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ARTICLES

Dower in history and its significance in Islamic law

The Emergence of Plantation Labour in Bengal: A historical and legal study

The Convention on the Rights of the Child, 1989: Its Success or Failure after 17 years

The concept of Islamic Law and its application in Bangladesh

Hiring and Firing of Securities Regulators in Bangladesh and Australia: A Comparative Review

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Inheritance of Orphan Grandchildren under Islamic law of Succession: A study of the impact of section 4 of the Muslim Family Laws Ordinance, 1961

পঞ্চম জাতীয় সংসদে গঠিত কতিপয় গুরুত্বপূর্ণ কমিটি: একটি পর্যালোচনা

বাংলাদেশের শিকস্তি ও পয়স্তি আইন : একটি পর্যালোচনা

ইসলামে মোহরানার অধিকার ও বাংলাদেশের আর্থসামাজিক প্রেক্ষাপট : একটি পর্যালোচনা

সাইবার ক্রাইম : আইন প্রয়োগ, সমস্যা ও উত্তরণের উপায় অনুসন্ধান

শিশু নির্যাতন এবং শিশু অধিকার : প্রেক্ষিত বাংলাদেশ

বাংলাদেশে টিপাইমুখ বাঁধ এর প্রভাব : একটি আইনী পর্যালোচনা

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<u>Authors' Name</u>	<u>Article</u>	<u>Page</u>
Dr. Begum Asma Siddiqua	Dower in history and it's significance in Islamic law	1-10
Dr. Md. Gholam Kibria	The Emergence of Plantation Labour in Bengal: A historical and legal study	11-22
Dr. Mohammad Abdul Hannan M. Ahsan Habib	The Convention on the Rights of the Child, 1989: Its Success or Failure after 17 years	23-36
Dr. Muhammad Faiz-ud-Din	The concept of Islamic Law and its application in Bangladesh	37-46
Dr. S M Solaiman	Hiring and Firing of Securities Regulators in Bangladesh and Australia: A Comparative Review	47-70
Md. Ahsan Kabir	Rights and Care for Elderly People : Bangladesh Perspective	71-84
Md. Delower Hossain	The Law of Maintenance and its Implementation in Bangladesh: A Comparative Study	85-96
Zulfiquar Ahmed	The Nexus between Electronic and Paper Evidence under the Evidence Act, 1872	97-112
Muhammad Ekramul Haque	Inheritance of Orphan Grandchildren under Islamic law of Succession: A study of the impact of section 4 of the Muslim Family Laws Ordinance, 1961	113-124
ড. রাফিক ইয়াসমিন	পঞ্চম জাতীয় সংসদে গঠিত কতিপয় গুরুত্বপূর্ণ কমিটি: একটি পর্যালোচনা	125-144
মো. আব্দুল আলীম	বাংলাদেশের শিকস্তি ও পয়স্তি আইন : একটি পর্যালোচনা	145-156
মো. আব্দুর রহিম মিয়া	ইসলামে মোহরানার অধিকার ও বাংলাদেশের আর্থসামাজিক প্রেক্ষাপট : একটি পর্যালোচনা	157-178
মুস্তাক আহমেদ মো. সাহাল উদ্দীন	সাইবার ক্রাইম : আইন প্রয়োগ, সমস্যা ও উত্তরণের উপায় অনুসন্ধান	179-200
সালমা আখতার খানম	শিশু নির্যাতন এবং শিশু অধিকার : প্রেক্ষিত বাংলাদেশ	201-222
মোসা. সাঈদা আঞ্জু সারাওয়াত রশীদ	বাংলাদেশে টিপাইমুখ বাঁধ এর প্রভাব : একটি আইনী পর্যালোচনা	223-238
A F M Mohsin	Abstract on the Project Legal Rights of the Child: Policy and Enforcement in Bangladesh, 1995	239

