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## Part 1

### Chapter One

## The Concept of Islamic Law

### 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, may be personal or international, private or public in nature. It is not indifferent to any issue whatever insignificant it may be. To 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 regard the Prophet said, "Today I have perfected your religion for you, and completed my favour towards you, and chosen Islam as your religion." The Prophet applied Islamic law in the State founded by him to break the established rule of law against 'might is right'. That was a new justice state. In fact, he was sent to establish the supremacy of Islam over all other man-made laws. In this respect the Islamic 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 religion."<sup>1</sup>

In fact Islamic law is altogether different from other man-made laws. We shall remove of misconceptions of the western people about Islamic law. We shall 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 (PBUH), is the result of a continuous process of development till now. It consists of the express injunctions of the Quran, Sunnah (practice of the

<sup>1</sup> Al Quran, 3:3.  
<sup>2</sup> Al Quran, 9:33; 48:28; 61:9

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 organism.<sup>3</sup> Besides Quran and Sunnah, Ijma (consensus of opinion) and Qiyas (Analogy) are also the sources of Islamic law. Islamic law is universal and it covers all branches of law such as, civil, criminal, constitutional, commercial which are commonly used for all citizens. But the law relating to marriage, dower, dissolution, paternity, guardianship, maintenance, gifts, will, *waqf*, inheritance etc. are applicable for the Muslims only. Muslims must believe in Allah and His Messenger and strive hard with their wealth and lives for the cause of Allah.<sup>4</sup> 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 Razzak v. Aga Mahomed* case, it was held that no court can test or gauge the sincerity of religious belief.<sup>5</sup>

The term 'Islamic law', or 'Muslim law' should be used interchangeably. But some writers, irrespective of Muslim or Non-Muslims, used ugly term like 'Moohumudun' (Neil Baillie), 'Mahomedan' (the judicial committee of the privy council and D.F. Mulla), 'Muhammedan' (Ameer Ali), 'Muhammadan' (Fyzee and Abdur Rahim), Anglo 'Mahommadan' (Wilson), 'Mohammadan' (Nicholson) and 'Mussalman' (various Indian Acts).<sup>6</sup> They are, it is submitted, either ignorant about Islam or careless or intentionally used the term with heinous attitude. Would it be wrong if they had used the term 'Islamic law' or 'Muslim law'. 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, because it is basically founded on the divine Books Al-Quran and Hadith. All the Prophets were entrusted with the duty to implement the commands of Allah. In this respect the Quranic version is 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."<sup>7</sup> The source of inspiration, therefore, is the revelation from Allah.

<sup>3</sup> Asaf A.A. Fyzee, *Outlines of Muhammadan Law*, P.1

<sup>4</sup> Al-Quran, 49:15

<sup>5</sup> *Abdur Razzak V. Aga Mahomed* (1894) 21 I.A., 56, 64

<sup>6</sup> Asaf A.A. Fyzee, *Outlines of Muhammadan Law*, P.2

<sup>7</sup> Al-Quran, 42:13.

Revelation is established as an inspiration and does not remain merely a vague suggestion.<sup>8</sup> 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. Definition of a Muslim

As 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 point of courts<sup>9</sup> and (2) from the point of theologians.

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

- (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 Mustahab* (practice of the prophet), if he follows this, he will be rewarded, but if he denies this, he will be punished;
- (c) *Mubtadah* (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 omitting 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;

But the view of the courts is different from the view of theologians. The court of law defines a Muslim as, "Every person who

<sup>8</sup> Yusuf Ali, *The Glorious Quran*, P. 1308

<sup>9</sup> Asaf A. A. Fyzee, *Outlines of Muhammadan Law*, op.cit., P. 60

<sup>10</sup> Syed Khalid Rashid, *Muslim Law*, Eastern Book Company, Lucknow, P.42

believes in the unity of God and the mission of Muhammad as a prophet (PBH) is a Muslim to whatever sect he belongs".<sup>11</sup> 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 Muslim. A non- Muslim, on the other hand, may accept Islam and can be a Muslim. The courts will decide each case on the facts as to whether a man is or is not a Muslim.

