable in the private sphere.¹⁴ Islam considers this as natural and idealistic, as men and women play different roles for the betterment of the Muslim society.

It is, of course, very simple to interpret this gender differentiation as deliberate discrimination against women and as we shall see, equally simple for male chauvinists to justify the superiority of men. The reasoning behind the supposed superiority of men over women is usually derived from another verse of the Holy Quran which states that men are protectors and maintainers of women because they support them from their means.¹⁵ The word *qawwamin* or Protectors used to be generally interpreted as 'in charge', 'an authority', 'ruler' or 'sovereign', which reflects the image of the society. Or in other word *qawwamin* means one who stands firm in another's business, protects his interests and looks after his affairs.¹⁶ Recently the word has been understood as a provider, a supporter, a manager, a caretaker, a custodian or a guardian.¹⁷ Asghar Ali, who analysed the concept of sexual equality in Islam, has argued that the divine revelation simply says that men are *qawwamin* or guardian over women, seeing it as a contextual statement and not a normative one.¹⁸ Abdul Aziz Jaweesh says that the superiority, if any, is not for any natural proficiency in one and deficiency in another, but it is only on account of the liability to maintain.¹⁹ The major argument for male superiority is that men are protecting women, maintaining them or are in charge of women or men are invested with the responsibility of taking care of women, financially and otherwise. Shariah provides that even if the wife is wealthier than her husband, the later is under an obligation to provide for her maintenance. The Hanafi law determines the scale of maintenance by referring to the social position of

¹⁴ Mohammed Mazaheruddin Siddiqui, p.21-22.

¹⁵ An-Nesa, Verse no. 34.

¹⁶ A Yusuf Ali (Trans.) p. 190; Asghar Ali: The rights of Women in Islam, London 1992, pp.46-47.

¹⁷ *Op.cit.* p.110-111.

¹⁸ Ashgar Ali, p.46.

both husband and wife, whereas the Shafi law only considers the position of the husband and the Shia law focuses on the requirements of the wife.²⁰

In Muslim society, therefore, the man has full responsibility for the maintenance of not only his wife but also his children. At the same time the earning of a wife is her own. She is at liberty to dispose it off as she wishes. The statement that men are a degree above women means that authority within the household has been given to the husband in preference to the wife, because a heavier burden has been placed on his shoulder. Perhaps the picture would have been different if women were the maintainers. The Quran is silent on the question of what should happen when men cease to be providers financially, emotionally or otherwise. Therefore it leaves open the question of status of women when they are no longer dependent on men as the providers or breadwinners. As indicated, recent trends show that increasingly families are finding it very hard to live on the husband's income alone and many husbands are failing to provide their normative commitment.²¹

The notion of superiority and authority should be distinguished from the burden to bear responsibility. Superiority and authority of obedience in Islam is only paid to Allah.²² But here Islamic traditions have developed yet another ambivalent stance on gender relations. While Allah alone is owed submission in religious terms, socially the male's providing position brings with it a female duty to subordination. The debate on the creation of women from Adam's rib is a Judeo-Christian tradition intermingled with Islamic tradition without any basis. However, Islamic law mainly gives priority and prerogative to the male Muslims. Well-known examples are the male's right to unilateral divorce, the male's right to marry up to four wives, the right to guardianship and custody, a son's double share in the property and one man being equated with two women in legal testimony. All this denies absolute equality of men and women. The rights given by different schools under the different sects of Islam do vary in details. For example in the Sunni Sects only the Hanafi School allows women to marry without a guardians approval, or not

¹⁹ *Op.cit.* p.110.

²⁰ Faiz Badruddin Tyabji: Muslim Law 1968, pp.265-266.

²¹ Abdur Rahman Doi I, p.41.

