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PUBLISHER'S NOTE

We are delighted to see that the second volume of the Journal of Islamic Law and Judiciary is now published. All praises are due to Allah, the most Merciful, the most Benevolent. Like the first issue, the current volume also contains some original and scholarly articles on different issues pertaining to Islamic law and judiciary. In view of the shortage of formal journals that contain academic and research articles on Islamic law, the continuation of our journal to its second year of publication can be considered as an immense success on our part.

Although Bangladesh is a predominantly Muslim country, there exists a large vacuum in the area of formal research that aims to explore and understand the meaning and applicability of Islamic law and Islamic legal system with special reference to the contemporary world. The Journal of Islamic Law and Judiciary is an effort with a view to narrowing down this vacuum.

The journal boasts a dedicated editorial board and a learned advisory board to ensure that the articles that are selected for publication are all of the best quality and the most relevant. We at the Islamic Law Research Centre are strongly committed to continuing our mission of conducting and encouraging research on various aspects of Islamic law and publishing the journal on regular basis. May Allah accept our humble effort.

M Nazrul Islam

Secretary General

Islamic Law Research Centre & Legal Aid Bangladesh

Senior Advocate, Bangladesh Supreme Court

JOURNAL OF ISLAMIC LAW & JUDICIARY

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Nahid Ferdousi

EDITORIAL

Is Corruption Unarrestable?

Present military backed caretaker government has been fighting against corruption relentlessly. For doing so they have been arresting, confining and charge sheeting against some known country men with high reputation. It is marked as a need of the day and time as the country has been categorized as number one corrupt nation in the word for several consecutive years by an international organization. The government's move for squeezing the corrupts has been considered as a good effort so far. But what let those high ranking people of being corrupt and what are the ways out of it are being talking less. In other words the reasons and ways of its permanent solution has not been made clear so far. It is a well known fact that saving a tree requires watering through its roots, not through the branch. The same is the case with the up rotation of corruption. All government, both democratic or non-democratic, always talk against corruption but it is that government itself which, in the end, comes up with the same face. In this brief writing it is aimed to say a few words as to what corruption is? What are the nature of corruption? What let the people to be corrupt and what are the ways of solution to it.

Corruption means miss appropriation, waste, dishonest practice, taint, moral deterioration, bribery, making thing impure, vitiate, base, change from sound condition to putrid condition, rotten, vice, sin, crime, highly distasteful and so on.

As such, corruption may be defined as, performance of an entrusted action through distorted or improper ways knowingly in in violation of standard rules for illegal gain. A corruption also may mean taking over of power by improper or unlawful means by a person or group of persons for whatever objective it may be. Corruption is also meant of having outside or extra marital relation

by a person as it is the violation of marriage code and so on.

Based on the above, scope of corruption seems very wide as it is opposite of lawful gain and lawful gain covers entire human activities. Hence, corruption is misappropriation of power, position, money, trust property, politics, education etc. Corruption in politics by ruling class is the misuse of power, misappropriation of government fund, taking revenge against rivals or opponents, selling interest of the nation to the outsiders in exchange of self aggrandizement, permitting license to operate illegal or harmful things and to produce and import injurious items, taking bribes in issuing order, permission etc. Corruption in politics by political parties are to paralyze the country in the name of size or strike or hortal and attack on the members of other political parties without reasonable cause. Corruption in Education sector is not to teach properly and to teach improper lesson, operation of coaching business instead of conducting class properly, not to conduct exam and not to announce result in time. Corruption in trust property is to grasp the land or money of orphans or depositors. Corruption in banking sector is to grasp the money of the depositors and practicing money laundering. Corruption in government sector on the side of the owner of institutes is not to give proper wages in its proper time to its employees and on the part of the workers are to damage or burn down the factories illegally. Corruption on the part of Journalism is not to publish the truth but opposite of it and to threat the people for not doing or doing something on the fear of publishing his name in the paper. Corruption in judiciary is to pass judgments without knowing the law and fact of the case and concoct the judgment despite knowing the truth because of some illegal gain. And corruption on the part of a lawyer is to side and support corrupt and offender clients knowingly and to teach the client lying and misguide the judge in getting bail etc. Corruption in police force is to charge innocent one and discharge the guilty one at the expense of something. It is also to recruit the member of the force in exchange of bribe. Corruption in army is to interfere with a thing which is not within their power and jurisdiction such as to take over the power by having coupe data and so on.

Why the people indulge in corruption? It is done (i) because of inner evil demand or desire of the soul, (ii) because of non-

fearness of Allah- the Creator and (iii) unmindfulness of the accountability in the hereafter. Man is consisted of body and soul. The former is perishable while the latter is immortal-hence the original component of man. There are three types of soul. Such as Nafs al-ammarah- the evil soul, Nafs al-lawwama- the neutral soul and Nafs al-Mutmayinna- the satisfied soul. Possession of Nafs al ammarah by a person whoever he is, is the root cause of corruption. The role of neutral soul is to support the soul which is powerful - ammarah or mutmayinnah. Agreement of two constitute majority. Hence, ammarah + lawwama = serious and vicious soul while mutmayinnah + lawwama = beautiful soul. The vicious soul is responsible for vices or corruption while best soul is responsible angelic action.

Fear of Allah is the bedrock of having guidance of Allah (Al-Baqarah, 2:2). Simply belief in Allah is not enough of keeping away from corruption. It requires fear of Allah as well. It is to care and fill the presence of Allah in a person round the clock. A sensible man, in the presence of Allah, would not commit any improper action including corruption. He can do so if he does not fill His presence or does not care Him. It is the beautiful soul that can only generate Allah-fearness.

Unmindfulness or heedlessness about the accountability here, among others, are not to fear or care about the punishment of the court of law and care about here after is to fear the punishment of Allah. As Allah says, kiraman katibin know everything that you do (Al Infitar, 82:11,12). He further says, whoever does good equal to the weight of an atom shall see it and whoever does evil equal to the weight of an atom shall see it. (Al Zilzal, 99:7-8). Allah Ta`ala further says, "A man of understanding, among others, fears Allah and dread the terrible reckoning (Al Ra`ad, 13:21).

The people of Arabia at the advent of Islam were corrupt the great of world. It is the teaching and practical demonstration of Islam that made them best of all in the world for all time and space. The best man in the world means the possessor of best soul. Although Muslim countries including Bangladesh have been ruling by Muslim but not by the law of Allah. In absence of the presence and implementation of law of Islam in all aspects of life more particularly in education, politics and judiciary the concept of soul,

its development within the wishes of Allah, fear of Allah and accountability etc remain far from reality.

In absence of implementation of law of Islam the people, in general, have been possessing evil soul and product of evil soul is the corruption and crime. A person does not fear Allah does not reasonably fear anybody in his practical life and absence of fear ness and accountability lead a soul to earn whatever he likes for the comfort of his worldly life. Hence, solution to the emerging corruption or to say making of a corruptless or crimeless society solely depend on the building of a nation free of evil soul and possession of good soul (Nafs al mutmayinna or Qalb al Salim) who would fear Allah the most and mindful about the accountability both here and here after. A government does believe in the supremacy of Islamic law and applies it in all branches of administration can only produces this types of nation. A so called secularist, ultra nationalists, opportunist, capitalists, socialist governments, by no means, produce such people. Therefore, corruption free society under them would remain a dream.

To overcome corruption is to possess faultless soul. Faultless soul means good character and possession of good character is the answer to the corruption.

To implement the law of Islam is to know it first. Since at present there is no arrangement at anywhere including in the system of education to learn the law of Islam except a little, therefore, numbers of knowledgeable people are very few in the Islamic society. To fill up the gap the journal of Islamic Law & Judiciary has taken a lead in this regard. The Journal is a brain child of Islamic Law Research Center and legal Aids Bangladesh. The present issue is the second one, the first of which was published exactly one year back. We have the pleasure to congratulate and appreciate the contributors (of article), well wishers and office bearers of the ILRC for their relentless effort and not to forget the readers. We hope this issue would also be appreciated by honorable readers and subscribers as the earlier one. We express our sorrowness for shortcomings whatsoever and seeking the corporation of all concerned for the improvement of our effort in this respect. May Allah bless everyone of us.

THE OBJECTIVES OF ISLAMIC LAW (MAQASID AL-SHARI'AH) AND ITS IMPORTANCE FOR THE CONTEMPORARY MUSLIM UMMAH

Dr. Mohammad Manzur -E- Elahi*

Introduction

Undoubtedly, the Shari'ah of Islam as a complete way of life and a universal call to all mankind has specific objectives and aims. These objectives revolve mainly around the interest and well-being of man in this world and in the hereafter. In fact, the core interest of the Shari'ah lies in its attempt to remove hardship and mischief from man, bring ease and benefits to his life and stand for whatever thing that falls within his interest and happiness.

It is clear that the Shari'ah aspires towards establishing and preserving human interests. The entire teachings of the Shari'ah are meant to provide the necessary guidelines, principles, values and ways which are suitable and capable of achieving what is in the best interest and benefit of people. As a practical manifestation and response to the appeals and aspirations of the Shari'ah a comprehensive and rich legal system had been introduced and developed by Muslim scholars and jurists, particularly in the days of glory and balanced civilizational development of the Muslim society. In later stages this guided legal system came to be known as al-Fiqh al-Islami or what we term today as Islamic law. This legal system, as a human endeavor that had been guided by the principles and teachings of the Shari'ah, has matured and enriched its legal legacy throughout the course of Islamic history. In its development and maturation process, Islamic law has consumed huge efforts and long stages of systematic and gradual accumulation of legal knowledge and wisdom.

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One of the most celebrating achievements of the Islamic legal studies is the theory of the objectives of the Shari'ah (famously known as Maqasid al-Shari'ah). In fact, the Maqasid paradigm was not only an approach for legal thinking and Ijtihad but also shown its ability to be a mature and well structured system for socio-cultural and civilizational orientation of the Muslim community to achieve its goal as a Allah- fearing community.

To understand the Shari'ah, one really needs to comprehend Maqasid al-Shari'ah. Indeed, Maqasid al-Shari'ah allows flexibility, dynamism and creativity in the overall policy of the Muslim Ummah.

This paper presents the place and role of Maqasid al-Shari'ah in the systematic process of intellectual and civilizational renewal of the Ummah. It addresses the issue of Maqasid al-Shari'ah not only as a tool for the exertion of creative Ijtihad within the traditional framework of our legal thought and practice but within a more extended spectrum of thought that brings the concept of Maqasid to the fore of the civilizational, intellectual, social and political reconstruction of the Muslim thought, personality, culture and civilization at large to the modern contexts.

