

RAJSHAHI UNIVERSITY LAW JOURNAL



**FACULTY OF LAW
RAJSHAHI UNIVERSITY
2007**

ARTICLES

Heritage of British Colonial Press Laws and Regulations: A critical overview

Revisiting Domestic Violence as a Gross Violation of Women's Fundamental Rights to Freedom from Torture

Reviewing the Interpretation of the Inheritance Law with Special Reference to Kalala

Right to Reasonable Investigation Process in Criminal Justice in Bangladesh

General Election in Bangladesh 2001: An Evaluation

Land Administration in Ancient Bengal

Sexual Exploitation of Children: A Critical Analysis with Reference to Bangladeshi Law

Ombudsman: A means of good governance in Bangladesh

Parole: Philosophy and Operation in Bangladesh

The Legal Regime of Management and Settlement of Khas Land in Bangladesh

Women's Rights in Islamic Legal System vis-à-vis Conventional System

Statutory and Traditional Approach to and Dissolution of Marriage in Hindu Law: A Comparative Study between Bangladesh and India

Women in Islam - A Critical Analysis

Alternative Dispute Resolution (ADR) in the Legal System of Bangladesh: Successes and Challenges

Guardianship in Islam: A legal study

দাপ্তরিক গোপনীয়তা আইন ও তথ্য-অধিকার

ISSN 1991-8976

Rajshahi University Law Journal

Volume 04 2007



**Faculty of Law
University of Rajshahi**

Rajshahi University Law Journal 2007

Editorial Board

Editor

Dr. Begum Asma Siddiqua

Professor, Department of Law & Justice
and
Dean, Faculty of Law, RU

Member

Dr. M. Habibur Rahman

Professor, Department of Law & Justice, RU

Dr. Muhammad Faiz-Ud-Din

Professor, Department of Law & Justice, RU

Mr. Abu Naser Md Wahid

Associate Professor, Department of Law & Justice, RU

Dr. Mohammad Abdul Hannan

Associate Professor, Department of Law & Justice, RU

Mrs. Sayeeda Anju

Assistant Professor, Department of Law & Justice, RU

Mr. Md. Sahal Uddin

Lecturer, Department of Law & Justice, RU

Rajshahi University Law Journal
Faculty of Law
University of Rajshahi

Volume 04 2007

Published by
Dean
Faculty of Law
University of Rajshahi
Rajshahi-6205
Bangladesh

© Reserved by the Publisher

Cover Design & Printed by
Text Dot Com (TDC)
Farmgate, Motihar, Rajshahi-6212

Printed at
Padma Offset Printers, Rajshahi

Subscription Rates

For Individuals : TK 100.00 US\$ 20 (without postage)
For Organisation : TK 150.00 US\$ 30 (without postage)

[Published in November 2008]

Rajshahi University Law Journal 2007

Authors' Name	Article	Page
Dr. Abul Mansur Ahmed	Heritance of British Colonial Press Laws and Regulations: A critical overview	1
Dr. Afroza Begum	Revisiting Domestic Violence as a Gross Violation of Women's Fundamental Rights to Freedom from Torture	9
Dr. Begum Asma Siddiqua	Reviewing the Interpretation of the Inheritance Law with Special Reference to Kalala	25
Dr. M. Abdul Hannan	Right to Reasonable Investigation Process in Criminal Justice in Bangladesh	37
Dr. M. Anisur Rahman	General Election in Bangladesh 2001: An Evaluation	49
Md. Abdul Alim	Land Administration in Ancient Bengal	63
Md. Abdur Rahim Mia	Sexual Exploitation of Children: A Critical Analysis with Reference to Bangladeshi Law	77
Dr. Md. Ahsan Kabir & Md. Hashibul Alam Prodhan	Ombudsman: A means of good governance in Bangladesh	95
Md. Ismail Hossain	Parole: Philosophy and Operation in Bangladesh	109
Md. Khurshid Alam & Mohammad Towhidul Islam	The Legal Regime of Management and Settlement of Khas Land in Bangladesh	119
Dr. Md. Maimul Ahsan Khan	Women's Rights in Islamic Legal System vis-à-vis Conventional System	139
Md. Sahidul Islam	Statutory and Traditional Approach to and Dissolution of Marriage in Hindu Law: A Comparative Study between Bangladesh and India	161
Md. Shahidul Islam	Women in Islam - A Critical Analysis	169
Mostafa Mahmud Naser & Mohammad Sarwar Alam	Alternative Dispute Resolution (ADR) in the Legal System of Bangladesh: Successes and Challenges	181
Dr. Muhammad Faiz-ud-Din & Md. Sahal Uddin	Guardianship in Islam: A legal study	201
মুস্তাক আহমেদ ও মো: সাহাল উদ্দীন	দাপ্তরিক গোপনীয়তা আইন ও তথ্য-অধিকার	211

Women's Rights in Islamic Legal System vis-à-vis Conventional System

Dr. Md. Maimul Ahsan Khan*

Abstract

The Quran is the center of gravity of all Islamic political, legal, economic, and cultural thoughts. Other sources of Islamic laws are neither completely divinely *ordained* nor the result of any intellectual and spiritual exercise of any particular groups of human beings. In fact, Islamic law is the culmination of the entire chain of all prophetic wisdom and traditions ingrained in heavenly human nature to pursue an ultimate task of establishing justice on earth to defeat all visible and invisible *satanic* forces that tend to make the world a shadow of hell. Islamic law and Jurisprudential thoughts are here on earth to ensure a lovely and beautiful world to be cultivated for achieving eternal glory, mortality, and salvation, and that cannot be reached through *zulm* (cruelty and exploitation). Here is the diametrically opposite direction we get in contrast to all other legal systems so far humanity have established and inherited. The stories of the rise and fall of Muslim nations in the annals of history are not fully capable to discover all dimensions of Islamic jurisprudential essence to be upheld for the greater interests of humanity irrespective of races, religions, and gender. The Islamic vision of unity in diversity and pluralism of all kinds, including cultural and sectarian, is the central theme of this paper. The author's endeavor (*ghayra*) to interrelate four fundamental sources of Islamic law and their consequence in real material life is the outcome of this research that need to be revisited again and again for the quest of better understanding of divinely dimensions and depths of Islamic jurisprudence.

1. Legal Paradoxes in Gender Issues

Not many Muslim and Western authors try hard enough to find the legal doctrinal grounds to understand and explain Islamic rules and regulations that sustain Muslim family values. They pick up some *Quranic* injunctions and tend to make them as universal laws of marriage, divorce, and inheritance for all Muslims. In fact, this is a trend supported and regimented under a system of jurisprudential school called pure theory of law. Until very recently Western world was not so keen to explore the full potential of this theory, which is a very similar to the one on which Hanbali *madhhab*

* Professor, Department of Law, University of Dhaka.