THE CONCEPT OF ISLAMIC LAW AND ITS APPLICATION IN BANGLADESH

Dr. Muhammad Faiz-ud-Din*

1. Introduction

Islam is the complete and comprehensive code of life. It covers all aspects of human life from cradle to grave. Islam prescribes solutions to all problems, personal or international, private or public in nature. It is not indifferent to any issue how insignificant it may be. On that account, Islam is regarded, as stated, the complete code of life and therefore, it has the comprehensive laws to govern the legal rights and obligations of the citizens. Islam received its perfection with the advent of the last Prophet Muhammad (peace be on him). In this respect the Quran states, "Today I have perfected your religion for you, and completed my favor toward you, and chosen Islam as your religion."¹ The Prophet applied Islamic law in the state founded by him as its head. He established rule of law against 'might is right'. That made it the welfare state. In fact, he was sent to establish the supremacy of Islam over all other man-made laws. In this respect the Quranic declaration is as follows, "He it is who has sent His Messenger with the guidance and the Religion of Truth that He may cause it to prevail over all religions."²

The aim of this article is to ventilate the distinctive character of Islamic law, which is altogether different from other man-made laws. It also aims at the removal of misconceptions of the western people about Islamic law. Further, its objective is to draw the attention of all concerned specially the legislators that the application of Islamic law in Bangladesh, where 90% people are adherents to Islam, will ensure peace and tranquility in the State and this is possible because of the divine character of Islamic law.

2. Definition of Islamic law

Islamic law, a divine law sent by Allah to Prophet Muhammad (PBH), is the result of a continuous process of development till now. It consists of the express injunctions of the Quran, sunnah (practice of the prophet) and the opinions of jurists. Islamic law is not systematic code like the enactments, which are passed by the modern parliament, but a living and growing

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¹ Al- Quran, Al-Mayida, 5:3. The first digit refers to no. of sura and the second digit refers to no. of Ayat.

² Al- Quran, At-Towbah 9:33; Al-Fatho 48:28; As-Shawf 61: 9

organism.³ Besides Quran and sunnah, Ijma (consensus of opinion) and Qiyas (analogy) are the sources of Islamic law. Islamic law is universal and it covers all branches of law, such as, civil, criminal, constitutional, commercial, which are common for all people. The law relating to marriage, dower, dissolution of marriage, paternity, guardianship, maintenance, gifts, will, waqf, inheritance etc. are applicable to the Muslims as personal law. Muslims must believe in Allah and His Messenger and strive hard with their wealth and lives for the cause of Allah.⁴ He may be a Muslim either by birth or by conversion. Court does not distinguish between the two at the time of application of law. In *Abdur Razzack v. Aga Mahomed* case, it was held that no court can test or gauge the sincerity of religious belief.⁵

The term 'Islamic law', or 'Muslim law' should be used interchangeably. But some writers, irrespective of Muslim or non-Muslims used erroneous term like 'Moohummudun' (Neil Baillie), 'Mahomedan' (the judicial committee of the privy council, D.F. Mullah), 'Muhammedan' (Ameer Ali), 'Muhammādan' (Fyzee, Abdur Rahim), Anglo 'Mahommadan' (Wilson), 'Mohammadān' (Nicholson) and 'Mussalman' (various Indian Acts)⁶. Strictly speaking, the religion preached and taught by the last prophet is Islam and not Muhammadanism and the people who believe in it are Muslims, not Muhammadans. In my opinion, the term 'Islamic law' is most appropriate than Muslim law, because it is basically founded on the divine Book Al-Quran and Hadith, the sunnah of the Prophet. All the prophets were entrusted with the duty to implement the commands of Allah. In this respect we see the Quranic version as follows- "He has ordained for you that religion which He commended upon Noah, and that which We inspire in thee (Muhammad) and that which We commended upon Abraham, Moses and Jesus."⁷ The source of inspiration, therefore, is the revelation from Allah. Revelation is established as an inspiration and does not remain merely a vague suggestion.⁸ Thus Islamic law is the direct and indirect expression of the divine will of Allah. It controls Muslim society and acts as guidance of an Islamic state. Indirect expression is found in Hadith, Ijma and Qiyas.