Definition and Examples

There are many definitions provided by the scholars of objectives of the Shari'ah. Ibn 'Ashur defined maqasid as the purpose and wisdom behind the enactment of all or most of the Shari'ah rulings.¹

Another definition was given by 'Allal al-Fasi. who defined maqasid as "The end sought behind the enactment of each of the ruling of Shari'ah and the secrets involved".²

These definitions explain that the objectives of the Shari'ah are the ultimate intention behind the enactment of each of the rulings of the Shari'ah and secrets involved in these rulings. The end includes development of the world and the preservation of a system of coexistence and maintenance of the good on earth through the betterment of people who are obliged to lead their life justly and virtuously and to do and think for the good of the world and its occupants. The secrets in the above definition refer to the partial goals intended by the Lawgiver (Allah) in the enactment of the laws.

The purpose and wisdom of the Shari'ah as well as the end includes various developments in life including the system of mu'amalah (civil transactions) etc. It also refers to partial goals intended by the Lawgiver in enacting the rulings of the Shari'ah. Some of the wisdom is defined by the Lawgiver in the Quran or in the Sunnah and some is left to be defined by the knowledgeable people.

The Qur'an is expressive, in numerous places and in a variety of contexts, of the purpose, rationale and benefit of its laws, to the extent that the texts stipulating these laws are characteristically goal-oriented. This feature of the Qur'an is common to its laws relating to both 'ibadah (ritual worship) and mu'amalah. Thus, when the text expounds on the ritual of wadu', or ablution for prayer, it adds: "Allah does not wish to inflict hardship on you but to make you clean and to complete His favour upon you".³ With regard to the prayer itself, it declares: "Truly, Salah restrains promiscuity and evil".⁴ With reference to Jihad the Qur'an similarly proclaims its rationale: "Permission is granted to those who fight because they have been wronged".⁵ The purpose, in other words, of legalising Jihad is to fight zulm (injustice), and of Salah, to attain spiritual purity and excellence, which is accomplished together with physical cleanliness through ablution before the prayer. With reference to the law of Qisas (just retaliation), the text similarly adds: "And in the Law of Qisas there is life for you, O people of understanding".⁶ And finally, with regard to Zakah (wealth Tax), the rationale is also given: "In order that wealth may not circulate only amongst the rich".⁷

One can add many more examples to demonstrate how the Qur'an and Sunnah are expressive of the goal, justification and benefit of their ahkam (laws). In addition to the above, which require or sanction the undertaking of some positive action, one may also refer to the ahkam of the Shari'ah which prohibit or discourage certain actions that are or may be harmful and that may result in prejudice, corruption and injustice. In all cases, whatever the aim or justification of the individual ahkam, however, it is to be noted that the underlying objective is the realisation of some maslahah (benefit). It is for this reason that the objective of Maslahah has generally been regarded as the summa of Al-Maqasid. For, in the final analysis, 'Adl and Tahdhib al-Fard may also be seen as

manifestations of Maslahah. The Masalih (pl. of Maslahah) is thus another name for the Maqasid, and the 'ulama have used these two terms almost interchangeably.

History in Brief

As a science of the Shari'ah in its own right, al-Maqasid did not receive much attention in the early stages of the development of Islamic legal thought, and as such, represents rather a latent addition to the juristic legacy of the Madhahib (Schools of Islamic Law). Even to this day many reputable textbooks on Usul al-Fiqh (Methodology in Islamic Jurisprudence) do not include Maqasid al-Shari'ah in their usual coverage of familiar topics. Perhaps, this is partly due to the nature of the subject. It is largely concerned with the philosophy of the law, its outlook and objectives, rather than the formulation of its specific text. Although al-Maqasid, as a distinct science of the Shari'ah, is of obvious relevance to Ijtihad, again, it has not been treated as such in the conventional expositions of the theory of Ijtihad.

It was not until the early 4th Century of the Hijrah (the Islamic calendar) that the term 'maqasid' was used in the juristic writings of Abu 'Abd-Allah al-Tirmidhi al-Hakim.⁸ Recurring references to this then appeared in the works of Imam al-Haramayn al-Juwayni (d. 478H), who was probably the first to classify the maqasid of the Shari'ah into the three main categories of the daruriyyah, the hajiyyah and the tahsiniyyah, which has ever since been generally accepted.⁹ Later al-Ghazzali wrote categorically that the Shari'ah pursued five basic objectives - life, intellect, faith, lineage and property, and that these were to be protected as absolute priorities.¹⁰

A number of prominent scholars have thereafter contributed to the development of the theory and science of Maqasid al-Shari'ah. Among them Sayf al-Din al-Amidi (d. 631H), Izz al-Din ibn 'Abd al-Salam al-Sulami (d. 660H), Shihab al-Din al-Qarafī (d. 684H), Taqi al-Din ibn Taimiyyah (d. 728H) Taj al-Din 'Abd al-Wahab ibn al-Subki (d. 771H), Abu Ishaq al-Shatibi d. 790H) and Muhammad ibn 'Ali al-Shawkani (d. 1255H) were mentionworthy.¹¹ Al-Shatibi was considered as the first jurist to write on the subject as a new independent theory, particularly in his book "al-Muwafaqat Fi

Usul Al-Shari'ah".¹² In the modern age Ibn 'Ashur and 'Allal al-Fasi wrote on Maqasid and opined that the subject should be given more attention from the Muslim scholars. Latterly, many works were done on the topic by prominent scholars and university teachers like Dr. Ahmad Raisuni, Dr Yosuf Hamed al-Alim, Dr Nur al-Deen al-Khadimi, Dr Saad al-Yubi and many others. Nowadays Maqasid al-Shari'ah is taught as an independent subject at the famous Muslim Universities.

The Concept of Masalih and Shari'ah Objectives

The concept of maslahah has been discussed at length by several jurists. However, the two most prominent of them, as cited here, are al-Ghazali and al-Shatibi. The former is considered as the one who first gave the original formulation of the concept from its rudimentary form, whilst the latter developed and refined the concept.¹³ The institution of maslahah is derived from the survey and scrutiny of all Islamic teachings and injunctions available in the Qur'an and Hadith. This means that the Shari'ah in all its teaching aims at the attainment of good, welfare, advantage, benefits, etc., and the warding off of evil, injury, loss, etc., for the creatures.¹⁴

It is generally held that the Shari'ah in all its parts aims at securing a benefit for the people or protecting them against corruption and evil in various degrees. The wajib (obligatory), mandub (recommended) and mubah (permissible) aim at realizing the benefit and welfare and the makruh (reprehensible) and haram (forbidden) aim at preventing corruption and evil.¹⁵ As a principle, each matter that increases the welfare of people from the Shari'ah point of view is considered as maslahah or utility. Similarly, each matter that decreases the welfare of people from the Shari'ah point of view is considered as mafsadah or disutility. This meaning is observed in al-Ghazali's definition of maslahah i.e., "...Preservation of Shari'ah objectives, and the Shari'ah objectives for the (welfare of) creation are five matters. They are preservation of the religion, life, mind, offspring and wealth. And everything that leads to the preservation of these five foundations is considered maslahah, and everything that leads to the disruption of these foundations is mafsadah, and its removal is maslahah,".¹⁶

Classification of Maqasid

The 'ulama have classified the entire range of maqasid-cum-masalih into three descending categories of importance : the daruriyyah (the essential), the hajiyyah (the complementary) and the tahsiniyyah (the desirable or the embellishments).¹⁷

The Essentials (al-Daruriyyah)

The essentials refers to the matters on which the religion and worldly affairs of the people depend on them, their neglect will lead to total disruption and disorder and it could lead to evil ending. These must be protected and all measures that aim at safeguarding them must be taken, whether by the individual, or by government authorities.¹⁸

These values including the five fundamental matters in life .¹⁹ Such as,

1. Protection of al-deen (religion)
2. Protection of life (al-nafs)
3. Protection of intellect (al-'aql)
4. Protection of dignity or lineage (al-'ird or al-nasl)
5. Protection of property (al-mal)

1. Protection of al-deen (religion)

Protection of al-deen at personal level is achieved through the observance of the different kind of 'ibadah. Protection of al-din at the wider scope involves defending Islamic faith particularly if it is attacked by the enemy of Islam.

2. Protection of Life (al Nafs)

The protection of nafs (human soul) is very important and this is the reason why it is placed at the second level of necessity (Daruriyyah). There are many verses in al-Qur'an which emphasized that killing of the nafs is forbidden. One of these verses is:

"And do not kill anyone whose killing Allah has forbidden, except for a just cause.²⁰ And whoever is killed intentionally (with hostility and oppression and not by mistake), We have given his heir the authority [to demand Qisas, Law of Equality in punishment - or to forgive, or to take Diyah (blood money)]. But let him not exceed limits in the matter of taking life (i.e. he should not kill except the killer). Verily, he is helped (by the Islamic law)".²¹

3. Protection of Intellect or Mind (Al-'Aql)

Al-'aql or the intellect is a great gift from Allah to mankind and it is one of the capacities that differentiate man with animals. The manifestation of the protection of intellect is obvious when Islam provide the right to freedom of expression, encourages its followers to acquire knowledge, and forbids them from any activities detrimental to mind. In Islam Drugs and all kind of alcoholic drinks are prohibited to protect the human intellect. In addition, punishment for those who involve in activities detrimental to mind also supports this principle.

4. Protection of Dignity (al-'Ird) or lineage (al-nasal)

Protection of dignity includes the protection of individual rights to privacy and not exposing or accusing others of misbehaviors. Islam has also regulate the relationship between man and women in order to protect their dignity and lineage. The prohibition of adultery in Islam is manifestation of the protection of dignity and lineage. Punishment for those involves in false accusation and adultery is meant to protect dignity.

5. Protection of Property (Al-Mal)

Property is one of the necessities of humankind and it should be acquired in legitimate way. The Qur'an emphasis this point when it says:

"And eat up not one another's property unjustly (in any illegal way, e.g. stealing, robbing, deceiving), nor give bribery to the rulers (judges before presenting your cases) that you may knowingly eat up a part of the property of others sinfully".²²

In addition, Allah has revealed severe punishment for those who obtain property illegally in order to protect them.²³ Apart form that, Islam has provided a guideline that must be observed in all financial activities.