(school of law) was established more than one thousand years ago. Not many Muslim jurists have agreed to follow the pure theory of law advocated by the Hanbali school of law and as a result only a tiny group of Muslim *ummah* had adhered to this school. This does not, however, mean that Hanbali school of law is better or worse than any other school of Islamic jurisprudence.

The rise of positive school of law in the West made the pure theory of law very popular, attractive, and even provided an effective means to regulate human behavior. It has also helped make activities of governmental agencies and private business institutions more predictable and apparently rational. However, most Western states in their over-zealous drive for money and profits have stripped their governance and rule of law of most of the fundamental and ethical values. But it is also a reality that without regulating material life (*muamela*) no state or society can ultimately be successful in promoting other higher goals of the concerned people. Legal system based on spiritual and ethical values are much more complicated than the system of governance and activities hankering after money and profit.

"The behavior regulated by a normative order is either a define action or the omission (nonperformance) of such an action. Human behavior, then is either positively or negatively regulated by a normative order. Positively, when a define action of a definite individual or when the omission of such an action is commanded ... The norm system that presents itself as a legal order has essentially a dynamic character. A legal norm is not valid because it has a certain content, that is, because its content is logically deducible from a presupposed basic norm, but because it is created in a certain way—ultimately in a way determined by a presupposed basic norm. For this reason alone does the legal norm belong to the legal order whose norms are created according to this basic norm."¹

There is a fundamental difference between basic norm (*usul-e-fiq*) and an injunction of law. If you loose the basic norms (principles) of any legal system, then injunctions derived from those principles can do little help to uphold the inherent values and dignity an individual community deserves. Muslims as a community are in bewilderment since the European domination of their economy and polity and hence the projection of a "Merciful Islam" that has been ingrained in the Quranic and Hadith literature is conspicuously absent. Moreover, many rudimentary and rough interpretations of Islamic laws have emerged some of which were implemented without taking care of values attached to those injunctions of law.

Islamic legal thoughts are supposed to create a balanced and cohesive system based on the principles of *adl*, *insaf*, and *ihsan*. The absence of these innate qualities or

¹ Kelsen, Hans, The Pure Theory of Law, 1967, pp.198-199.

characteristics would make the promulgation and propagation of Islamic injunctions inconsistent with divinely inspired goals. Many of the recent Muslim presentations of Islamic laws are dangerously flawed jurisprudentially and economically non-viable and socially unacceptable. Under such circumstances, the so-called Islamists have been calling for strict implementation of the Quranic injunctions while the Muslim ultra-secularists are out there to undermine the universal values of Islam. The best way for non-Muslims to undermine Islam and its causes is to attack position and status of women in Islam. However, there are more complicated issues behind the controversies over many Islamic legal issues.

"Shafi's legal theory is a perfectly coherent system, superior by far to the theory of the ancient schools, and he became the founder of the *usul al-fikh*, the discipline dealing with the theoretical bases of Islamic law. It was the achievement of powerful mind, and at the same time the logical outcome of a process which had begun much earlier. The development of legal theory in the second century of Islam was dominated by the struggle between two concepts: that of the common doctrine of the community, and that of the authority of the traditions from the Prophet."²

This struggle between different schools of law in Islamic jurisprudence in determining the boundaries of legality and morality is a continuous process to keep the inherent dynamism of Islamic legal theories alive. However, misuse of the scope of disagreement between different schools of law is a dangerous phenomenon in many warring sections of Muslim communities around the world. Islam in these days means many things to many people. Like racism, *chauvinism* is also rampant in many societies and Muslim communities on many occasions are no different from the Western or American societies. We all talk about moral decadence without realizing that we are also part of humanity. Human race is one and integrated whole in this universe irrespective of religion, race or colors. However, when it comes to legal issues there are innumerable paradoxes. Thus Islam had to face many dilemmas to be sorted out through legal and moral avenues.

In the final analysis, almost all kinds of punishment are a form of revenge system on the part of society or state against the criminals or proven offenders. Apparently Islamic criminal system is also very identical to such a retributive theory of punishment. However, Islamic criminal justice system is primarily based on legal pluralism that is not so apparent in practice.

"The question of the reason for the validity of a legal norm belonging to a specific national legal order may arise on the occasion of a coercive act; for example, when one individual deprives another of his life by hanging, and now the question is asked why

² Schacht, Joseph, *An Introduction to Islamic Law*, Oxford at the Clarendon Press, 1964, p. 48.

this act is legal, namely the execution of a punishment, and not murder....To understand the nature of the basic norm it must be kept in mind that it refers directly to a specific constitution, actually established by custom or statutory creation, by and large effective, and indirectly to the coercive order created according to this constitution and by and large effective; the basic norm thereby furnishes the reason for the validity of this constitution and of the coercive order created in accordance with it. The basic norm, therefore, is not the product of free invention."³

The Muslim legal acumen has long been dulled into passivity by centuries of Western domination in economic, political, cultural and technological spheres. It is only in recent decades, however, that Western civilization has also learned to acknowledge the moral and political bankruptcy associated with the concept of discrimination based on race, language, creed, color and religion.

Article 2 of the Declaration of the Granting of Independence to Colonial Countries and Peoples, 1960 states that "[a]ll people have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development." In reality this principle has remained unfilled because of many uneven trade relationships and military conflicts. Many countries every now and then have put their economy on war footing. Furthermore, many Muslim theologians and orthodox or conventional secularists knowingly or unknowingly have contributed to a growing polarization in the so-called wars between genders and classes where Muslims are pitted against non-Muslims.

The preamble of the Declaration on the Elimination of Violence against Women, 1993, says: "Recognizing that violence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men."⁴

This is perhaps the clearest statement on the issue of gender discrimination which applies universally, and not just to the Muslim women. So while the Western world cries hoarse at what they perceive to be the plight of Muslim women and their subordination by their male counterparts, the real discrimination against Western women remain obscure and eclipsed. Women trafficking, sex-related business and workplace abuses are cases in point.

³ Kelsen, Hans, *The Pure Theory of Law*, 1967, pp. 200, 201.

⁴ Cited in, *Basic Documents on Human Rights*, Ian Brownlie, Guy S. Goodwin-Gill (eds) Fourth Edition, Oxford University Press, 2002, p. 63.

2. Marriage in Islam: Legal Dilemmas to be addressed

Marriage is the foundation of a Muslim family life. From merely legal perspective marriage in Islam is no more or less than a civil contract that can be signed and terminated at any time by either side. Socially, culturally, and religiously, marriage in Islam is a very sacred institution to be protected by spiritual and economic means. Like any other civil contract, marriage does allow concerned parties to hand over limited or unlimited power, money or wealth of all kinds from one side to another.

Marriage is enjoined as an Islamic duty for every adult man and woman with sound mind and body. However, marriage is not an obligatory duty for a Muslim man, if he is not in a position to bear the financial cost of maintaining his wife and family.