³ Asaf A.A. Fyzee, *Outlines of Muhammadan law*, Oxford University Press, Delhi p.1 (1993)

⁴ Al- Quran, Al-Huzrat 49:15

⁵ *Abdur Razzack V. Aga Mahomed* (1894) 21 I. A. 56,64

⁶ Asaf A. A Fyzee, *Outlines of Muhammadan law*, op cit p. 2

⁷ Al- Quran As-Shura 42: 13

⁸ Yusuf Ali, *The Glorious Quran*, Lahore. p. 1308 (1977)

3. Definition of a Muslim

Muslim personal law is applicable to Muslims only and therefore we should define the term 'Muslim'. 'Muslim' can be defined from two view points, that is—(i) from the view point of courts⁹ and (2) from the view point of theologicians.

According to the theologicians, three conditions should be fulfilled in order to be a Muslim. These are- (i) he must believe that there is no deity but Allah; and (ii) a Muslim must believe in the prophethood of Muhammad (peace be on him) (iii) he must also believe in the following classification of human actions, namely.¹⁰

- (a) *Fard* (obligatory action), if he does these acts, he will be rewarded but if does not do these, he will be punished;
- (b) *Sunnah* or *Mandub* (practice of the prophet), if he follows this, he will be rewarded, but if he denies this, he will be punished;
- (c) *Mustahab* (commendable) – if he performs these acts, he will be rewarded, but in case of omission, there is no punishment;
- (d) *Mubah* (permissible)- doing of these acts are simply permitted, but there is no reward or punishment for doing or undoing of these acts;
- (e) *Makruh* (abominable) – these acts are not approved but some times allowable;
- (f) *Haram* (prohibited)- these acts are strictly prohibited and commission is punishable;

The view of the courts is different from the view of theologicians. The court of law defines a Muslim as, "Every person who believes in the unity of God and the mission of Muhammad as a prophet (PBH) is a Muslim to whatever sect he belongs"¹¹ Thus any person who professes the religion of Islam, that is, accepts the unity of Allah and the prophetic character of Muhammad (PBH) is a Muslim and is subjected to Muslim law. This view has been accepted by the courts of Indian sub-continent including Bangladesh. A person may be a Muslim either by birth or by profession or by conversion. If a Muslim renounces Islam, he ceases to be a Muslim. A non-Muslim, on the other hand, may accept Islam and can be a Muslim. The courts will decide on the merit of each case as to whether a person is or is not a Muslim.

⁹ Asaf A. A. Fyzee, *Outlines of Muhammadan law*, op cit p. 60

¹⁰ Syed Khalid Rashid, *Muslim law*, Eastern Book Company, Lucknow, p.42 (2004)

¹¹ *Jiwan Khan V. Habibi*, AIR 1933 Lah.759

It is presumed that, if a man is born as Muslim, then he is a Muslim. If one of the parents is a Muslim, the child is presumed to be a Muslim. In *Abdur Razzack V. Aga Mahomed*¹² case, Lord Macnaghten lays down the following principle, "No court can test or gauge the sincerity of religious belief. Profession with or without conversion is necessary and sufficient to remove the disability". Therefore, the freedom to choose religious belief has to apply to a born Muslim. A formal profession of Islam is, therefore, sufficient, unless (i) the conversion is pretended or a colorable one, for the purpose of perpetrating a fraud upon the law, or (ii) the whole of the man's conduct and the evidence of surrounding facts is such as to run counter to the presumption of conversion to Islam.¹³ Thus a Muslim remains a Muslim unless he renounces Islam. In short, a perfect Muslim is one who is not only a believer but also a strict follower of all the commands, positive or negative, of Almighty Allah, though, however, there are innumerable number of so called Muslims who do not abide by the injunctions of Islam. Ironically the courts in Bangladesh do not differentiate between a practicing and non- practicing Muslims at the time of disposal of cases.