The Complementary (Al-Hajiyah)

The complementary interests or al-hajiyah on the whole supplement to the five essential interests and it refers to kind of interests whose neglect leads to hardship of the individual or community although it does not lead to the total disruption of normal life. Examples of such interest in muamalah include the permissibility of trading and other kinds of transactions such as lease (ijarah), mudharabah etc.²⁴

The Embellishments (Al-Tahsiniyyah)

The embellishments or al-tahsiniyyah refers to interests whose realization leads to improvement and the attainment of that which is desirable. The disappearances of tahsiniyyah will not interrupt the normal life. However, it might lead to the lack of comfort in life. The Shari'ah encourages cleanliness of the body and attire for the purposes of 'ibadah, and recommends, for example, the wearing of perfume when attending the Friday congregational prayer. The Shari'ah also encourages the giving of charity to those in need, over and above the obligatory Zakat. Again in the area of 'ibadah, it recommends supererogatory prayers and voluntary fasting. In customary matters and interpersonal relations, the Shari'ah encourages al-rifq (gentleness), husn al-khulq (pleasant speech and conduct) and ihsan (fair dealing). The judge and the head of state are similarly advised not to be too eager in the enforcement of penalties, as this is considered to be undesirable. The purpose of all this is the attainment of refinement and excellence in all areas of human conduct.²⁵

The above classification is the common classification of the objectives of the Shari'ah. However, there are other classifications such as the classification of Imam Ibn Ashur that divided the objectives into general and specific.²⁶ The general objectives are those overall principles that guided the enactment of Islamic laws in their totality. The specific objectives relate to those objectives that are designed to achieve specific benefits to people in their daily activities, like the importance of validation of contracts.²⁷ A third contemporary classification by Dr Raisouni, divides the objectives into integral and partial.²⁸ The integral objectives refer to overall goals that the Shari'ah aims at achieving in each of its rulings. The partial objectives are specific objectives that the Shari'ah aims at achieving in each of its rulings, yet there are few other classifications of the objectives of the Shari'ah which can be found in the literature of Usul.

Means of Identification of Maqasid

Means to identify the Maqasid are as follows :²⁹

- a. An explicit command or prohibition itself conveys the intention (maqsud) of the Lawgiver.

- b. The textual injunctions are observed as manifestations of the intentions of the Lawgiver.
- c. The underlying 'illah or rationale of the text.
- d. The silence of the Lawgiver in respect of certain conducts, especially where a general reading of the relevant evidence casts light on the value of that conduct.
- e. Istiqra' (induction) is one of the most important methods for identifying the maqasid of the Shari'ah. There may be various textual references to a subject, none of which may be in the nature of a decisive injunction. Yet their collective weight is such that it leaves little doubt as to the meaning that is to be obtained from them. A decisive conclusion may thus be arrived at from a plurality of inclining expressions. Al-Shatibi illustrates this with an important example.³⁰

There is no specific declaration in the Qur'an to the effect that the Shari'ah has been enacted for the benefit of the people, and yet, this must be the definitive conclusion that is to be drawn from the collective reading of a variety of textual proclamations. To illustrate the point further we may give two more examples. There is no specific declaration in the textual sources on the classification of the maqasid into the three categories of daruriyyah, hajiyyah and tahsiniyyah or on the conclusion that the Lawgiver has intended that these maqasid must be protected - and yet, through istiqra', this classification and conclusion has generally been accepted by the ulama. Again, there is no specific textual declaration espousing the claim that the protection of the five values of deen (religion), life, intellect, lineage and property is of the most primary importance to the Shari'ah - but once again, through istiqra', this has also been generally accepted by the ulama.³¹

Maqasid al-Shari'ah and Ijtihad

Having expounded his theory of Maqasid, al-Shatibi advocated and accentuated the need for knowledge of the science of al-Maqasid as a prerequisite to the attainment of the rank of a mujtahid (jurist). Throughout Muslim history, those who neglected acquiring mastery over the science of al-Maqasid did so at their own peril, as it made them liable to error in ijtihaad.³²

Ibn 'Ashur, the author of the landmark work on al-Maqasid, stressed that knowledge of the science of al-Maqasid was indispensable to ijtiḥad in all its manifestations.³³ Ibn 'Ashur observed that Some ulama, who confined the scope of their ijtiḥad only to literal interpretations, found it possible, , to project their personal opinions into the words of the text, but fell into error as they were out of touch with the general spirit and purpose of the surrounding evidence.³⁴ We may illustrate this by reference to the differential views taken by the ulama with respect to whether the Zakah on commodities, such as wheat and dates, must be given in kind or could also be given in their monetary equivalent. The Hanafis validated the possibility of this substitution, but some ulema held otherwise. The Hanafi view was founded on the analysis that the purpose of Zakah was to satisfy the needs of the poor, which could just as easily be achieved with the monetary equivalent of the commodity.³⁵

Disharmony and conflict between the aims and objectives of the Shari'ah and its specific rulings may arise latently. A mujtahid or a judge may issue a ruling or a decision which appears at that time to be consistent with the text and maqṣud of the Shari'ah. With time and further scrutiny, however, it may prove to be not so consistent. A judge may, for example, uphold a duly signed contract and make it binding on the parties. With time, however, the contract may prove to be grossly unfair on one of the parties. In such an eventuality the judge or the mujtahid can hardly ignore the attendant unfairness and insist on the strict adherence to the letter of the contract. Indeed, according to the Shari'ah laws of obligations, a contract is no longer a governing instrument, the Shari'ah al-'aqidayn, between the contracting parties if it becomes an instrument of injustice. The judge must therefore, in order to uphold the maqṣud of justice, a primary and all-pervasive characteristic objective of the Shari'ah, set aside the contract.³⁶ The judge or the mujtahid must, likewise, give priority to the maqasid whenever there is such a latent discord. These discords or conflicts are most likely to occur where the specific rulings have been arrived at through the doctrine of Qiyas (Analogy). Thus, where a rigid adherence to Qiyas may lead to unsatisfactory results, recourse may be had to Istihsan (Juristic Preference) in

order to obtain an alternative ruling that is in greater harmony with the objectives of the Shari'ah.³⁷

Importance and Necessity of the Knowledge of Maqasid to the Modern Contexts

The Maqasid have potent Islamic values that provide a vision broadening and common conceptual language through which present and future social change can be proactively defined, negotiated, led and pursued. At the same time, the Ummah is in a period of non-uniform dysfunction, restlessness and hardship. Conventional development paradigms and the interests and values that they carry and impose have been practically and theoretically discredited and there is a global search for superior alternatives. In the quest for advancement, the Maqasid are important values that individuals and institutions can interpret and act upon. The translation of such theory into reality could be termed 'Maqasid based development'.

Values such as faith, life, lineage/dignity, intellect and property are remarkable accessible to the broadest range of believers. Human contextualisations of Maqasidi concepts is important to envisage if social presence and realisation is desired. In the bellow some modern contexts are give where Maqasid based works can play a vital role.

Maqasid and Social Responsibility

Maqasid al-Shari'ah allows flexibility, dynamism and creativity in social policy. According to Imam Al-Ghazali (d. 505H):

"The objective of the Shari'ah is to promote the well-being of all mankind, which lies in safeguarding their faith (din), their human self (nafs), their intellect ('aql), their posterity (nasl) and their wealth (mal). Whatever ensures the safeguard of these five serves public interest and is desirable."³⁸

Al-Shatibi (d.1388) approves al-Ghazali's list and sequence, thereby indicating that they are the most preferable in terms of their harmony with the essence of Shari'ah.³⁹

Generally, Shari'ah is predicated on benefits of the individual and that of the community, and its laws are designed so as to protect these benefits, and facilitate improvement and perfection of

human lives' conditions on earth. This perfection corresponds to the purposes of the Hereafter. In other words, each of the worldly purposes (preservation of faith, life, posterity, intellect and wealth) is meant to serve the single religious purpose of the Hereafter.

The uppermost objectives of Shari'ah rest within the concept of compassion and guidance, that seeks to establish justice, eliminate prejudice and alleviate hardship. It promotes cooperation and mutual supports within the family and society at large. This is manifested in the realisation of *maslahah* (public interest) which the Islamic scholars have generally considered to be the all-pervasive value and objective of the Shari'ah and is to all intents and purposes synonymous with compassion.

In the light of the preceding discussion of the *Maqasid al-Shari'ah*, social responsibility assumes a broader and more holistic significance to the Muslim workers, managers, corporations, customers and society as a whole. Obviously, the concept of social responsibility in Islam encompasses a broader meaning embracing the *taqwa* dimension (Allah-consciousness) by which corporations as groups of individuals, assume the roles and responsibilities as servants of Allah in all situations. By assuming such roles, they are ultimately responsible to Allah, the Owner of their very selves and the resources they are utilising and managing. This responsibility to Allah is, in fact, a function of the intrinsic quality of the Muslims' lives as a trust from Allah.⁴⁰

A Muslim is, in fact, considered as a social being who cannot isolate or ignore his role and responsibility to the society or any of his fellow human being such that he is discouraged to isolate himself even for the purpose of worshipping Allah. The invocation of Shari'ah and the reflection of *taqwa*-paradigm in all spheres of life imply that the people are no longer driven by the principle of self interest alone, but by the pursuit of the ultimate happiness in this life and the Hereafter, whereby he acknowledged his social and moral responsibility for the well-being of his fellowmen.

Maqasid and the Development of Ummah

Maqasid based development discourse could be beneficially transfused into three distinct. These are the political-administrative structure, the Muslim knowledge culture and the general Muslims.

The values conveyed in the Maqasid of the Shari'ah provide a great starting point for Muslims today to launch into study and action for the benefit of all, and particularly the uplift of the Muslim society. It provides a common objective appeal constructed upon directions that we have been given in our primary textual sources. It will not be a panacea, but may act as a stimulant, a catalyst, or a detonation wave, for a genuinely participatory and qualitative advancement.

Maqasid and Muslim Intellectual Reform and Civilizational Renewal

The Maqasid Framework can play an important role in enhancing the Ummah's abilities and qualities of intellectual reform and civilizational renewal. It could become an approach for the orientation of the different activities pertaining to the civilizational reawakening of the Ummah. It could form the epistemological and philosophical scaffold for directing the theories, sources and objectives of civilizational renewal. It could also constitute the ethical and educational reference for guiding the activities of social and civilizational transformation of the Ummah. Moreover, it could assist in discovering the laws and pattern of civilizational transformation. In all these activities the Maqasidi framework can provide principles, guidelines and methods of discovering and implementation of the objectives of Islam in a real practical context.

Maqasid and Islamic Finance and Banking

Islamic finance was revived at institutional level with the establishment of Islamic banks during the last quarter of the 20th century. Along with the new institutions of Islamic banks, Islamic insurance companies and other Islamic finance companies came out on new "financing" practices of a few classical contracts like Mudaraba, Musharaka, Istisna etc.

The objectives of the Shari'ah in financial transactions refer to the overall goals and meaning that the Shari'ah aims at achieving from its rulings. These objectives are not confined to one type of financial transaction, but include all aspects of financial activities and human life in general.

Though these objectives seem specific as they deal with finance, they can be considered as integral objectives when their universal

goals are considered. This is because such objectives do not deal with specific types of rulings, but they are related to almost all types of financial transactions and involve all activities of trading, profit making, spending and consumption. Allah says:

"There is not a moving (living) creature on earth, nor a bird that flies with its two wings, but are communities like you. We have neglected nothing in the Book, then to their Lord they (all) shall be gathered.⁴¹ Looking deeply and constantly into several texts or verses of the Qur'an and the Sunnah of the Prophet (PBUH) on financial activities, it can be stated that the Shari'ah has observed specific objectives in the enactment of financial laws and principles.