*"O young people! Whoever among you can marry, should marry, because it helps him lower his gaze and guard his modesty, and whoever is not able to marry, should fast, as fasting diminishes his sexual power."*⁵

Within the parameters of Islam, marriage relation itself is based on and regulated by many religious beliefs and injunctions. However, for men it involves a heavier economic burden and many social responsibilities. In marriage relation, a wife is required to guard her chastity, a notion the West regards as ridiculous. Westerners fail to acknowledge that virginity and chastity, (used synonymously in many writings both in the East and West), equally apply to both Muslim men and Muslim women.

In practice, however, Muslim men and women find it equally difficult to establish marriage relation on their own. Arranged marriage has eased that constraint to some extent. That is why guardians and/or families of either sides try hard to ensure a certain and better future for the bride and groom at the time of signing a marriage contract.

Thus Muslim marriage system as a civil contract with many social, cultural, and economic consequences has become very complicated in every Muslim society and country of our time. Main reasons why educated Muslim youth, especially in the West and upper class urban elite has increasingly becoming disinterested in establishing marriage relations are:

Firstly, marriage is a very costly business in most Muslim societies and it is now almost an established fact that married couple are quite unsuccessful in formulating a realistic plan in perusing higher professional degrees to lead a creative life for the betterment of the society or state he or she lives in.

⁵ Hadith: Bukhari Shareef, Volume 7, Book 62, Number 4: In: <http://bukharishareef.blogspot.com/2008/03/translation-of-sahih-bukhari-book-62.html>

Secondly, Muslim couples in most cases are unsuccessful in delaying their parenthood and are caught up with huge responsibilities of upbringing their own children, while still they are students.

Thirdly, extended family bondage has been weakening up to its collapse and arranged marriages are also becoming very unsuccessful on many occasions.

Fourthly, because of many social and cultural reasons unsuccessful couples are compelled to drag with their unhappy marriage relations and reproductive process that has becoming much more complicated than ever before.

"The characteristic feature of our modern age is the lengthening of the span of time between natural puberty and social maturity, when one becomes capable of establishing a family. If, in the simple old days, a boy at the beginning of his natural puberty could take up a vocation in which he could stay till the end of his life, this is no longer possible. A student who successfully passes through his education in primary school, secondary school and university without any interruption...will graduate at the age of twenty-five. Surely it will then take three to four years to arrange things to get married permanently. The same applies in the case of an educated girl who has to pass through all the stages of study."⁶

Under these circumstances marriage union need to be protected and nurtured as a spiritual unit upon which the entire fabric of society can be built up. For women folks, Muslim way of private life is a sacred means of ensuring distributive justice and fairness among household member comprising a Muslim family. Men are required to provide all necessary means to ensure this justice within and beyond the family frontier. Motherhood is the most precious thing a marriage and family life can give to women.

*"And among His wonders is this: He created for you mates out of your own kind so that you might incline toward them, and He engenders love and tenderness between you: in this, behold, there are messages indeed for people who contemplate."*⁷

Thus one can observe that Islam takes marital and family relations seriously and also makes these invaluable relations quite flexible so that everybody can handle such relationships depending upon one's capability. Making family and marital relations mysterious as well as practical, Quran invites all to get benefit out of it irrespective of their race, religion and gender. However, ultimate goal is the spiritual salvation through sacrifices that are beneficial for the family and society in particular and humankind in general.

⁶ Mutahhari, Murtada, *The Rights of Women in Islam*, WOFIS, Tehran, 1981, p. 29.

⁷ Quran, 30: 21

In real material life such a balanced way of maintaining family relation for both husband and wife is neither easy nor achievable for each and every Muslim or individual of a *particular* society. To address this dichotomous problem in maintaining ideal family life for Muslim communities, many *Shias* tend to believe that the so-called temporary marriage system would be able to make the situation easier and bearable for the contracting parties to a marital relationship.

"As we already know, permanent marriage creates a great deal of responsibilities and duties for the couple. This is why a boy and girl in their early youth, when they enter the period in which natural puberty brings them under the pressures of the instincts, are not ready for a permanent marriage...Fixed-term marriage puts the limit on a woman that she must not be the wife of two men at the same time. Evidently such a restriction upon the woman itself necessitates a restriction upon the man. When every woman has exclusive attachment to a particular man, every man will necessarily be attached to a particular woman."⁸

The Sunni world, in general, does not acknowledge such principle of fixed-marriage and regards it an un-Islamic devise not endorsed as a valid norm of Islamic marriage. However, most Shia sects accept it as a valid form of marriage and believe that it would solve many problems for young men and women and would prevent them from indulging in pre-marital and extra-marital sexual relationship. The question of fixed-marriage and its practical use is not that of a big issue for religious people; its validity as a form of Islamic marriage is a bigger and complicated question and dispute. It appears that *Shias* and *Sunnis* would never agree on this issue as *Shias* do not believe that fixed-marriage system was completely and categorically prohibited by the Prophet of Islam himself. Despite the fact that there are a number of hadiths, *Sunnis* take seriously, in support of banning temporary marriage for good, the *Shias* believe that not the Prophet himself but the Second Caliph, Omar, who completely banned such type of marriage.

3. Polygamy: Obscenity and Promiscuous Sexual Life Style

Widespread obscenity in public and promiscuous sexual life style is a dominant reality of industrial age and its concomitant, modernization or urbanization. Again, while polygamy is neither a norm nor desirable life style for Muslims, informal or unofficial polygamy is the mainstream trend in all Western and non-Muslim societies. Islamic doctrines pertaining to polygamy are the target of attack by Westerners mainly because of their ignorance of Islamic ways of thinking and living. Islam teaches that a Muslim male or female have to lead a worldly life for the benefit of other fellow human beings. There are no higher causes in Muslim life than to serve the ways of God by satisfying

⁸ Mutahhari, Murtada, *The Rights of Women in Islam*, WOFIS, Tehran, 1981, pp. 29, 31, 37.

the minimum material requirements of fellow human beings and neighbors and putting utmost efforts to make human souls free from wickedness, greed, and hypocrisy.

In this backdrop, the very tightly restricted polygamy is allowed under Islamic law and ethics, if there is no fear of any kind of discrimination between the concerned parties. This exceptional rule was given a very narrow pass to cater to the desperate needs of women with destitute conditions with minor children. Thus there is a serious and very specific context of allowing very restricted form of polygamy under Islamic system, when the situation makes it imperative.