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 Razzak V. Aga Mahomed*<sup>12</sup> 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". 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 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<sup>13</sup> 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. Characteristic 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

<sup>11</sup> *Jiwan Khan V. Habibi*, AIR 1933 Lah. 759

<sup>12</sup> (1894) 91 I.A. 56, 64

<sup>13</sup> Asaf A.A. Fyzee, *Outlines of Muhammadan Law*, P.64.

nature on His part<sup>14</sup> A summary on the characteristic features of Islamic law are as follows:

#### (i) Allah is the Legislator

Islamic law was 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 various laws for the welfare of human beings.

#### (ii) Islamic law is consistent with human nature

Islamic law is in harmony with human nature. It is the religion of human (*Din-al Fitrat*) 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."<sup>15</sup>

#### (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."<sup>16</sup> 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 fast them. These are the Quran and the practice (Sunnah) of the prophet."

<sup>14</sup> Aziz Ahmad, *Islamic Law in Theory and Practice*, PLD Lahore, P.12.

<sup>15</sup> Al-Quran, 30:30

<sup>16</sup> Al-Quran, 3:19

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".<sup>17</sup> 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 the 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) prophethood and (c) the life after death. Islamic law is applicable to this world as well as to the next world. An offender, for example, 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 performs 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 helps 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.

<sup>17</sup> Al-Quran, 4:59

### 5. Distinctions between Islamic law and other laws

Islamic law, being divine law, differs in many respects from other man-made laws. We 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, except 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. But 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 the Sunnah or Hadith. Besides, *Ijma'* and *Qiyas* are the secondary sources of Islamic law. The Muslim jurists frame laws in accordance with these sources. But the sources of other laws are statutes, conventions, customs, precedents etc. Parliament takes into consideration to these sources at the time of enactment of laws.

#### (iv) As regards legislation

Allah is the Legislator of Islamic law that have been implemented by His prophet. He used to receive revelation from Allah, whereby he established an Islamic state in Medina 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 the Hadith. Of course, *Majlish-e sura* (consultative Assembly) can amend other Islamic laws which are made by Ijtihad only. But 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 law-abiding citizen. But 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. But other laws are enforced by the government by infliction of punishment in this world only like imprisonment, monetary fine, exile, death sentence etc. So 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 dominate.

**(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. Islamic is not limited to any territory. Ownership of this world belongs to Allah and as such laws prescribed by Him shall be applicable. But other laws are applied only in the territory of 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 is to be punished. If the offender remains unpunished in this world 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."<sup>18</sup> 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 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."<sup>19</sup> But in case of other 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 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."<sup>20</sup> But other laws are not universally applicable. Different States follow different types of punishment for the commission of the same offence.

<sup>18</sup> Al Quran, 99:78

<sup>19</sup> Al Quran, 6:164; 53:38

<sup>20</sup> Al Quran, 5:38

**(xii) As regards morality**

Islam lays much importance on morality at the time of adoption of laws. There are some deeds which need to be performed not in accordance with law but according to morality. But 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 according to modern law. Islamic law considers fornication (*zina*), for example, as punishable offence and immoral act, whereas it is 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 done on a minor or with prohibited degrees.

**6. Application of Islamic law in Bangladesh**

It has been 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 Mughals used to apply Islamic laws in India during their rule of India. But the British colonial Master gradually took over the control of Indian sub-continent after the tragedy of Palassy 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 principle of "divide and rule." In 1947 India became independent and it was divided into two parts- Pakistan and India. Pakistan again divided into two parts in 1971. Bangladesh was emerged as an independent state in place of East Pakistan. Bangladesh inherited the laws from Pakistan and India.

The British rulers, in the beginning, applied Muslim law during their rule which were not Islamic in both civil and criminal courts like the Mughals.<sup>21</sup> But 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*),

<sup>21</sup> Abdur Rahim, Muhammadn Jurisprudence, PLD, Lahore, P.37.

*wasiyat* and *waqf* etc. which are considered as Muslim personal law.<sup>22</sup> But 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: 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.

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 etc, 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.

Though about ninety percent people of Bangladesh are the followers of Islam and as such Muslims, but still 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 everywhere including Bangladesh. The Bangladesh Parliament may legislate necessary laws in the light of the Quran and the *Sunnah* and may repeal or amend existing laws. The Member of Parliament (M.P.) can do so and hence it is the duty of voters to elect those persons as Members of 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.

<sup>22</sup> Abdur Rahim, Muhammadn Jurisprudence, PLD, Lahore, P.37.