²² Kaukab Siddique: The Struggle of Muslim Women, Kingsville, 1986, p.26.

to veil their face and hands and also goes to the extent of allowing them to be judges. All the sunni schools in principle allow women to have education, the capacity to buy and sell property, to participate in war, to have political rights and to work with men, but these rights are often subject to various restrictions and work within limits.²³ The tendency was to interpret the Quranic provisions in the light of standards of the prevailing tribal norms, resulting in the loss of women's status and position in the family as granted by rules of divine origin. For this reason, the perception of status of Muslim women in the early period of Islam stands in sharp contrast with their position in later Muslim society. The actual situation of women with their rights and privileges has been far removed from the Islamic ideal.²⁴

Family Law and Women in Bangladesh

Family law and women has always been a contentious issue. In Bangladesh, as elsewhere, there is a simmering discontent that family law does not allow gender equality, which is apparently granted at the level of international law as well as in the realm of constitutional law. In religious and official family law, on the other hand, women have only equitable rights, in social reality, women may even be denied such equitable treatment. There is, it would seem, a popular belief that family law is the last bastion in which women need to achieve equal rights with men. The concept of sexual equality influences the discourse about the position of women in family law in any particular jurisdiction. But such discourse misses important points about the realities of women's lives in a patriarchal dominated society such as Bangladesh. Where the ideal concepts underlying the debates do not match with social facts, the discussion actually confuses idealised position with realistic goal achievement.

Focusing on women and family law in Bangladesh, the present paper argues that gender equality, rather than full-fledged equality is a desirable and realistic aim for the development of Bangladeshi family law. We are mainly

²³ Abdel Khaleq: Contemporary women's participation in public activities: Differences between ideal Islam and Muslim interpretation with emphasis on Saudi Arabia, 1983, p.137.

²⁴ N. Coulson: Women and Law reform in contemporary Islam, London, 1978, p.37-51; S. Akbar Ahmed: Discovering Islam-making sense of Muslim history and society. New Delhi, 1990, p.185.

dealing with Islamic family law and gender equity in a particular cultural context. Islam qualifies sexual equality with special rights and duties for both men and women in their social and natural roles and does not recognise absolute and undifferentiated equality. Thus traditional models define the complementary roles of the sexes, i.e. women should be protected in return for their obedience. In social reality the situation is often not reciprocal when women, in return for their submission, are economically deprived and physically abused. The real demands of women in Bangladesh are not focused on a premise outside the framework of the family but on working out a situation within it where women will be free from economic deprivation and violence. Bangladeshi women are not demanding the same rights and position as some western women enjoy. Rather they see their roles within social context and would prefer gender equality within the traditional framework. Although there is some influence of idealised feminist thinking about sexual equality, women's proper place is seen to be within the family in the wider context of Bangladeshi society. In other societies, for example in Britain, it seems that absolute equality of rights is also not witnessed in practice. The law, on the one hand, formally provides improvements in the legal position of women; and on the other hand, it maintains its support to the patriarchal structures of the family.²⁵

Women in Bangladesh tend to respect and cherish their family as the highest priority of their life. What they want is not equality but freedom from violence and economic deprivation imposed by men. Thus it makes not much sense to aspire for the distant mirage of sexual equality rather it is argued for sexual equality in family law in parallel with cultural norms. This is an acceptable and sustainable strategy towards the empowerment of women, securing their granted basic rights in the patriarchal society of Bangladesh. Thus, it is pursued a model of sexual equality here in this article, which should enable the women of Bangladesh to cope with the reality of their existence and to assist them in articulating their grievances within that particular social and legal context.