“Hence, render unto the orphans their possessions, do not substitute bad things [of your own] for the good things [that belong to them], and do not consume their possessions together with your own: this, verily, is a great crime. And if you have reason to fear that you might not act equitably towards orphans, then marry from among [other] women such as lawful to you – [even] two, three, or four: but if you have reason to fear that you might not be able to treat them with equal fairness, then [only] one – or [from among those] whom you rightfully possess.”⁹

Thus it is very clear that the norm of a marriage is a union between a man and woman and this is the regular and best form of marriage. Still life, society, and state may demand and establish some exceptions to this general principle. Muhammad Asad has partly explained these verses as follows:

“As regards the permission to marry more than one wife (up to the maximum of four), it is so restricted by the condition...., as to make such plural marriages possible only in quite exceptional cases and under exceptional circumstances. Still, one might ask why that same latitude has not been given to women as well; but the answer is simple. Notwithstanding the spiritual factor of love which influences the relations between man and woman, the determinant biological reason for sexual urge is, in both sexes, procreation: and whereas a woman can, at one time, conceive a child from one man only and has to carry it for nine months....It is, of course, obvious that the biological factor is only one – and by no means always the most important – of the aspects of marital love: none the less, it is a basic factor and, therefore, decisive in the institution of marriage as such. With the wisdom that always takes human nature likely that you will not deviate from the right course.”¹⁰

The way many Muslims countries, including some Arab countries, have been practicing polygamy cannot be regarded as right Islamic directions and many cases are sheer violations of fundamental Islamic values and injunctions. The concept of harem

⁹ Quran, 4: 2, 3.

¹⁰ Muhammad Asad, *The Message of the Quran*, (Translated and Explained), Dar Al-Andalus, Gibraltar, Complete Edition, 1980, pp. 101, 102.

is against all Islamic doctrines of regulating human behaviors for decency and fairness. In the name of gender equality, Islam has never been agreed to allow Muslim societies to be obscene and promiscuous as we witness today in many Muslim countries as well. In a secular country like ours, the legal system does allow a restricted form of polygamy under the guidance of the Arbitration Council where concerned parties needed to be involved in the decision making process.

"In considering whether another proposed marriage is just and necessary during the continuance of an existing marriage, the Arbitration Council may, without prejudice to its general powers to consider what is just and necessary, have regard to such circumstances as the following, amongst others: Sterility, physical infirmity, physical unfitness for the conjugal relation, willful avoidance of a decree for restitution of conjugal rights, or insanity, on the part of an existing wife."¹¹

In Islamic perceptive polygamy is neither a fad nor a license to a man to have more than one wife at a time. As an institution it tends to save at least some women and children from desperate situation of poverty and other helplessness conditions. Polygamy is not propagated in any Islamic legal system; it is only tolerated as an exception to the rule that every party of a marriage should have only one person of opposite sex with clear and dedicated intension to establish a family and start or continue reproductive process of humankind in a very decent and healthy manner.

No man is indeed capable of doing full justice to more than one wife and a Muslim male should marry only one wife,¹² though many culture and religions advocate polygamy as a matter of right. Polygamy is designed in Islamic doctrines in a way that in most cases women can get benefits from such uneven wedlock. Islam is quite relaxed religion for women in general, as they don't have to bear any burden to meet the financial and other needs for the family and children. Woman is completely free from any compulsory military or policing duty to any state or persons except to protect her own minor children or children of husband who are under her custody.

Relaxation of conditions for Muslim women goes further in many religious duties including special dress codes prescribed by the Quran. *"The elderly women who do not expect to get married commit no sin by relaxing their dress code, provided they do not reveal too much of their bodies. To maintain modesty is better for them. God is the most knowledgeable entity of all."*¹³

¹¹ Article 14, Muslim Family Laws Rules, 1961, cited in Obaidul Huq Chowdhury's Hand Book of Muslim Family Laws, DLR, Sixth Edition, 2005, p. 119.

¹² "If ye fear that ye cannot do justice (to so many) then only one... Thus it is more likely that ye will not do injustice." Quran, 4: 3.

¹³ Quran, 24: 60

In Islam marriage relation and family life are not intended for the satisfaction of lust and greed of either partner only. In family matters, many Westerns take most of the issues as conflicts of rights, while for Muslims these are either issues of right or wrong, vice or virtues, sin or crime and issues of conflicts of interests between the concrete parties.

Unlike many other religions and ideologies of the past, Islam is categorical in declaring that all men and women are equal as a spiritual entity. It is strongly believed and is considered an important part of Islamic faith that God has infused same kind of heavenly spirit in the creation of the first human couple on earth as a measure of test as to who are truthful in their actions and how they establish justice on this planet to get reward in the life hereafter.

4. Property Rights to Women

From the very inception of Islam as a final version of monotheism, fourteen hundred years ago, Muslim women are granted all kinds of property rights. They are allowed to acquire new ownership and possession of specific property. Moreover, absolute ownership is virtually granted to Muslim women only, who are also empowered legally to control all her tangible and intangible property without any interventions from any person or quarter whatsoever.

*"Unto men a fortune from that which they have earned, and unto women a fortune from which they have earned."*¹⁴

In practice, Muslim women in many societies are deprived of their legitimate rights, including property rights. Main deprivations come seemingly from the father's family as the distribution of inheritance is very complex under Islamic laws and prevailing customs are not favorable to women in securing property rights inherited from father and husband.

Father and husband can transfer any movable and immovable property to a Muslim woman before and after marriage, separation, and divorce. A wife can claim any amount of money and wealth in the form of *mahr* (dower)¹⁵ at the time of marriage and divorce, if the terms and condition are well stipulated in the marriage contract document. However, *mahr* might be very insignificant amount of money or property, if

¹⁴ Quran, 4: 32.

¹⁵ "The famous and widely heard story about Umar ibn Al-Khattab attempting to prohibit large dowries from the *minbar* and being corrected by one of the women companions with the above verse [And if you wish to replace a wife with another and you have given one of them a heap of gold, do not take anything from it. Would you take it as a fraud and a clear sin?} *An-Nisaa:20*] is a weak hadith which has no validity. What is authentic is that Umar advised people not to be excessive in dowries, but not that he prohibited people from agreeing among themselves on dowries of any amount." In: <http://www.java-man.com/Pages/Marriage/Marriage06.html> (last visited on May 10, 08)

the bridegroom and bride have agreed upon the stipulated terms and conditions written down in the marriage document.

"The expression *nihlah* signifies the giving of something willingly, of one's own accord, without expecting a return for it (Zamakhshari). It is to be noted that the amount of the marriage-portion, or dower, which the bridegroom has to give to the bride has not been circumscribed by the law: it depends entirely on the agreement of the two parties, and may consist of anything, even a mere token."¹⁶ In Bangladeshi laws dower can be demanded even if that is not mentioned in the *nikah nama* (marriage document).¹⁷

Islamic law demands that maintenance of a wife must be adequate and equitable under all circumstances. Despite the fact that the properties owned from father and husband remains at a Muslim woman's disposal, she is still entitled to all kinds of maintenance from husband. On the other hand, legally like the sons, daughters also cannot claim any inheritance as long as the father is alive. After husband's death, a wife is entitled to recover her unpaid dower from the wealth of deceased husband, and to keep all gifts, ornaments, and properties received at the time of her marriage, and properties designated to her ownership according to the written and/or oral will left behind by her husband. After the death of the father, children can inherit property according to a complex system prescribed in the Quran and hadiths. However, the main practical problem in this area of property right is the absence of detailed codified laws with specific mode of realization of rights of conflicting parties at state or court levels.