These objectives include the circulation of wealth in the society, the continuity of the investment of the wealth, achieving the economic prosperity for the whole society by satisfying the basic needs of the people, transparency in financial activities to eliminate disputes and permissibility of private and public ownership of the wealth. These are the main objectives of Shari'ah in financial transactions and contracts. All the above objectives falls under the general meaning of the following verses of al-Qur'an :

"Allah does not want to place you in difficulty, but He wants to purify you, and to complete His Favour to you that you may be thankful".⁴²

Allah also says in another ayah :

"...Allah intends for you ease, and He does not want to make things difficult for you....".⁴³

It is observed that, unfortunately, no serious effort has been made to fix the clear objectives of Islamic banking. What can be seen in many literatures are scanty and disjointed discussions about the objectives of Islamic Banks. It has been taken for granted that Islamic Banks are only about avoiding riba (interest). Rather there must be many basic important objectives of Islamic Banking which should be identified and from the theory of Maqasid al-Shari'ah, the ideal objectives of Islamic Banking can be identified. And based on those objectives a model of Islamic Banking performance can be developed.

Conclusion

The maqasid are rooted in the textual injunctions of the Qur'an and Sunnah, but they look mainly at the general philosophy and objectives of these injunctions, often beyond the particularities of the text. The maqasid have become the focus of attention as it tends to provide ready and convenient access to the Shari'ah. It is naturally meaningful to understand the broad outline of the objectives of the Shari'ah in the first place before one tries to move on to specifics. An adequate knowledge of the maqasid thus equips the student of Shari'ah with insight and provides him with a theoretical framework in which the attempt to acquire detailed knowledge of its various doctrines can be more meaningful and interesting.

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QUALIFICATIONS OF A WITNESS UNDER THE LAW OF EVIDENCE OF ISLAM AND SECULAR LAW: A COMPARATIVE ANALYSIS

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Introduction

Evidence is the most important means, to certain extent, the only means either to prove or disprove a case. A real culprit may go unpunished or an innocent may be punished due to either absence, lacking or concoctment of evidence. Due to this reasons, Islamic law gives due importance and emphasis to the law of evidence which is known as 'Qanun al-shahadah'; which literally means to witness, to testify, to confirm, to acknowledge, to swear, to prove, to certify. Legally it refers to the statement given or taken from a person either to support or to deny a fact presented before him in the proceeding of trial of a case. The idea and applicability of that brilliant discipline that is qanun al shahadah has almost been disappeared from the mind of the people including legal experts of both Muslim and non-Muslim. It happened because of its exclusion from the curricular of legal education and non applicability in the judiciary of almost all over the world including Bangladesh. The topic is extremely big and wide. In this present article the qualification of a witness in both laws will be discussed only. This brief article, therefore, aims at bringing forward some preliminary idea of Islamic law of evidence and making of a comparison thereof with its counter part that is secular law. The sole objective of this effort is to bring back the concept of law of evidence to the learned readers so as to show the existence, beauty, dominance as well as primitiveness of qunun al Sahadah of Islam.

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Definition of Shahadah (Evidence)

literality Sahadah means to explain, to inform, and of certainty.¹ It is also said that literally and basically shahadah means to be present.² As Allah Ta'ala says, whoever among you are present (faman shahidaminkum) at the time of month of Ramadan he must fast.³ The Messenger of Allah (SIm.) says, (al ganimatu liman shahida al waqi`a), the booty that is due for the one who can present or produce stories.<sup>4</sup> Here word shahadah is for the meaning of Hadara that is present. It is said that so and so witnessed an action means he has produced his vision before the court. Again it is said by a poet that `when understood that I witnessed (shahadatu) then they disappeared (ghabu). In other words I produced or presented and they did not.⁵ Some (`ulama) scholars hold the view that shahadah derived from mushahadah which means certainty. Some other say that , it means presence. For example, I witnessed the court; it means he was present in the court.<sup>6</sup> Some other `ulama defined shahadah as knowledge. Because, the word knowledge has synonym meaning of understanding (al`ilm). As Allah Swt., says, shahid Allahu Annahu Lailaha Illahua.⁷ Allah witnesses that there is no god but Allah.⁸ It, among other, means Allah has the knowledge of His Unity or wahdaniyat.

Legal Definition of Shahadah

There are several definitions of shahadah, such as, (i) shahdah is an information of truth for the establishment of any right or interest by using the word shahadah in the proceedings of court.⁹ (ii) Shahadah is an information (akhbar) about an action that was presented by a witness (herein after 'shahid') and certified over it. This is to be considered as real information as the shahid viewed it and witnessed it. Such as witnessing the killing or commission of zina (adultery).¹⁰ (iii) Shahadah is an information or testimony about the right of others against others.¹¹ (iv) Shahadah is an information about viewing and seeing of some thing in contrast to guessing and suspicion.¹²

Maliki school defined shahdah as an information of rulings (hukm) about a finding (`ilm) to the judge in a suit or litigation. That is to say, shahadah is a ruling about a finding i.e., certainty and not mere guess nor suspicion and so on.¹³ Hunbaly defined it as an

information regarding a finding of a shahid (witness) by using specific words i.e., shahadtu that is to say, I witnessed, or ashhadu (I am witnessing).¹⁴ Shafi jurists al Sheikh Shabuddin defined shahadah as an information about any right or interest for other persons against others by using the specific word such as, ashhadu that is I am giving witness.¹⁵ Fathi Bahansi defined shahada as an information about any right or interest for other persons against the other persons irrespective of whether it is right of Allah or right of the person himself. It was also indicated in the Hadith as well which provides that 'when you see it as you see the sum' then only give your testimony and do not leave it.¹⁶

The Islamic Law of Evidence of Pakistan (ILEP) defined shahadah as "to give the true information for the purpose of proving any right, in or before a court, in the presence of the parties whether present in person or by an agent or presumed to be legally present, by uttering the words as 'ashhadu' or by use of any synonymous expression."¹⁷ The definitions given above in ILEP seem to be the unification of aggregation of all definitions as given by all schools of law. Therefore, it is more comprehensive as it codified one as well.

Conditions of Shahid (the Presenter of Evidence)

Before going to discuss the conditions of a shahid, it would be much worthier to have a short look into the defection as to who's a shahid. A shahid is a person who gives shahadah¹⁸ (evidence) in the court proceeding for or against any of the disputing parties, even against he himself. The condition by which a shahid is to be enabled to give his shahadah basically are two. That is the condition relating to (i) receiving or accepting of shahadah and (ii) Condition relating to delivering of shahadah. The jurists of Islamic law have the differences of opinion in its great details but not in its general differences from the approaching point of view and not in its basic or foundational concept of conditions.¹⁹

Conditions of Shahid with regard to Receiving of Shahadah

Conditions of receiving of shahadah (shart al tahammul al shahadah) is the conditions which must be presented before a shahid at that time when he goes to give the testimony. The conditions are as follows:

1. Of Sound mind ('Aqil) : A shahid must be a person of sound mind at the time of bearing shahadah. As such an insane and child are not qualified to bear witnesses or testimony. Because, giving of shahadah means to understand the said incident and to remember it. This can only be done through specific form or by a person who can understand and remember the occurrence undoubtedly. Therefore, clear sound of hearing, understanding and memory of a person only can make him eligible for bearing the shahadah or evidence.

2. Vision (Basir) : Generally a shahid must be a sighted person and not a blind. This is according the opinion of a group scholars. But according to Imam Shafi'i vision is not a condition for both receiving and delivering of shahadah in all cases because the purpose of sight or vision at the time of receiving or witnessing of shahadah is to know the matters in question, whereas this purpose can be obtained through listing too. Therefore, testimony as well as receiving of testimony of blind is as good as sighted person in the cases where direct vision, in the case on record, is not required.

3. Maturity (Baligh) : To receive or bear shahadah, the person must be a mature in age. Hence, a child is not capable of receiving or bearing of it. As such freedom, Islam, male hood is not a condition to be a witness. As such, the receiving or bearing of shahadah of child of sound mind, slave, non-believer, sinful person and a child who subsequently became mature (baligh), a slave becomes free, non-believer becomes Muslim, fasiq (offender) becomes upright, shahadah of those people are valid and it can be received.²⁰

Condition of Delivery of Shahadah

In order a shahadah to be accepted or to be delivered the shahadah of the shahid must have possessed some conditions. Such as, he must be a Muslim, of sound mind, (baligh), upright ('adil) and must not be a mahdud (punished with had) and so on.

1. Islam

The jurists are of the unified opinion that Islam is a condition for the delivery of shahadah for a shahid. In other words, he must be a Muslim. They invoked the following authority from al Qur'an that (watashhadu shaidyni min rijalikum),"and get two witnesses out of your own men".²¹ With regard to the witness of non -

Muslim the following ayah is to be applied. As Allah Ta`ala says, (walakin alladhina kafaru yaftaruna `ala Allahi al kadhiba), "It is blasphemous who invents a lie against God; but most of them lack wisdom."²²

From these two ayat it is made clear that, testimony of non-Muslim is not good against a Muslim. However, there are differences of opinion as to the validity of testimony of non-Muslim, such as:²³

Testimony of non-Muslim against a Muslim relating to wasiyah during journey: The jurists are of differences of opinion on this point. According to Abu Hanifa and Ahmad non-Muslims are allowed to give shahadah for a Muslim relating to wasiyah made by a Muslim during the journey, provided that no Muslim is available there for the said testimony.²⁴ They interpreted the ayah 2:282 of al Baqarah as it provides needs of witness. However, to accept the testimony of such wasiyat two non-Muslims are required and that would consider equivalent to one Muslim witness. It is to be noted that this will be practiced and applied by a government of Islamic law. It is not being practiced under secular law. But Imam Shafi'i and Malik do not allow non-Muslim to give shahadah at all against a Muslim in any case including will (wasiyah) in journey. They depend their opinion on the basis of ayah 5: 106 of Surah Maidah.²⁵ From the above ayah, it is clarified that a shahid must be a Muslim and upright person. As such, a non-believer would never be allowed to fall in the category of witness against a Muslim as he always lies about Allah and commits sin (fisq) by virtue of his disobedience to Allah and committal of wrong doing in the light of Islam.²⁶ But he is allowed to do so for his own people law.²⁷ Moreover they argue that, the ayah 282 of al Baqarah does not specify the condition by which non-Muslims testimony could be allowed during journey. To them the word *minkum* refer to (*ashiratikum*) that is your family, it does not mean *ila ahli dinikum* that is to your religious community. They also opined that *min ghairikum*, refer to *min ghairs ashiratikum* that is a person from your family not out of your own religion.²⁸

Testimony of non-Muslim in Case of Necessity

In principle testimony of non-Muslim against or for a Muslim is not allowed in case of necessities if there are no other alternatives.