(4) Characteristics of Islamic Law

Taking into account the Islamic point of view, law may be divided into two types – Islamic law and man- made law. Islamic law is a communication from Allah with reference to men's conscious actions expressive either of demand or indifference or a mere declaration of its nature on His part.¹⁴ A summary of the characteristic features of Islamic law are as follows:

i) Allah is the Legislator:

Islamic law revealed from Allah, Who alone has the sovereign right and supreme power to legislate it for mankind. He has been revealing His wishes and commands on His prophets throughout the ages from the birth of mankind according to needs and conditions of different countries and stages of civilization. As a part of such continuity, Al-Quran is the latest revelation covering all basic laws, which are essential to mankind. Last prophet implemented these laws during his lifetime. In Islamic law sovereignty belongs to Allah Who is not accountable to anybody. He legislates laws for the welfare of human beings.

¹² (1894) 91 L.A. 56,64

¹³ Asaf A. A. Fyzee, *Outlines of Muhammadan law*, op cit p. 64

¹⁴ Aziz Ahmad, *Islamic Law in Theory and Practice*, PLD Lahore, p.12 (1956)

ii) Islamic law is consistent with human nature:

Islamic law is in harmony with human nature. It is the religion of human (*Din-al-Fitrah*) based on reasoning. The Quran states, "Then set your face upright for religion in the right state- the nature made by Allah in which He has made men. There is no alteration of Allah's creation, that is the right religion, but most people do not know."¹⁵

iii) Islamic law covers all aspects of human life:

The distinguishing feature of Islamic law is that it is applicable in all fields of human life, namely, personal, national, international life and so on. The holy Quran declares, "The Religion before Allah is Islam (submission to His will) only."¹⁶ Therefore, any law contrary to Islamic law is not acceptable.

iv) Sources of Islamic law are Al-Quran and sunnah:

The Quran and the sunnah are the main basic sources of Islamic law. A well-known hadith supports the view that every problem can be solved with the help of Quran and Hadith. The prophet said, "I have left for you two things. You will never go astray so long as you will hold them fast. These are the Quran and the practice (sunnah) of the prophet." Besides, there are secondary sources as well, such as, Ijtihad, Ijma and Qiyas.

v) Obedience to Allah and His Apostle

The Quran states, "O you who believe! Obey Allah and obey His Apostle"¹⁷. Unconditional obedience to the will of Allah and His Apostle is obligatory for all Muslims. While framing law parliament should take vigilance so that no law contrary to the Quran and sunnah is passed.

vi) Islamic law is perfect and universal:

Islamic law is perfect and free from any defect. Since it is the complete code of life, no addition or deduction in it can be made. It is universal and therefore, it is applicable now and for all ages to come and for any territory and therefore, the punishment for the same offence is fixed irrespective of any period or state.

vii) Scope of application of Islamic law:

The foundation of Islam is based on the three main principles, such as (a) Oneness of Allah, (b) prophet hood and (c) the life after death. Islamic law is applicable to this world as well as to the next world. An offender, for example,

¹⁵ Al- Quran, Ar-Rum 30:30

¹⁶ Al- Quran, Al-Imran 3:19

¹⁷ Al- Quran, An-Nisa 4:59

may escape punishment in this world by evading the law enforcing agency or managing judiciary, if any, but it is not possible to escape punishment in the next world. A man will be rewarded or punished according to the deeds he performed in this world. This belief, I can say without any hesitation, actually inspires a man to do good deeds and at the same time prevents him from committing sin or offence in this world.

viii) Islamic law and morality

Islam lays importance on morality, which, help to create congenial atmosphere in the society. For instance, to show respect to parents, elders, teachers, to help the distressed etc. are indispensable parts of morality. Sometimes morality becomes more effective than the law. In most cases, the commission of crime takes place due to the absence of morality. Taking of bribe, for example, is both immoral and illegal. Morality, therefore, should be the part and parcel of Islamic law.