From Hammurabi (1728-1686 BC) to the majority of exponents of medieval legal sources, hardly any Western jurist could recognize the fact that because of the sameness of human spirit both in man and woman, legal system should allow every woman to own properties independently.

The Table V of the Roman Twelve Tables of Law categorically stipulates: "Females should remain in the guardianship even when they have attained their maturity."¹⁸ A little more than one hundred years ago, the Western world has finally abandoned this

¹⁶ Muhammad Asad, *The Message of the Quran*, (Translated and Explained), Dar Al-Andalus, Gibraltar, Complete Edition, 1980, p. 102.

¹⁷ "Where no details about the mode of payment of dower are specified in the *nikah nama*, or the marriage contract, the entire amount of the dower shall be presumed to be payable on demand.", Article 10, Muslim Family Laws Rules, 1961, cited in Obaidul Huq Chowdhury's *Hand Bok of Muslim Family Laws*, DLR, Sixth Edition, 2005, p. 104.

¹⁸ "The Twelve Tables were written by the Decemviri Consulari Imperio Legibus Scribundis, (the 10 Consuls) who were given unprecedented powers to draft the laws of the young Republic. Originally ten laws were drafted ; two later statutes were added prohibiting marriage between the classes and affirming the binding nature of customary law." In: <http://members.aol.com/pilgrimjon/private/LEX/12tables.html> (last visited on May 11, 08)

legal postulate as a constitutional principle. Even the Magna Carta¹⁹ adopted on June 9, 1215 as a law under the rule of King John of England could not or did not provide much right to the women folk in England. Article 54 of this so widely publicized legal monument for freedom states:

"No one shall be arrested or imprisoned on the appeal of a woman for the death of any person except her husband." A Muslim jurist explains this article by saying that, "even if her beloved children, parents, and other relatives are killed before her own eyes, yet the killers would go unpunished, because the witness is a woman ..."²⁰ Until now we celebrate this legal document all over the world without knowing that the Magna Carta as a whole was a great failure to ensure freedom and prosperity for common men, especially women, slaves, and children.

"If at the death of a man who holds a lay 'fee' of the Crown, a sheriff or royal official produces royal letters patent of summons for a debt due to the Crown, it shall be lawful for them to seize and list movable goods found in the lay 'fee' of the dead man to the value of the debt, as assessed by worthy men. Nothing shall be removed until the whole debt is paid, when the residue shall be given over to the executors to carry out the dead man's will. If no debt is due to the Crown, all the movable goods shall be regarded as the property of the dead man, except the reasonable shares of his wife and children."²¹

In many Western countries women were not allowed to have or claim absolute ownership over property and bank balance for a long time without having a legal guardian involved to the property and bank balance concerned. Without the consent of her husband, a wife could not even open a bank account and spend money from the account. This was a common scenario in many Western countries just over a century ago. However, through positive law system i.e., by codifying rules and regulations in every aspect of life the Western world has overcome these types of legal dilemmas. Western women had to strive and struggle in the domain of politics and economics to

¹⁹ It is believed by many historians that the Archbishop, Stephen Langton has written the original text of it. It was legally valid only for three months and subsequently it was revised several times and progressive provisions of it hardly had been implemented at the court of law. Moreover, as a whole its provisions had protected the interests of the so-called equals only. "No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals or by the law of the land." (Article 39). In: <http://www.fordham.edu/halsall/source/magnacarta.html> (last visited on May 15, 08)

²⁰ Cited in A. B. M. Mahbubul Islam, *Freedom of Religion in Shariah: A Comparative Analysis*, (year and place of publication could not be found) p. 50

²¹ Article 26, Magna Carta, Revised Edition, British Library, 1989. In: <http://www.fordham.edu/halsall/source/magnacarta.html> (last visited on May 15, 08)

achieve their legal and commercial rights to empower themselves in the face of male domination. However, this ultimate freedom was not without some serious costs to the family: it ushered in an endemic breakdown of family system in many Western societies.

Most Muslim nations were either silent spectators in the ongoing political and legal battles waged by the Western women against their male folks or wished to follow blindly the same kinds of rules of games in their respective countries. As a result, many Muslim countries have lost their safety net traditionally provided by Islamic customs and values on the one hand, but on the other, they did not achieve any substantial positive changes in existing Muslim legal system.

Islamic legal system has some fundamental differences with any other system of law in regard to dealing and ensuring all kinds of property rights for daughters, wives, and mothers. However, most of those legal postulates are either not codified or shrouded with many ambiguities in the imagination of a vast majority of Muslims. As a result, when it comes to the complexities of practical implementation of laws, then prudent and wise opinion and/or verdict hardly can be found. From historical perspective, it appears that Muslim jurists wished to have a legal system combining the features of common law system and traditions of civil law of governance based on wider perspectives of rule of law aimed at the spiritual salvation and justice for all.

Islamic legal vision is not limited to a set of ideals or ideas, rather it is a universal world view capable of finding reasonable solutions to almost all difficult problems of any age ranging from agrarian society to knowledge-based and technologically-driven highly industrial society. In this regard most Muslim communities of modern era have failed miserably to demonstrate that Islamic law is the only alternative to the existing dominant powers that have been destroying ecological balance and degrading human dignity of indigenous and non-white people around the world. Moreover, the level of socioeconomic development and industrialization process in the Muslim world was not at all favorable to the emergence of a better legal system than any Western system either based on case-made laws and/or enacted laws promulgated by the legislative bodies that has been protecting vested interests of richer sections of the population. Furthermore, in most cases existing legal and judicial systems in the Muslim world based on the societal process are either grossly inefficient or completely inadequate to deal with urgent political and legal disputes and controversies at hand diligently and honestly.

The fundamental sources of Shariah may appear like a kind of positive law to regulate conflicts of interests between the parties at the court of law. In terms of the "Pure theory of Law" it might not be so difficult to find some "Basic Norms" to regulate human behaviors on day-to-day basis, but without detailed statutory laws, courts

cannot reward or punish the concerned parties involved in particular cases. Only by using the basic sources of a particular system of law to discharge justice in the field of property rights and also to try to have a fair criminal justice system for all is both dangerous and ineffective because creation of new laws always demands use of different sources simultaneously.