In explaining the surah 2: ayah 282 Ibn Abbas says that, a non believer or non-Muslim is allowed to give shahadah in case of necessities, like in journey where no other Muslims are available.²⁹ Imam Malik holds the views that non-Muslim can do it in case of necessity like on medical report etc. Malik and Shafi'i invoke the following textual authority for general principle. As Allah says, (Idha jaa fasiqun binayin fatabayyanu)³⁰ that is disbelievers are fasiq and once a fasiq brings news ascertain it before accepting it.

Testimony of non Muslim Among Themselves

Shahadah³¹ of non Muslim within themselves are allowed, but it may differ intern of degree of nationality of the Muslim. Shahadah of dhimmi against dhimmi is also valid. As Abu Hanifa argues that, all disbelievers are belonged to the same nation (al kufr millat al wahyidah) even though they have different nationality i.e. states. However, it makes no difference between Christianity and Jews.³² But to Abu Laily, Abu Abid and Salam Mudkhur shahadah of a dhimmi against or for a dhimmi is not valid unless both of them agreed upon it, because of the following authority from the sunnah: (La shahadata li ahli millat `ala ahli millati ukhra illa al Muslimin fa shahadatihim maqbulun `ala ahl al millat kulliha). The Messenger of Allah says, "No evidence by a nation against (i) another nation accept a Muslim who are entitled to witness for any nation. The prophet SIm, says, the evidence of Muslim is not only acceptable to one other but to all people and evidence of others (non-Muslims) are acceptable to themselves only.³³ But a group of Hanafi jurists challenged this view by invoking the following text. As Allah Swt, says, that non-believers are brother of one another (Walladhina kafaru ba`aduhum awuliau ba`ad).³⁴ But other Hanafi jurists opined that dhimmi is not like apostate, therefore, due to the authority from al sunnah, as reported by Zabar b. Abdullah and Abu Musa, his shahadah is to be acceptable.³⁵ Shahadah of Mustamin (temporary visitors) is valid if they are from the same state, if not, their shahadah can not be given effect as the state cut off their nationality (lqta` al wailayat) which deprive them from having succession unlike dhimmi.³⁶

2. Sound Mind

To deliver shahadah a shahid must be a person of sound mind. The authority on this regard is from the sunnah: As the prophet SIm.,

says, *rufia` al qalam `ala talathatin: `an al sabi hatta yubalaghu wa `an al naim hatta yastaiqaza wa `an maznun hatta yufiq*), The pen is dropped out from three things, that is, a child till he grows up, a sleeping person till he gets up and a drunkard till he becomes sound.³⁷ Therefore, a person of sound mind is not competent to deliver or give shahadah, because he does not know how to receive it. Similarly, he is not capable of delivering it. But, if a person some time becomes unsound and at another time becomes sound the testimony of such person is to be accepted during his sound state.

3. Bulugh

Scholars of law ('ulama) are in agreement that bulughiat (maturity in age) is a condition for a shahid to the delivery of his shahadah. The hadith mentioned above³⁸ is applicable here as well. Therefore, shahadah of a child is not good even if he is asked to do so. But according to Imam Malik, in certain circumstances, exception to general rule, it can be given for among themselves in relation to al damm (killing or injury) in case of necessity if none is available to be called for that case.

Who is baligh? According to Qanun al Shahadah of Pakistan, The Code Islamic Law of Evidence, he is an adult person who has attained, being a male, the age of eighteen years or being a female, the age of sixteen years.³⁹ But to be so they must have fulfilled the following conditions that is: (i). he must be prudent i.e. *sabi al mumaiiz*-the one who can distinguish between right and wrong, true and false. (ii) he must be present there physically at the time of the commission of the incident and no adult was present there at that time then he can be called for the testimony, otherwise not.⁴⁰ Hanbali also accepts the shahadah of child in the cases of grievous hurt or injury with a condition that the testimony was given or taken at the place of incident before the child left the place and the sign of truthfulness is to be seen in their statement and memory.⁴¹ Based on a narration from Ahmad Ibn Hanbal that a child of ten years can deliver shahadah. Ibn Hamid an eminent jurist of the past, said that testimony of child can be accepted in all cases except in the cases of hudud (fixed punishment) and qisas (retaliation) if he reached at the age of 10.⁴²

4. Adil

The jurists agreed upon that, `adalah (uprightness) is a condition for a shahid (witness). Consequently, a person other than `adil is not eligible for delivering shahadah. Authority of shahadah in this regard invoked by the jurists are as follows: (Hua fal yumlil walaiya bil `adli wa astashhadu shahidini min rijalikum fa in lam yakuna rajulaini fa rujulum wa imraatani min man turdawna min al shuhadaa), "Then tell his guardian dictates in justice and get two witnesses out of your own men. If there are not two men then a man and two women such as you are pleased on them."⁴³

Here "such on you are pleased" refers to a person to be called as shahid must be upright and the prosecutor must be satisfied of his quality that such person is an `adil.<sup>44</sup> Hanafi jurists invoke the following ayah in support of `adalah⁴⁵ that is (wa ashhadu dhawi al `adli minkum wa aqim al shahadah), "And take as witness two just persons from among you (Muslim) and establish the testimony for Allah.<sup>46</sup> As such, the text above itself is evidence of `adalah of a witness and the number is also restricted for two upright persons as well.

Reasoning

Along with revealed texts by reason shahadah is a condition of proof of truthfulness of testimony as well. Again shahadah is a statement which may be true or false. Therefore, in order to have true shahadah, `adalah of shahid is essentially important factor to decide any case or litigation justly.⁴⁷

Opinion of Abu Yousuf

Iman Abu Yousuf discussed about the of amount of shahadah. To him, if a sinful person who has a good as well as bad reputation in a society and he possess human dignity then his⁴⁸ shahadah is to be accepted, because, it would not bring any benefit for him and it is also due to the fact that dignity prevails over falsity.⁴⁹ The most preponderant view is that the testimony of a fasiq (the one who commits crimes heabitually) is not acceptable.⁵⁰ According to Hedaya, an ancient Hanafi Code of Law, irrespective of social and human dignity of a fasiq his testimony will not be acceptable and Abu Yousuf's opinion contradicts the text above that requires `adalah of witness. A strong opinion of Hanafi school views that if

a qadi (a judge) accepts his testimony and passes his judgment based on that testimony such verdict will be thrown out and the qadi himself will be considered as sinner too.⁵¹

Test of `Adalah

The scholars provide the following test for `adalah that is credibility or character or uprightness of a witness, such as, to be an `adil, among others, (i) the private part and stomach of the witness should be free from any objectionable acts that is zina or fornication and food respectively. Some Hanafi jurists say that, `adalah established the purity of a mukallaf (a legal person who is qualified to be a witness) person that made him free from any objection in his private part (i.e zina) and stomach (i.e. not stealing etc). This is because most of the crimes are being caused due to or through these two organs.⁵² (ii) No evidence of approaching of crime: According to some Hanafi jurists, whoever is free from committing crime in his day to day action he is an `adil.<sup>53</sup> (iii) Abandoning of bad habit in support of a good habit: According Hanafi views, the sign of `adalah is the abandonment of all bad habit. Because, as per the law of al Qur'an hasanat (good habit) defeats the bad habit.⁵⁴ (Inna al hasanat yabdu al saiyyiat). The sunnah as well authorizes this provisions as such: "If you see a man performing his prayer in the mosques, it is evidence for his Muslim hood. He also said, whoever prays towards our qibla and eats our slaughtering this is the evidence of his belief⁵⁵ (fa ash hadu lahu al Iman). iv) Giving up of minor sins: According some other Hanafi view, shahadah requires the giving the up of minor sin and performing of obligatory `ibadat and devotion for good deeds by avoiding bad deeds. Whoever is found on such state is to be considered as `adil (upright).⁵⁶ According to Fathi Sughra an `adil is to be free from committing of major sin (ithm al kabair). The reason is that, once he commits big sin his `adaah would be dropped out and would lead him towards committing of minor sins.⁵⁷ In other word, prohibition of committing of bad sins keep him free from committing of small sins as well. (v) Free from Conviction: A shahid must also not be convicted of hadd al- Qadaf: To the Hanafi, it is a general and essential condition of a shahid in all cases including had al qadha, qisas, ta`zir and other transactions. More particularly, to be a shahid, had al qadhaf that

is conviction for accusation of a chaste woman of having zina, must not be executed upon him.⁵⁸ However Imam Shafi'i opposed the above view. To him, mahdud al qadhaf⁵⁹ is a competent witness upon exercise of his repentance (tawbah). Hanafites apply the following text in support of their stand. As Allah says, (walladhina yarmuna al muhsinat thumma la ya'tu biarba` shuhadaa....wala yaqbalu lahum shahadatan `abada.) And those who accuse chaste women and produces not four witnesses, flog them with eighty stripes, and reject their testimony forever. They indeed are fasiq (liars) rebellious, and disobedient to Allah.⁶⁰

Qadhaf is a serious crime against a chaste person.⁶¹ Ibn Rushd reconciled these views above by saying that the Hanafi considers that tawbah only forgives the sin of the offenders but not brings back his `adalah. But Imam Shafi'i views that, once sin is removed the `adalah also be revived, because removing sins and denial of `adalah is not the intention of shari`ah.⁶² Fathul Qadir quotes Kamil al Hasan as saying that even if mahdud, on whom had been executed, repents his shahadah is not to be acceptable. However, Maliki, Shafi'i and Hanbali positions are opposite to Hanafi position in this regard. To them, tawbah or repentance enable the offender to become `adil in accordance with the following ayah. As Allah Ta`ala says, ("Alladhina tabu wa aslihu") "Do not accept their shahada unless they repent and do good deeds."⁶³ This Quranic ayah is confirmed with the following statements. As Omar bin Khattab say, to Abu Bakara that repent, your testimony would be accepted. It is said that Abu Bakara was a slave. However, this statement conflicts with his subsequent statement whereby He says, (al Muslimuna `udulun baduhum `ala baad illa al mahdud al qahaf), Omar b. Khattab says to Abu Musa Ash'ari that Muslims are upright to another except the one on whom had al qadhaf (a fixed punishment for calumny) was executed.⁶⁴

By law and by reason the subsequent statement always prevails over the earlier one. As such, according to Hanafi view, if Mahdud al qadhaf is an accuser against a Muslim his shahada shall never be accepted unlike a dhimmi. However, if Muslim slave accuses a free Muslim and his subsequent freedom from emancipation does not make him `adil or upright.⁶⁵

vi) Free from Bias and Benefit: A shahid (witness) in view of his shahadah, must not ask for any gain or benefit and hopping for solution of any of his distresses or misfortunes.⁶⁶ (An la tajri al shahadah naf'an awu daf'a al darar). It must always be for Allah alone. If a shahid intends to gain any profit or removing of any of his problem by virtue of giving of his shahadah is not to be valid. Hanafi dalil in support of this view is : As the Messenger of Allah says, (i) "la shahadata lijar al maghrim⁶⁷ and (ii) wala taqbal al shahadah al walad li walid wala walid li walad.....).⁶⁸ It means, there is no shahadah to gain something and no shahadah of the son for father, father for son, wife for husband and husband for wife, slave for master and master for slave and tenant for the owner of the house.