In the context of the present study, particular emphasis must be given to Islamic family law, which is based primarily on the religion of Islam. In

²⁵ Aftab Hussain: *Status of women in Islam*, Lahore 1987, p.106; Abdur Rahman Doi: *Women in Shariah (Islamic Law)* London 1989, p.4.

religious matters Quran places women on equal footing with men in the eyes of Allah.²⁶ In this regard the Quran states, "from what is left by parents and those nearest related there is a share for men and a share for women, whether the property be small or large, a determinate share".²⁷ The Holy Quran further states, "never will I suffer to be lost the work of any of you, be he male or female; you are members, one of another."²⁸ The Quran again declares, 'to men is allotted what they earn, and to women what they earn.'²⁹ However, this definitely does not mean that men and women are equal in Islamic law. At the same time, the Quran and the early Islamic law are concerned about the betterment of the status of women.³⁰ Again, the concern is with equitable rights within the family context, not individualised norms of absolute equality. Islamic law justifies gender differentiations on the ground of creation and nature, giving special rights and duties both to men and women.³¹ Islam does not believe in concepts of sexual equality, which ignore natural differences and the special aptitudes, specific powers and faculties of men and women, but regards men and women as complementary to each other. One sex is making up what the other lacks, acting in their specific sphere, in different roles. Thus, socially the sexes are in an equitable symbiotic relation.

Very little has been written specifically on Muslim family law in Bangladesh and this writing does not primarily focus on women.³² On the other hand, while some studies have centered on women in Bangladesh and their legal status generally, their core theme did not concern the impact of family law reforms on women.³³ The major problem of the family law system in Bangladesh appears to be that it does not take into account the reality of the

²⁶ *Ibid.*

²⁷ An-Nesa, Verse no. 7,

²⁸ Al-Imran Verse no. 195, See A Yusuf Ali; The Holy Quran, p.175, footnote. 500.

²⁹ An-Nesa. Verse no 32.

³⁰ Qamaruddin Khan: Status of women in Islam, New Delhi 1990, p.13.

³¹ Murtada Muthari: The rights of women in Islam, Tehran 1981, pp.113-123; Mohammad Taqi Mesbah: Status of women in Islam, London 1990, pp.10-11.

³² Alimuzzaman Choudhury: The Family Courts Ordinance 1985 and other personal Laws, Dhaka 1987; Justice Nasir Jamal: The status of women under Islamic Law and under modern Islamic Legislation, London 1990.

³³ Rafiqul Huda Chaudhury and Nilufer Raihan Ahmed: Female status in Bangladesh, Dhaka 1980; Salma Sobhan: Legal status of women in Bangladesh, Dhaka 1978

social conditions, particularly women's concerns about freedom from violence and economic deprivation, either by incorporating them into various enactments or by giving them appropriate importance while interpreting the law in courts.

The religious and official family laws of Bangladesh clearly aim for gender equity rather than absolute sexual equality. Problems arise over abuses of this relative status system. The crux of the problem is that many women in Bangladesh today are deprived even of the rights granted by the religious and state-sponsored family laws.³⁴ Prominently, women are deprived of their rights maintenance, dower, dissolution of marriage, custody, guardianship, and other forms of property and these claims are based on an Islamic obligation and official law.

Conclusion:

In the present day, there have been many efforts to establish rights of women in various spheres of life. No doubt, it is a step in the right direction. However, as the complete code of life, Shariah has indoctrinated the highest rights and privileges to women. Unfortunately, many of us are not fully aware of the same. As a result, misunderstanding and misgivings arise among some people in the society. Islamic law or Shariah law is divinely ordained to direct mankind to right path of peace in this world and bliss in the world hereafter. As a divine law Shariah is a better one and eternal and Allah has ordained this law. This makes the difference between the divine law and the man made laws, which are concerned with the welfare of this world alone.

Islam does not believe in the conception of sexual equality but regards men and women as complementary to each other and places them equitable in private sphere. Islam qualifies and defines gender equality with the assertion and this is not an absolute and undifferentiated equality but an involving special right and duties for men and women. Shariah emphasis's that social laws and other laws related to women rights must be framed in accordance with human nature.

³⁴ Taslima Monsoor: From patriarchy to gender equity: Family law and its impact on women in Bangladesh, Dhaka 1999; Shaheena Akhter: How far Muslim Laws are protecting the rights of the women in Bangladesh, Dhaka 1992, p.35.