"A widespread instance has existed and exists when state courts are required for certain cases to observe and enforce the observance of the norms of another law, either religious or customary or of another state. So, for example, one law may give effect to the norms of another law prohibiting blasphemy or disrespect to the ruler, and to the norms defining the conditions for the contracting of a marriage."²²

Property disputes need to be resolved quickly through civil procedure of justice without which a state or society would lose the required dynamism to flourish and grow. This is a major shortcoming of existing legal system of many Muslim countries. For example, after the death of a father, a possible unequal distribution of property between the male and female child is not the real issue at hand, as in most cases only insignificant amount of wealth and property usually have been left undistributed that belonged to the deceased. A Muslim father usually is quite concerned to distribute his wealth among his heirs and/or choice of his own before his mental incapacitating situation or serious physical illness. In case of his failure to do so, a grand parent is supposed to ensure the distribution of property of his son or daughter among the grandchildren.

Like many other property related issues, the Quran is not explicit in this regard and some Muslim jurists are in confusion on how to regulate such issues legally. Such kinds of ambiguity and confusion could be removed by enacting laws or by creating precedent-based justice system. Instead of doing that Muslim ruling elite has created legal instruments such as Figh-e-Firoz Shahi, Fatwa-e-Ālamgari, Fatwa-e-Tatarkhaniya, Amal-e-Akbari, Kanun-name, Hedaya, and so-forth. These types of legal documents cannot be regarded as codified laws as they are mainly a fatwa-driven legal system dominated by the *Faqi* and *Mufti*. The founding stone of Islamic justice is the *Kadi* system, which is completely independent from the intervention of executive and administrative powers. *Faqi* and *Muftis* are there either to aid legislative bodies or judicial system designed by the legitimate authorities as the representatives of people.

"The *kadi* cannot give judgment in favour of his near relative. On the other hand, his competence extends beyond the judicial office, and includes the control of the property of the missing person, the orphan, the foundling, and the person with restricted

²² Gordon R. Woodman, "Globalization, Social and Religious Diversity, Legal Pluralism: Can State Law Survive?", In: Law Journal, International Islamic University Malaysia, Vol., 15, No., 2, 2007, p. 7.

capacity to dispose, of found objects, pious foundations, and estates of inheritance. His power to dispose goes further than that of the guardian, even than that of father; he may, for instance, lend the money of an orphan...Finally, the *kadi* is in charge of public welfare in general, e.g. he forces the speculator on rising prices of food (*muhtakir*) to sell; he is, generally speaking, 'the guardian of those who have no other guardian'.²³

There is no doubt that distinction and relationship between state law and customary and/or religious law is always a problematic one. Even the very definitions of these laws are almost always create more confusions rather than to solve any real problem. The entire law making process in any society and state cannot be put over any serious question of inside maneuvering for keeping some vested interest group above the law. Islam is very unique in the regard during its journey at the beginning to side with the downtrodden people of all religions, races, and gender. However, throughout the centuries, Muslim rulers have been distorting the very core mission of Islamic jurisprudence. And later on, colonialist took the full advantage of the situation and brought the entire Muslim world under brutal exploitation of capitalism.

Any jurist with up-dated legal acumen would recognize that Islamic system of law at any given time and place is ultimately a very sophisticated methodology to be adopted and implemented for the causes of ensuring justice for all. Such a system of law cannot be established and/or revitalized overnight. "The Historian Ibn Khaldun describes *fiqh* as "knowledge of the rules of God which concern the actions of persons who own themselves bound to obey the law respecting what is required (*wajib*), forbidden (*haram*), recommended (*mandūb*), disapproved (*makruh*) or merely permitted (*mubah*)".²⁴ Such a complicated system was necessary not only to ensure justice to the poor, slaves and women; it was also needed to change people's attitude toward law and justice. As a civilization Muslims also inherited a lot of religious and tribal taboos against which they had to wage jihad that is still continuing at different levels.

By signing the treaties with different tribes in Medina under the arrangement of the Medina Charter, and the Hudaibiyah Treaty with the Tribes of Mekkah, the Prophet (P.B.H.) put an end to an overwhelming dependence of unwritten customary laws for the development of a comprehensive and contemporary legal system. Despite the fact that such a vital and virtuous prophetic tradition did continue for many centuries, the development of legal system involving the emancipation of women had slowed down in the mist of rivalry between different Muslim nations during the late Medieval era,

²³ Schacht, Joseph, *An Introduction to Islamic Law*, Oxford at the Clarendon Press, 1964, p. 188

²⁴ <http://en.wikipedia.org/wiki/Fiqh> (last visited on June 13, 2008)

and was completely stopped during the European colonial domination over the Islamic world.

From theological and spiritual perspectives, Islam does not prescribe either a patriarchal or matriarchal society. In practice, the patriarchal legal system still remains as the biggest impediment to the establishment of property rights for women in the Muslim states. On an individual level, neither the Muslim male nor female, in general, have been doing enough to guarantee the rights to property to women in the Muslim world. Moreover, some secularists and ultra-feminist by explaining these delicate legal issues convey a message that Muslim men in general, are the greatest obstacles to the emancipation of Muslim women. We need to stop this unnecessary and unwanted squabble and increase our efforts to implement property rights for women keeping our religious sanctity and harmony in family life.

It is true that at the time of marriage, Muslim women are not allowed to take their full portion from their parents' property to husband house. They can try to settle their disputes over property rights with their brothers and relatives after the death of either parent or both. Another reason and argument why Muslim women should keep their property distributed and/or diversified within her own family and husband's family is to keep them as a safety net for any unforeseen crisis like separation or divorce from husband and accident or unexpected death of a breadwinner. This is why a prudent and just judicial system has to be in place so that women can establish their ownership and possession whenever their rights are violated. Unfortunately such an equitable and fair judicial system is absent in most part of the Muslim world.

5. Divorce Right to Women Under Islamic Law

Religiously, divorce is quite undesirable for any Muslim husband and wife. However, it is neither a prohibited nor sinful act. Dissolution of marriage is permissible in the case of unhappy or unworthy marriage contract.

As a divorcee, whatever property a woman owned at the time of marriage and what was already in her possession, she is entitled to keep almost all of it barring any ill motivation of owning property unfairly or in dishonest manner. Jurisprudentially, and religiously, Islam does not encourage divorces to be settled in a court of law, if custody of children is not the matter of dispute.

*"And if ye fear a breach between them (husband and wife), appoint an arbiter from his folk and an arbiter from her folk."*²⁵

A deeper reading of relevant Quranic verses demonstrates that the relationship between husband and wife in Islam is very sacred, divinely inspired and highly valued. And it is

²⁵ Quran, 4: 35.

the bedrock of the entire family system as all kinds of pre-marital and extra-marital sex is completely prohibited in Islam. However, Islam does not do any policing on sex life of individual, if that is within the parameters of any legal school (*madhhab*) of Islam or supervised by any wise mentor²⁶ with religious and financial integrity.