This is to avoid biasness (tohmah). As such, in case of fear of tomah no shahadah is to be valid. Reasoning also supports the above authority. Because, shahdah is to be for Allah alone. If it is to be given among interrelations, hope of gaining of profit and removing of any form of debt may cause bias for the parties concerned. Therefore, following rules are to be seen to avoid any kind of biasness: such as, i) Parents can not be shahid for his children as it is lower in rank, similarly children can not be shahid for his parents as it is higher in rank.⁶⁹ ii) No slave for his master, similarly no master can be shahid for his slaves. iii) No husband for wife and no wife for husband. iv) No nearest like brother, uncle can be shahid for their own relatives but for others have no bar. v) Foster parents cannot give shahadah for their foster children and vise versa. vi) No shahadah by tenant for land lord in which he is given tenancy. vii). Similarly no shahadah by a partner for his co-partner in a same business.⁷⁰

These are the Hanafi laws. It is to avoid any bias as well as priority out look law of evidence of Islam. Though it is a lengthy discussion, in order to make it short, we only quote the Some authority in brief on this regard as mentioned here. According to Shafi'i view a husband is a valid witness. As the Quran says, (ahhadu shahidini min rijalikum). "Bring two witness from your own met."⁷¹ But Hanafi invoked the hadith which says, there is no witness for any gain and no shahada for parents by children and vise versa. Maliki and Hanbali agreed with Hanafi. To them, shahada of divorcer for

divorcee is not as well valid either it is talaqi rij'i or Bai'n.⁷² A shahid must not be antagonistic against mahhud (against whom he is witnessing) for delivering of his shahadah.⁷³ A shahid must not be enemy or a disputed party to each other. Hanafi invokes the following authority in their support as the prophet says, witness of antagonism and suspicious matter is not permissible (la yajuzu al shahadah khamun wala zanin).⁷⁴ Reasoning also support the authority above, because if an opponent gives shahadah it would be obviously for his own self as he would not accept the right of his rival and would justify his own lie?⁷⁵ Similarly, to the Hanafi shahadah of testators for dead and orphan is not valid as well, because custody constitutes al khashm that is dispute and enmity.⁷⁶

Knowledge of Shahid in which he is giving his shahadah: To Abu Haifa it is essential for shahid to possess the knowledge in which he is giving is shahadah during the delivery of it but according to sahibain (Abu yousuf and Muhammad) it is not an essential condition. Therefore, mere seeing of his name, seal etc on record is sufficient to be acceptable of his shahadah.⁷⁷ But Abu Haifa stands with the following authority of al Quran, as Allah says, (la taqfi ma laisa laka bihi `ilma), "do not follow or give witness in which you have no knowledge of it".<sup>78</sup> The Messenger of Allah say, (Idah raita mitla al shams fa ash had wa illa fada`) if you see something like you see the sun then only give witness or evidence, otherwise give it not. Here are the requirement for delivery of Shahadah.⁷⁹

Condition of Deliberation under Various School

1. Strong memory

To be a shahid one has to possess strong memory, because truthfulness in speaking depends on one's strong memory regarding any important fact relating to the case in question. As weak memory is subject to forgetfulness of the fact or commission of unintentional errors. Hence, if a person is not holding strong memory he is not capable of delivering shahadah. This is why a child is not allowed to give shahadah as his memory is weak, but to Imam Malik, child is allowed to give shahadah if he can fulfill the following conditions.⁸⁰ For example: i) the said shahadah must be in a case other than property matters like injury, killing etc, ii) it must be taken before the child is separated or departed from the place of occurrence of that fact. iii) it must be within or for he

himself, iv) he must not be known as a liar, v) none of the adult was present there in that material places of occurrence. vi) only that particular child was present there while no passerby or pedestrians other than him were seen there and vii) the child must be a free man and *sabi al mummyaz*. (the age of discernment).⁸¹

2. Free from slavery

Hanafi, Shafi'i and Maliki agreed upon the condition that to be a *shahid* he or she must be free man or *sabi al mummyaz*.⁸² With regards to this Allah Swt., put forwards the example of two men - the one is a slave who under possession of another, he has no power of any (*daraballahu mathalan abdan mamlukan la yaqdiruna `ala shyin*).⁸³ In addition to that the Hanafi arguments from reasoning are that: a slave who him self is dependent on his guardian or master so he has no legal right to do so. How he can carry out the duty for others?⁸⁴ *Shahada* here means transformation of right, who has no title at all how would he deliver the title to others? But some other Hanafi say, once a slave is called to do so, he is bound to deliver the *shahadah* because, Allah Ta'ala says, a witnesses should not refuse it once he is called for giving of witness. (*La ya'ba al shahada idha ud`u*).⁸⁵ As such, a *mamluk* is (i) indebted to do so. *Makatib, um al walad* and partially free man also having the same responsibility. But some other juristic opinion suggests that partial free man can do so because he is going to be freed soon ii) if a slave already delivered his *shahdah* for his master it would remain hanging till he gets freedom that is becomes a free man from slavery.

3. Speaking (al Natiq)

To be a *shahid* one must be, as general rule, able to speak. Hence, contrary to speaking like mute and dumb is not eligible to deliver *shahadah*. However, the jurists have some opinions to the general rule. As Malik and Shafi'i say, as long as mute and dumb speak through sign their *shahdah* is to be accepted because, sign is as same as speaking, but this kinds of sign limited only with the matters of debt, *talaq*, *nikah*, *zihar* and *ila*.⁸⁶

However, a group Hanbali scholars opined that, sign of mute is not good evidence, because, it does not reach upto the stage of certainty unless it is necessitated. If no necessity (*darurah*), it is

not valid.⁸⁷ The other group of jurists hold the view that it can be taken in absence of any other witness as like the case of children's one.⁸⁸

4. Good Character and Self respect

A person to be shahid for delivering his shadah, he must be of highly morals and self respected person. Though there is a condition of `adalah for a shahid yet the jurists of Islamic law emphasis on this condition too. It is because dignity depends on high morale character of a person and non dignity disqualifies `adalah of some one. Hence, disqualifies him to be a witness in the court of law . Some example of actions of a shahid that nullify his credibility of being a person of good character are a) to eat in public while walking b) traveling or walking without covering head or without cape, c) hugging or embracing of even one's own wife in public, d) feeling of happiness with ugly music and songs and e). playing chess and cards etc.⁸⁹

Conditions of Shahid (witness) in Positive Law

There are some similarity and dissimilarly among the conditions of shahid under Islamic law and secular law. Islamic law is very much rich in providing the conditions of a witness. Because, once testimony of a witness is accepted then the judge is bound to give his judgment based on that testimony. That is why Islamic law provides due emphasis on this regard. On the other hand secular law does not provide even a separate chapter on the condition of a witness rather it is scattered under the concept of credibility of witness. Some modern authors and their works on Law of Evidence are Sanker on Evidence, Cross on Evidence, Law of Evidence of Monir etc which are written on the basis of secular or conventional law. The same secular or to say conventional law of evidence are enforced in almost all commonwealth countries that is Bangladesh, Pakistan, India, Malaysia and others. A brief discussion on secular concept of law of evidence with regard to the quality of a witness are as follows:

Who may be Called for Testimony

Present secular law, applicable in Bangladesh, Malaysia and elsewhere, provides that every person is competent to be shahid or witness unless he is not bared from the court of law by testing his capacity. Generally mentally disordered or lunatic person is fit to

give testimony unless they are prevented by the court. Other than that all are eligible to be the witnesses. In the past condition of witness was very strict. Such as husband for wife vice versa, convicted of treason, felony etc were unfit to be witness but such provisions were gradually removed and finally by Evidence Act 1843 of England which are being followed in commonwealth countries. Hence, at present competency is rule and their in competency is exception.⁹⁰ According to professor Cross, a witness is competent if he may lawfully be called to give evidence. Now a days most of the people are competent witness unlike the early centuries.⁹¹

Of Sound Mind and Maturity

Generally condition of sound mind and maturity are present in both the laws except in their technicality. As Sanker wrote, " so the in competency that the present Acts recognizes is competency from immature or defective intellect only and these may arise from i) infancy, ii) idiocy, dumbness, deafness, iii) lunacy, iv) illness etc.⁹² A brief analysis are as follows:

As regards i). Infancy, it is not so much the age as the capacity to understand which is a determining factor. No precise age limit can be given as the persons of the same age differ in mental growth and their ability to understand the question and to give rational answer. The sole test in this regard is whether the witness has sufficient intelligence to depose or whether he can appreciate the duty of preaching the truth.⁹³ Therefore, it seems that concept of capacity as a child is the same. In Islamic law a child can be a witness but his capacity is limited in certain matters while secular law does not limit the area rather it imposes test of intelligence. If he can give satisfactory answer to the questions of the court then he can be considered a competent witness. ii) Idiot: He is a person who does not possess understanding from his day of birth and such capacity is permanent. Deaf and dumb persons are incompetent if they are unable to understand the questions put to them or to communicate their ideas by sign or writing. The law allows testimony of dumb and deaf by sign or writing.⁹⁴ It seems the provisions in both the laws are the same as the testimony of them are not void ab initio. As such, it seems that at present the basic difference are not in law but in the religious belief of both

secularism and Islam. iii) Lunatic: He is as well in competent witness in secular law and Islamic law.⁹⁵ But in secular law as it was held in *Bank v Good Fellow*⁹⁶ that his competency may be restored during a lucid interval. A monomaniac may depose as to other matters in relation to consumption of liquor.⁹⁷ Hence, condition of lunacy for a shahid seems to be the same both in Islamic law and secular law. A slight difference in English and Indian and Bangladesh Evidence Act in respect of child witness are: in England, a child to be a witness must believe in the punishment in a future state for lying but in Bangladesh and India, a child who is unable to understand the nature of an oath may give witness in certain proceedings viz. offence against a child, offence under prevention of cruelty of children Act.⁹⁸ However, memory is important condition in Islamic law but in secular law weak memory may affect the credibility but not the competency of a witness.⁹⁹ iv) Accused: The accused person is competent witness in Islamic law except a mahdud al qadhaf. In secular law, an accused in an earlier case is not to be compelled to come to the give witness. Offence here refers to criminal offences, except in the case of qadaf (false accusation) against a chaste woman. Here both the provisions of accused witness are the same. However, in Islamic law accusation itself is not enough unless one is found guilty but in secular law leveling with offence is enough to disqualify of being a witness.¹⁰⁰