5. Distinctions between Islamic law and other laws

Islamic law, being divine law, differs in many respects from other man-made laws. We may summarize the distinctions under the following heads:-

i) As regards nature:

Muslim jurists hold the view that Islamic law is in harmony with human nature. It has been implemented by the last prophet Muhammad (peace be on him) with a view to bring welfare to human beings. Islamic law cannot be secular law like other man-made laws. All existing laws in Bangladesh and elsewhere, which are enforced by the State machinery, are secular in nature, other than Muslim personal law.

ii) As regards aims and objectives:

Enactment of full-fledged laws according to Quran and sunnah, in order to maintain peace in this world and salvation in the next world, is the prime objective of Islamic law. The only aim of Islamic law is to gain satisfaction of Almighty Allah. The aim of other laws is to ensure peace in this world. It is indifferent of the world to come.

iii) As regards source.

The fundamental sources of Islamic law are the Quran and sunnah or Hadith. Besides, Ijma' and Qiyas are the secondary sources of Islamic law. The Muslim jurists frame laws in accordance with these sources. The sources of other laws are statutes, conventions, customs, precedents etc. Parliament takes into consideration to these sources at the time of adoption.

iv) As regards legislation:

Allah is the Legislator of Islamic law that has been implemented by His prophet. He used to receive revelation from Allah, whereby he established an Islamic State in Madina and applied those revelations in the form of law. On the other hand, modern secular laws are legislated by parliament. This has been the practice followed by all modern democratic States including Bangladesh.

v) As regards amendments:

Islamic law is divine law and as such it is not amendable specially those which are framed by the Quran and Hadith. Of course, *Majlish-e sura* (consultative Assembly) can amend other Islamic laws, which are made by Ijtihad. Man-made laws are always changeable and amendable. The parliament of a State can amend, repeal and frame any law. The Bangladesh parliament, for example, has amended the Constitution of Bangladesh several times.

vi) As regards enforceability

The fear of punishment compels a man to become a law-abiding citizen. There are some formal *Ibadat* like fasting, *Zakat* etc which are performed not for fear of the infliction of punishment in this world but for the fear of the punishment to be inflicted in the next world. Islamic law, therefore, can be successfully enforced for fear of Allah. Other laws are enforced by the government by infliction of punishment in this world only, such as, imprisonment, monetary fine, exile, death sentence etc. There is a basic difference between Islamic law and other laws regarding their enforceability.

vii) As regards supremacy:

In the case of Islamic law, supremacy of Allah and His prophet dominates, but in the case of laws other than Islam, supremacy of parliament dominates or in the absence of parliament the commands of the dictator dominates.

viii) As regards territorial jurisdiction

Islamic law is not confined to a particular territory; rather its boundary is open for any part of the world. According to Islamic law, an offender, for example, shall be punished whether the offence is committed in Bangladesh or France or in any State, provided that those States are the followers of Islamic law. Islam is not limited to any territory. Ownership of this world belongs to Allah and as such laws prescribed by Him shall be applicable in this world. But other laws are applied only in the territory of the concerned States.

ix) As regards infliction of punishment

Islamic law prescribes definite punishment for definite offence according to *Hudud* or *Qisas* or discretion of the court or tribunal as the case may be. So in case of breach of law, the violator shall be punished. If the offender remains unpunished here due to any reason whatsoever, he will be punished in the world hereafter. In this respect we can see the *Quranic* version, - "Then shall anyone who has done an atom's weight of good, see it. And anyone who has done an atom's weight of evil shall see it."¹⁸ The implication of this verse is that everybody shall be rewarded or punished according to his deeds. Modern law prescribes punishment in this world only, but there is no punishment after death. So under this system, an offender may escape punishment due to negligence of law enforcement agency.

x) As regards accountability:

Accountability can ensure obedience to law and everybody, according to Islamic law, shall be accountable for his own deeds to Allah who is all-knowing. The Quran says, "No bearer of burdens can bear the burden of another."¹⁹ In case of man-made law, a person is accountable to the government only in case of breach of any law of the land and not to Allah.

xi) As regards universality and uniformity:

Islamic law is universal and uniform for all ages to come. There are some laws like *Hudud* and *Qisas*, as stated above, which are universally applicable. The last resort for punishment for theft, for example, is the amputation of hand prescribed by the Quran which says, "As to the thief, male or female, cut off his or her hand, a punishment by way of example from Allah for their crime, and Allah is exalted in power."²⁰ Man-made laws are not universally applicable. Different States follow different types of punishment for the commission of the same offence.