Under the prevailing arranged marriage systems in the Muslim world both *dower* and *dowry* have played important roles in sustaining marriages and making it difficult to obtain divorce even when it is necessary and desirable. Islam, however, views divorce as a necessary evil to get rid of unhappy marriage. And this idea of flexibility in marriage relation and divorce, have made Muslim marriages very dynamic and successful for many centuries.

Under the influence of capitalism and consumerism, most Muslims today, unfortunately, are more concerned about the amount money and wealth that would be transferred from one hand to another in the name of *dower* and *dowry* at the time of marriage and divorce. In Islamic legal system there are two forms of dower: prompt and deferred. Both kinds of dower have to be paid by husband to wife before and/or after the marriage signing contract. Wife can keep a portion of dower in a form of deferred payments to be paid gradually or at the time of divorce or death of her husband. Dower as a form of immediate or prompt payments allows Muslim women to be economically independent soon after signing the marriage contract.

However, when a husband is unemployed or employed in a low paid job, then dower, as an institution, cannot safeguard the economic interests of his wife. Another objective of dower is to keep husband under pressure so that he cannot try to go for divorce whimsically. A huge amount agreed upon to be paid as a dower may keep a husband away from taking decision to divorce her wife unilaterally. However, misuse of dower system has many dire consequences for both husband and wife and many Muslim families are not aware of the danger of abuse concerning the amount of money and wealth allocated as a prompt and deferred dower.

Problems with the use of dower money and wealth have reached a disproportionate scale in a society because of the widening gap between rich and poor. This dower-related problems have also given rise to a new phenomenon of *dowry*²⁷ i.e. transaction of money and wealth from bride's family side to the groom or his family. There is no strong religious argument why a bride's family should gift property, movable or

²⁶ Islam does not believe in any highly organized sainthood with a country wide following. However, locally pious people have a social duty to organize and regulate the behavior of their constituencies.

²⁷ "The opposite direction, property given to the bride by the groom, is called dower or mahr. Normally the bride would be entitled to her dowry in event of her widowhood, prior to the evolution of her dower rights; so common was this that the terms "dowry" and "dower" are sometimes confused." In: <http://en.wikipedia.org/wiki/Dowry> (last visited on May, 22, 08.)

immovable, to a prospective husband. Such instances, are, ironically more frequently observed in brides' family who are financially handicapped and vulnerable.

This is, of course, a very unethical (and definitely un-Islamic) way to use brides' or their family's money or wealth to establish a new family for the bride and the groom. However, in non-Arab Muslim world it is now an endemic problem of "bribing" young Muslim male to start a family life with a particularly incompatible wife in terms of spiritual, psychological, and educational achievements. Sometimes these type of marriages are quite successful in terms of reproductive function of a family. Very often, however, such marriages end up with tragic consequences for both sides of the marriage contract.

In terms of historical antecedent, many Muslim males try to justify such phenomenon by arguing that the Prophet of Islam had gifted a number of household items to Ali at the time of Ali's marriage with Fatima, the daughter of the Prophet. However, this is a very weak religious justification, since the underlying spirit was helping both men and women to start a family life of their own rather than living lonely and separate lives.

Bangladesh has been enacting ineffective laws one after another with severe consequences for the younger generation seeking to establish family life or wish to come out from unhappy and unsuccessful marriage relations. A flawed or rough start in their family life may more likely to end up with a greater number of divorce rates like their counterparts in the West. Still very often we can observe that Western authors and observers think that a Muslim man can easily divorce his wife just pronouncing *talak* (divorce) three times at any time. It is a sheer misunderstanding of Islamic system of marriage or a reflection of misuse of Muslim prevailing system of marriage and divorce. Even the very learned Western authority on Islam and Muslim issues cannot appreciate why Muslim preachers are so hard to keep every Muslim marriage going instead of breaking down the marriage relationship.

"For a Muslim cleric to condemn divorce is particularly sticking. Divorce at the husband's instigation is a pillar of the traditional conception of *sharia*, but in the West it means family breakdown. Thus a preacher adapts to the actual, rather than imagined, behaviour of his flock and stresses values that go against uncritical respect for the letter of the *sharia*, although he is certainly not a liberal. In this sense he speaks rather like a conservative Catholic priest."²⁸

Here renowned author Olivier Roy shows his helplessness to understand why Muslim men should be so protective to the marriage relations despite the fact it is not prohibited in Islam to divorce one's life-partner or soul-mate. By reading religious

²⁸ Roy, Olivier, *Globalized Islam: The Search for a New Ummah*, Columbia University Press, New York, 2004, P. 216.

scriptures or documents Islamic provisions cannot be understood at all, if someone is not capable of putting the literary meaning in the practical context of real material life. Islamic ethical values and legal injunctions do maintain a very complex relationship to help each other to keep Islamic system functional and dynamic to address complicated issues from family life to international affairs. However, since the European colonial domination over the Muslim world, failure of many Muslim states to live up to the ethical standards and legal mechanisms to solve the problems of Muslim communities has provided Western authors ample clues to think that Islam is an ideology very similar to Catholicism, Fascism, Present-day religious fundamentalist movements, which are of Western origin rather than have anything common with any Islamic symbolism or idealism.

6. Balanced Family Life: Spiritualism to Materialism

It is not at all easy to lead a well balanced and harmonious family life without active and continuous help and guidance from the other partner in marriage contract. During the early centuries of Muslim civilization, renowned saints or pious people even did not establish their own family life based on marital relations. Female Muslim saint, Rabeya Basri, and Hasan Basri did not marry at all and many saints married in their old age just to fulfill a religious obligation of having a family of his or her own. The ultimate spirit of Islam is that the entire mankind is one integrated family descending from Adam and Eve. Reproductive process is only a *fard-e-kefayah* that can be done or fulfilled by any segment of human population.

Many saints coming to this greater Bengal or North-East region of this Indian Sub-continent to propagate Islam had remained unmarried till the end of their lives. "[H]e was later affectionately renamed Shaikh-ul-Masha'ikh Hazrat Shah Jalal al-Mujarrad (the last name meaning "the bachelor", on account of his celibacy). Shah Jalal's date and place of birth is not definite. A number of scholars claim that he was born in 1271 in Konya, Turkey."²⁹ Famous Indian Sufi scholar and author Mohamad Hamidullah (1908-2002) lived a life of celibacy and so does Turkish philosopher and Imam Fethullah Gulen (1938-), although Islam does not prescribe such way of living to be followed by Muslims in general. Moreover, celibacy is seriously discouraged by the major tenets of Islam, it is not completely *haram* (prohibited) if that is the honest choice for someone who does not want to have a family life and takes the entire mankind as his or her family and serves it honestly and sincerely. The above cases are highly exceptional and thus cannot be generalized. Moreover, Islam, as a legal system and practical way of living, strongly advocates a healthy family bondage based on marital relationship.