Elements of Bias: Both the laws provided that witness must be free of bias. But they differ to the elements of biasness. For example, in Islamic law generally husband is not competent for wife and vice-versa but in secular law competency is general and in competency is exceptional.¹⁰¹ That is to say, husband and wife both are competent in both civil and criminal case for their own or against. However in Islamic law, in order to eliminate the elements of biasness husband and wife are not competent witness in civil matters for one another. It is simply to remove the possibility of elements of biasness. High moral character: Character of a witness in Islamic law is very important but in secular law character is important but not by itself. Secular law only provides that, character of a witness ... may be impeached to shake their credit, a plaintiff may be discredited by answering elicited in cross

examination that his antecedents were bad.¹⁰² But in Islamic law character is an essential condition for witness. Moreover, the concept of character is not the same in both laws. Evidence of bad character of an accused is totally irrelevant and is admissible only in reply. That is to say, when an accused has given evidence on good character and also in a case where character itself is an issue.¹⁰³ The case on character of witness was raised and decided on accomplice and decided accordingly in *Wong Hai v PP*¹⁰⁴ of Malaysia and decided thereof. Religion: In the past it was an established law that five categories of people were barred from giving evidence. They are (i) Non-Christian (ii) Convicts. (iii) Person interested in the outcome of the court proceedings, (iv) Parties and (v) their spouses.¹⁰⁵ Present Position: Till the end of the 17th century the evidence of non-Christian had been taken by taking oath of Gospel. If any one found who does not accept the authority of Gospel his testimony had not been accepted by European Court.¹⁰⁶ This was changed. Presently Act 1 prescribes the form in which an oath shall be administered to Christian, Jews and to those who are having other religious belief in other forms. Hence, at present a person taking oath has no religious belief he has not to be prevented from giving of witness unlike of the recent past. In Islamic law under general principle a shahid must be a Muslim in some particular cases but non Muslim are not barred from giving evidence at any point of the history. However, position of a murtad, the one who leaves the religion of Islam voluntarily, is very serious. He may not be eligible for that cause.

Conclusion

Islamic law of evidence, like all other laws of Islam originated from the Quran, Sunnah, Ijma` and Qyas. The all conditions of a shahid discussed here are not exactly available in al Quran and al sunnah. It is the jurists, who out of their good capacities, derived those conditions of a shahid based on al Quran and al sunnah, as discussed earlier. Application of shahadah in Islamic law is binding for proving the cases. The knowledge of judges here is not effective in passing of judgment. Therefore, for the sake of true judgment, it is the shahid or witness on whom the judges are to be purely rely upon. If a shahid is truthful in delivering of shahadah, then only the other party can expect the true and fair judgment.

That is why the Islamic law imposes some conditions on a shahid. Because, basis of judgment in the court of law of Islam is sahadah (evidence) only or confession of guilt. On the other hand, the conditions of a shahid or witness in secular law is not as strict as it is in Islamic law. If there are some similarities between Islamic law and secular or British common law then it has the history behind of it. According to some well known opinion that the basis of secular law is common law and custom etc. However, the common law or British made law in general, as it is claimed, are basically based on Islamic law. That was made possible during Muslim rule in Europe for almost 800 years through Spain. Many jurists like Tan Sri prof. Dr. Ahmad Ibrahim of Malaysia, Dr. Tanzilur Rahman, former chief justice of shari'ah court of Pakistan, claimed that common law of England are based on Islamic principle at least by 90%. The Europe borrowed it when they applied Muslim rules in third one land.¹⁰⁷ As the law of Islam was a dominant force during those days and European came in close contact with Muslim states. And present position of law of evidence in both Islamic law and British made law are somehow close to each other but not the same in its detail. Although there are some similarity between them yet a great many differences remain in its spiritual values. The conditions relating to a shahid in Islamic law is hard to be found in an un-Islamic legal system. Because, environment itself is not conducive for the possession and growth of those conditions and qualities in secular system of law as foundation of belief in both are totally different to one another. These conditions enable a shahid to develop his physical as well as spiritual value. Therefore, it is to be said unhesitantly that concept, nature, and application of law of Islam particularly law of evidence is far superior than its counter part. The beauty of this law can not be seen at preset as the law of Islam has not been practiced in the proceeding of courts any where in the world. It and its beauty only be seen once again with the application of that law in all as branches of life of a nation.

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21. Al Qur'an, al Baquarah, 2:282.
22. Al Qur'an, al Maidah, 5:106.
23. `Ilm al Qada, op.cit., p.198
24. ibid. p.199
25. ibid.
26. ibid
27. ibid. Ibn Rushd, p.500
28. Sayeedon, Mamud Awang, Islamic Law of Evidence, op.cit., p.87888
29. Al Qur'an, al Baqarah, 2:254
30. Al Qur'an, al Hujrat, 49:6Al
31. Dhimi from the word dhimmah which literally means protection. Legally it refers to a non Muslim citizen under Islamic state who is under the protection of law. It means none of his inherent right be taken away without lawful case. If so the messenger of Allah will be his counsel or advocate against the offender in the court of Almighty Allah in the day of resurrection.
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48. *`Ilm al Qada*, vol.1, p. 219 Here he covers she as well.
49. *ibid.*
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53. *ibid.*p.219
54. *ibid.* 216. The hadith is quoted from *`Ilm al Qada* as quoted earlier.
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56. *ibid.*
57. Major sin refers to commission of hudud offences as well. According to Hanafi view if some one participated in a gathering of drinking of wine, even though he did not drink the wine yet he would be disqualified of being a witness in an Islamic court.
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59. *Ibn Haman, Fathul Qadir*, op.cit., p.111
60. *Al Quran*, al Nur, 24:5
61. *Al `Ilm al Qada*, op.cit., p.211
62. *ibid.*
63. *Al Quran*, al Nur, 24:5
64. Awoda, Abdul Qadir, *Al Tashrih al Jinaya fil Islam*, op.cit., 31;
65. *`Ilm al Qada*, op.cit., p.228
66. *Fathul Qadir*, vol. 2, *`Ilm al Qada*, vol.3. p.239
67. *ibid.* p.244
68. *ibid.* p.245
69. Awoda, Abdul Qadir, *Al Tashrih al Jinaya fil Islam*, op.cit., 31;
70. *`Ilm al Qada*, op.cit., p.228
71. *ibid*
72. *ibid*
73. *Al Quran*, al Baqarah, 2:282
74. Ibn Majah, *Sunan*, K. al Qada; *Fathul Qadir*, vol. 2., P.157
75. *`Ilm al Qada*, op.cit., p.228
76. *ibid.* 249
77. *ibid.* p.149
78. Awanng, Mamud Sayeedon, *Islamic Law of Evidence*, op.cit., p.110

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80. Al Quran, al Isra, 17:36
81. Ibn Majah, Sunan, K. Qada
82. `Ilm al Qada, op.cit., p.252
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88. *ibid.* 210
89. Ibn Qudama, Al Mughni, Maktab al Shafi`i, Madina Munawwarah, vol. 12, p.6
90. Zaidan, Abdul Karim, Al Qada fil Islam, Dar al Ilm, Egypt, 1978. p.185
91. Ibn rushd, opcit., p.499
92. Law of Malaysia, Act56, Evidence Act. 50.S.239
93. Sanker's Law of Evidence, India, p.1195
94. *ibid*
95. Cross on Evidence, 8th edition, p350
96. Sanker's Law of Evidence, India, p.1195
97. Section 119 of Evidence Act applicable in Bangladesh and Malaysia, India and Pakistan. See Sanker's Evidence at p.1196
98. LRS. QB. 549
99. Sanker's Evidence. P.1197
100. *ibid*
101. *ibid.*
102. *ibid*
103. Sanker's Evidence. P.1199
104. *ibid.*
105. Guntaka V Bosettie. A 1954. AP. 39
106. 1964 (Malayan Law Journal).p 149
107. Cross on Evidence, p.184
108. In UK the present position is that, a witness has been convicted is a matter of concern is the credibility and not the competency of his testimony. See at page 189 of Cross on Evidence. The same has been the case of all secular countries follow the British model of law.
109. Prof. Dr. Tan Seri Ahmad Ibrahim was the Dean of Law Faculty of International Islamic University. An Indian origin man born in Singapore settled in Malaysia. He was an imminent Islamic jurists too and Prof. Dr. Tanzilur Rahman, a Pakistani was a law professor in International Islamic university Malaysia. He was chief justice of shari`ah court of Pakistan and author of many books on law.

LAW OF WAR AND FORCE: THE PERSPECTIVE OF AL-QURAN AND THE BIBLE

Dr. Khandaker A.N.M. Abdullah Jahangir*

Introduction

The West often blames Islam for its law of War or Jihad. According to their view, Islam teaches its followers to be non-tolerant towards other religions. It orders Muslims to wage 'Jihad' against non-Muslims and kill them. This is why Pope Benedict XVI blamed Islam for its conception of Jihad and said that God does not like violence which is incompatible with His nature. According to him, Christianity teaches love and peace, so it is compatible to reason and to the nature of God. In fact we find that it is not only the Qur'an, but the holy Bible also commands for Jihad or war against unbelievers or enemies. In this article we will make a comparative study between the Qur'an and the Bible regarding doctrine of war and violence to examine and explore accuracy or erroneousness of Western view in the light of the Holy Scriptures of Islam and Christianity.

The Bible

The holy Bible is "the sacred scriptures of Judaism and Christianity. The Christian Bible consists of the Old Testament and the New Testament, with the Roman Catholic and Eastern Orthodox versions of the Old Testament being slightly larger because of their acceptance of certain books and parts of books considered apocryphal by Protestants. The Jewish Bible includes only the books known to Christians as the Old Testament. The arrangements of the Jewish and Christian canons differ considerably. The Protestant and Roman Catholic arrangements more nearly match one another."¹

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The Jews believe in the divinity of Torah or books of the Old Testament only. They deny divinity of the New Testament and they do not recognize the Christhood or Messiahship of Jesus and even they do not accept his prophethood, but they consider him as a false prophet.² According to Christian belief every word of the old and the new testaments are the irrefragable word of God.³

According to the Islamic belief, God revealed Torah to Moses, Zabur (Palms) to David and Engeel (euangelion/Evangel/Gospel) to Jesus. These holy books were later distorted and altered by the Jews and the Christians by deletion, omission, addition and alteration. So both the Old and New Testament of the Bible include some words of God along with a lot of false statements. The Muslims consider all inhuman, cruel or brutal instructions, sayings and acts attributed to God or any Prophet are among distorted, altered or misrepresented statements.⁴ So we will discuss biblical instructions and quotations according to the Christian Faith, not according to Muslim Faith.