xii) As regards morality:

Islam lays much importance on morality at the time of adoption of laws. There are some deeds, as stated above, which need to be performed not in accordance with law but according to morality. Man-made laws do not pay heed to morality. There are many deeds which are immoral in the eye of Islam but these are not immoral to modern law. Islamic law considers fornication (*zina*), for example, as punishable offence and immoral act, whereas it is

¹⁸ Al- Quran, Al-Zilzal 99:7-8

¹⁹ Al- Quran, Al-An'am 6:164; An-Najam 53:38

²⁰ Al- Quran, Al-Mayida 5:38

neither immoral nor illegal in the eye of other man-made law. Rape is punishable offence when it is committed without consent under the Penal Code. But If sexual cohabitation is done with consent then it is not an offence, and not punishable, unless it is committed on a minor or within prohibited degrees.

6. Application of Islamic law in Bangladesh:

We have stated above that Islam is the complete and comprehensive code of life because of its divinity and therefore it has the complete code of law to control the legal rights and obligations of its citizens. The Mugals used to apply Islamic laws during their rule of India. But the British colonial Master gradually took over the control of Indian sub-continent after the tragedy of Palassey in 1757. They ruled it for one hundred and ninety years i.e. up to 1947 by applying their own secular law and applied the policy of "divide and rule." In 1947 India became independent and it was divided into two parts- Pakistan and India. Pakistan was again divided into two parts in 1971. Bangladesh emerged as an independent State in place of East Pakistan and inherited the laws from Pakistan and India.

The British rulers, in the beginning, applied Muslim law during their rule in both civil and criminal courts which were not Islamic.²¹ The scope of application of Islamic law was limited by the Regulation Act 11 of 1772. The enactment of the Criminal Procedure Code and the Indian Penal Code ousted the Islamic criminal law from the criminal courts. In British India Muslim law was applicable in matters relating to family relations only like marriage, dower, dissolution of marriage, maintenance, guardianship of minors, inheritance, gift (*hiba*), *wasiyat* (will) and *waqf* etc. which are considered as Muslim personal law.²² Still in certain cases pure Islamic laws are not being applied even in family law affairs of a Muslim.

This position continued in Pakistan and it has also been continuing in Bangladesh. In Bangladesh there are some enactments which are absolutely applicable for the Muslims. Among them the following Acts are important, such as, the Muslim Personal (*shariyat*) Application Act, 1937 the *Waqf* Ordinance, 1962 (which consolidated the earlier Acts on this subject), the Dissolution of Muslim Marriages Act, 1939, the Muslim Family Laws Ordinance, 1961, the Muslim Marriages and Divorces (Registration) Act, 1974.

²¹ Abdur Rahim, *Muhammdan Jurisprudence* PLD, Lahore, p.37 (1968)

²² *Ibid*

Thus, in Bangladesh the provisions of Islamic law are applied (1) by the enactment on succession, waqf, marriage, dower, dissolution of marriage, gift, with its distorted version in some cases, as stated above and (2) by the laws which are applied to Muslims as a matter of justice, equity and good conscience such as pre-emption as applied under the tenancy Acts.

7. Conclusion

Although about ninety percent people of Bangladesh are the followers of Islam and as such Muslims, but Islamic law is not being followed here in all civil and criminal matters. Bangladesh follows the laws inherited from the British as well as from Pakistan, specially procedural laws and penal laws adopted during British rule and these are being applied in our courts. Islamic law can be introduced and applied in Bangladesh in all walks of life as it is found in Islamic or Muslim States of the past. The experience shows that application of Islamic law can reduce the commission of crime elsewhere including Bangladesh. The Bangladesh parliament may legislate necessary laws in the light of the Quran and sunnah and may repeal or amend existing laws. The Member of Parliament can do so and hence it is the duty of voters to elect those persons as member parliament, who are committed to pay attention in this regard. Until then, all have to wait patiently as Islam does not authorize any kinds of violative actions on the process of adoption and application of the law of Islam.