²⁹ http://en.wikipedia.org/wiki/Shah_Jalal (Last visited on May 12, 08)

Prophet of Islam says: "I am more submissive to Allah and more afraid of Him than you; yet I fast and break my fast, I do sleep and I also marry women. So he who does not follow my tradition in religion, is not from me (not one of my followers)."³⁰

Many perceive Muslim personal law as outdated rules and regulations or find them hostile to the desired liberty and freedom we would like to enjoy as a family man or woman. The major problem here is that we can hardly realize the revolutionary changes Islam has brought to many nations and countries leading to profound influences on the manner and attitude that govern and shape family life, trade, and business. This historical phenomenon can be potentially revitalized again in many Arab countries and/or heartlands of Islam in Asia and African continents. Other continents and/or countries have to discover many hidden beauties of Islamic ways of thinking and living, especially when it matters to the family life and system of marriage.

Conclusion

The above discussion about the doctrinal issues and popular perceptions of women rights in Islam reveals that the Quran does not view the right of man or woman separately but as a complementary force within the family and outside that to ensure harmony and decency in the way that neither party would find their mundane life unbearable and spiritual enlightenment impossible. In Islamic perception social life is just an extension of family relations. A state's fundamental duty is to ensure justice and social security for all. Unfortunately those who now talk about the civilization and/or Islamic issues very frequently are the worst kind of violators of human rights and women rights. On the other hand, more often existing legal system all over the world tends to punish people who are economically very vulnerable and educationally unenlightened.

"Social observation shows that doctrinal reasoning is in fact a causal factor in the social observance of many rules of many types of law. So if we are to understand law as a social fact we need to understand the doctrines which are involved with these facts...We cannot understand properly another law from the internal viewpoint of our own law. This was demonstrated repeatedly in the attempts of the British colonial power, having imposed their law on non-Europeans societies, then to decree that the local religious and customary laws should also be parts, but subordinate parts, of the legal systems they had established. ...Religious philosophies hold to the principle that certain values derive from higher source than any human source and so it is impossible

³⁰ Hadith: Bukhari Shareef, Volume 7, Book 62, Number 1, In: <http://bukharishareef.blogspot.com/2008/03/translation-of-sahih-bukhari-book-62.html> (last visited on May 19, 08).

for humans to derogate from them. It will always be difficult to negotiate integration where those absolute principles are involved.³¹

Absolute principles and norms are not that many in the Quran and sunnah, so Muslim scholars and jurists of all ages tended to add some new universal principles to be followed and obeyed by all Muslims and even non-Muslims. By doing so they wanted to have a comprehensive legal system for all. However, different legal schools found their own way of developing different criminal and civil systems at their national levels. There is no harm of having different decent Muslim legal systems based on Islamic jurisprudential thoughts. But failure of using precedent system and codified rules to be followed at the court of law bears serious bad consequence for all concerned parties. Some Muslim jurists try to urge that the customary laws and case-made laws have no place in Islamic jurisprudence and thus everything should be based on codified laws. It is rather easy to say that Muslim need to administer the entire system of governance and judicial system solely based on written laws based on Islamic legal doctrines and ethics, but in practice mundane dynamics of life and urgency for justice for all segments of people of a state demands many things to be done promptly and wisely.³²

"Islamic jurisprudence or *fiqh* looks to the writings of scholars, who are obliged to base their conclusions on the precepts of the Qu'ran, the Sunnah, and the Hadiths. This being the case, there is no *a priori* place for any civil/criminal dichotomy. To anybody schooled in the Common Law system, the lack of court-based precedents in Islamic Law texts (and indeed statute law as one understands it) is very striking. That is not to say, however, that there is no such thing as precedent in Islamic Law, and the gulf may not be as wide as it appears at first sight."³³

Islamic jurisprudence, therefore, allows a system of law to use precedents as less as possible at the court of law to discharge justice as Islamic system should rely on more codified laws. In other words, John Candlish tends to say that a kind of civil law system should have a closer link to the ideals of Islamic jurisprudence in terms of making laws and their implementation. Main reason behind such argument is the

³¹ Woodman, Gordon R., "Globalization, Social and Religious Diversity, Legal Pluralism: Can State Law Survive?", In: Law Journal, International Islamic University Malaysia, Vol., 15, No., 2, 2007, p. 156, 157, 169.

³² See for details, Kamali, Mohammad Hasim, Principles of Islamic Jurisprudence, Revised Edition, Islamic Texts Society, Cambridge 1991, pp. 245-296

³³ Candlish, John, "Necessity' in Criminal and Medical Jurisprudence: A Comparison of Common Law and Islamic Law Concepts," In: Law Journal, International Islamic University Malaysia, Vol., 15, No., 2, 2007 p. 217.

specificity, rigidity, and accuracy of the ideas upon which Muslim jurists and academicians have to articulate or act in developing a just legal and judicial system. However, flexibility presented in the core jurisprudential ideals in Islam does allow Muslim law makers and jurists to combine the merits of common law traditions with the advantages of civil law systems. Here lies the superiority of Islamic vision of jurisprudence and justice. We need to make use of full potential of Islamic jurisprudence to defend all legitimate rights of all women at every walk of life in the process of governance of a state system and family affairs.

Apart from the complexities related to vocabulary and cultural prejudices, there is a serious problem in using Islamic tenets to protect women's rights. Many Muslim jurists make Islamic legal doctrines too indoctrinated to be implemented in resolving disputes between husband and wife. On the hand hand, people those who adamantly oppose any kind of implementation of Islamic legal principles and/or norms, they do it either because of sheer ignorance or as a reaction to many ongoing misdeeds that have been taking place in the "Islamic lands." In this backdrop, it is quite hard to deal with Islamic legal thoughts and Muslim religiosity even handedly.

"Some *fuqaha* have drawn a distinction between *dalil* and *amarah* (lit. sign or allusion) and apply *dalil* to the kind of evidence which leads to a definitive ruling or that which leads to positive knowledge (*ilm*) ... The rational proofs, on the other hand, founded in reason and need to be rationally justified. They can only be accepted by virtue of their rationality. *Qiyas*, *istihsan*, *istislah* and *istishab* are basically all rationalist doctrines although they are in many ways dependent on the transmitted proofs."³⁴

Thus it is an intellectual as well as economic challenge to find a balanced and middle path to establish and protect women's rights with the help of *hikma* (wisdom, here legal acumen) that can make use of transmitted positive knowledge from heavenly sources and keeping them compatible with the sense of positive morality based on rationality and human decency. This is a fine line between deep-seated spirituality and materialistic consumerism through which Islamic legal doctrines can reach to its full fruition to protect women's rights in all circumstances and all ages.

³⁴ Kamali, Mohammad Hasim, Principles of Islamic Jurisprudence, Revised Edition, Islamic Texts Society, Cambridge 1991, p. 10.