Instructions for War and Force against the Heathen in the Bible

According to the Bible God is very much fond of war. So the saints, priests, devotees and all religious people must have swords in their hand to kill the heathen and unbelievers. The Bible says :

*"Let the high praises of God be in their mouth, and a two-edged sword in their hand; To execute vengeance upon the heathen, and punishments upon the people; To bind their kings with chains, and their nobles with fetters of iron; To execute upon them the judgment written: this honour have all his saints."*⁵

Regarding war the Bible says:

*"Kill every male among the little ones, and kill every woman that hath known man by lying with him. But all the women children, that have not known a man by lying with him, keep alive for yourselves."*⁶

Here a reader may understand that God orders Genocide and holocaust. It is agreeable that sometimes war may be inevitable. Where there is a state, there must be some options for war to protect the sovereignty and interests of the state and its people. All peace loving people may agree to this extent, though they always

try to avoid war. In case of war they try to avoid harming non-combat people and consider such atrocities as war crimes. But here God of the Bible commands to kill all non-combat male, female and children, except young unmarried woman for the entertainment of that holy people.

God also says in the Bible :

*"And when the LORD the God hath delivered it into thine hands, thou shalt smite every male thereof with the edge of the sword; but the women, and the little ones, and the cattle, and all that is in the city, even all the spoil thereof, shalt thou take unto thyself; and thou shalt eat the spoil of thine enemies, which the LORD thy God hath given thee. Thus shalt thou do unto all the cities which are very far from thee, which are not of the cities of these nations. But of the cities of these which the LORD thy God doth give thee for an inheritance, thou shalt save alive nothing that breatheth; but thou shalt utterly destroy them."*⁷

Here a reader may claim that God encourages His devotees to occupy land of other people and to free that occupied land from the poison of infidels and unbelievers He orders for wholesale destruction by killing every human being and every breathing animal.

In another place God commands His people and devotees: "He that sacrificeth unto any god, save unto the LORD only, he shall be utterly destroyed."⁸

It may be interpreted as an open license for indiscriminate killing of all non-Jewish or non-Christian people.

God also says :

*"For mine Angel shall go before thee, and bring thee in unto the Amorites, and the Hittites, and the Perizzites, and the Canaanites, the Hivites, and the Jebusites: and I will cut them off. Thou shalt not bow down to their gods, nor serve them, nor do after their works: but thou shalt utterly overthrow them, and quite break down their images."*⁹

Again He says :

*"Take heed to thyself, lest thou make a covenant with the inhabitants of the land whither thou goest, lest it be for a snare in the midst of thee: But ye shall destroy their altars, break their images, and cut down their groves".*¹⁰

A reader may understand that it is a divine instruction to deny religious freedom and liberty of non-Jewish and non-Christians. He may fill that God loves violence towards unbelievers and pagans. So He orders His people to be violate and non-tolerant towards them.

From these quotations one may conclude that God orders to kill every infidel, destroy their religious institutes and deny their religious freedom. He may also claim that for this open license Christian churches and government throughout the history killed millions of Jews, Muslims, so called witches and so called 'heretics'. He may also understand that for these Divine instructions they are killing hundreds of thousands of innocent people in Iraq and elsewhere.

Brutality and Genocide of the Biblical Prophets

As we stated earlier, war may be inevitable to protect sovereignty and interests of people and state. In the case of war peace-loving people try to make war less destructive. But from numerous quotations of the Bible one may claim that the holy prophets of God were not eager to make war less destructive. On the contrary, they were eager to fulfill such divine orders of wholesale killing and destruction. We find stories of such genocide and massacre in many books of the holy Bible. In 1 Samuel we find an example of such massacre :

"And David and his men went up, and invaded the Geshurites, and the Gezrites, and the Amalekites: for those nations were of old the inhabitants of the land, as thou goest to Shur, even unto the land of Egypt. And David smote the land, and left neither man nor woman alive...."¹¹

Another example of massacre and brutal killing :

"And David gathered all the people together, and went to Rabbah, and fought against it, and took it.... And he brought forth the people that were therein, and put them under saws, and under harrows of iron, and under axes of iron, and made them pass through the brickkiln: and thus did he unto all the cities of the children of Ammon".¹²

God says :

"My servant David, who kept my commandments, and who followed me with all his heart, to do that only which was right in mine eyes".¹³

Here a reader may conclude that all such massacre and holocaust of David are considered right and praiseworthy by God.

Praising such massacres and brutal killings by David and other Prophets of God St. Paul, the founder of the Trinitarian Christianity, says in his letter to Hebrews:

*"And what shall I more say? for the time would fail me to tell of Gedeon, and of Barak, and of Samson, and of Jephthae; of David also, and Samuel, and of the prophets: Who through faith subdued kingdoms, wrought righteousness, obtained promises, stopped the mouths of lions, Quenched the violence of fire, escaped the edge of the sword, out of weakness were made strong, waxed valiant in fight, turned to flight the armies of the aliens."*¹⁴

Cold Blooded Murder of 'Heretics' or Followers of Other Religion

There is yet another kind of killing of 'infidels' in the holy bible. According to the Bible the faithful or religious people have the right to kill the heathens or followers of other religions even through deception, cheating or lying. We see a lot of instances of such cold-blooded murder in the holy Bible. In one case we see that depending on the command of God and divine guidance Jehu, the son of Jehoshaphat, king of Israel, cheated unarmed and unaware worshippers of 'Baal' and killed them under the edge of the sword.

Describing the events the Bible says :

"And Jehu gathered all the people together, and said unto them, Ahab served Baal a little; but Jehu shall serve him much. Now therefore call unto me all the prophets of Baal, all his servants, and all his priests; let none be wanting: for I have a great sacrifice to do to Baal; whosoever shall be wanting, he shall not live. But Jehu did it in subtilty, to the intent that he might destroy the worshippers of Baal. And Jehu said, Proclaim a solemn assembly for Baal. And they proclaimed it. And Jehu sent through all Israel: and all the worshippers of Baal came, so that there was not a man left that came not. And they came into the house of Baal; and the house of Baal was full from one end to another. And he said unto him that was over the vestry, Bring forth vestments for all the worshippers of Baal. And he brought them forth vestments. And Jehu went, and Jehonadab the son of Rechab, into the house of Baal, and said unto the worshippers

*of Baal, Search, and look that there be here with you none of the servants of the LORD, but the worshippers of Baal only. And when they went in to offer sacrifices and burnt offerings, Jehu appointed fourscore men without, and said, If any of the men whom I have brought into your hands escape, he that letteth him go, his life shall be for the life of him. And it came to pass, as soon as he had made an end of offering the burnt offering, that Jehu said to the guard and to the captains, go in, and slay them; let none come forth. And they smote them with the edge of the sword; and the guard and the captains cast them out, and went to the city of the house of Baal. And they brought forth the images out of the house of Baal, and burned them. And they brake down the image of Baal, and brake down the house of Baal, and made it a draught house unto this day."*¹⁵

In another example Prophet Elijah slew 450 unarmed prophets of Baal, as the Bible says :

*"And Elijah said unto them, take the prophets of Baal; let not one of them escape. And they took them: and Elijah brought them down to the brook Kishon, and slew them there."*¹⁶

Here one may conclude that the Bible not only instructs to conquer or occupy other countries, states and nations, but it also directs to kill unarmed and unaware followers of other religions, even through deception. We will see that such biblical narration inspired the Christian church to brutally kill and burn followers of other religions.

Hatred towards the Heathen and Unbelievers in the Bible

The holy bible sometimes refers to the non-Jewish or non-Christian people as 'dogs' or 'swine'. Jesus said: "Give not that which is holy unto the dogs, neither cast ye your pearls before swine..."¹⁷

Matthew says :

"And, behold, a woman of Canaan came out of the same coasts, and cried unto him, saying, Have mercy on me, O Lord, thou Son of David; my daughter is grievously vexed with a devil. But he answered her not a word. And his disciples came and besought him, saying, Send her away; for she crieth after us. But he answered and said, I am not sent but unto the lost sheep of the house of Israel. Then came she and worshipped him, saying, Lord, help me. But he

*answered and said, It is not meet to take the children's bread, and to cast it to dogs."*¹⁸

A prejudiced reader may conclude here that this is the philosophy for such brutality and violence. The non-Jewish or non-Christian people are sub-human beings like dogs. These dogs may be provided with help or assistance if that does not harm the 'children of God'. If the interests of the children contradict those of the dogs, then the dogs may be mercilessly killed.

War and Jihad in the Quran

The Pope and other Christian scholars would confirm that the above mentioned verses are correctly quoted from the holy Bible, but they may not agree with the interpretation and conclusion. They may brand such explanation and conclusion as biased, prejudiced or intentional misinterpretation. Out of their ignorance or biased mentality they are doing the same in interpreting 'Jihad' of Islam.

Jihad in Islam is nothing but 'state war'. Even 'holy war' is not the meaning of 'Jihad'. Both 'crusade' and 'holy war' are pure Christian terms invented by Christian popes to encourage Christians to invade Muslim countries. Jihad in Islam means endeavor. In political term it means 'war against enemies of the Muslim State'. Generally the enemies of the Muslim states are non-Muslims. This is why state enemies are termed as non-believers or infidels. But it does never mean that the Qur'an gives open license to kill infidels or the heathens like the holy Bible. There are many preconditions for Jihad, such as, (1) Statehood and order of the head of the state, (2) being attacked by the enemies, (3) accepting every opportunity of peace, (3) limiting the war only in combatant enemies, etc.

People of Madina embraced Islam through absolutely peaceful propagation and they chose Muhammad (Peace be upon him) as the head of their state. When Muslims of Madina were attacked by their enemies, Allah permitted them to fight. Allah says in the Qur'an :

*"To those against whom war is made, permission is given (to fight), because they are wronged; and verily, Allah is Most Powerful for their aid."*¹⁹

Prophet Muhammad (PBUH) says: "Head of the state is the shield behind whom war to be waged"²⁰

The Qur'an says :

*"But if the enemies incline towards peace, do you (also) incline towards peace, and trust in Allah: for He is the One that Hears and Knows (all things)."*²¹

Allah says in the Qur'an :

*"Fight in the cause of Allah those who fight you, but do not transgress limits; for Allah loves not transgressors."*²²

So war must be limited with combatant enemies of the state. Even in the battlefield it is prohibited for a Muslim fighter to kill a woman, child, sick, old man, monk or any non-combat person. Prophet Muhammad (PBUH) says :

*"In the name of Allah and for His cause you fight. Do not break faith; do not kill any woman, child, monk, sick or old man. Do not mutilate any human body, do not destroy any well, do not cut any tree except that prevent you from your enemy, do not kill an animal except for use and be friendly and merciful, for Allah loves those who are merciful."*²³

These Islamic instructions regarding 'Jihad' may be compared with above mentioned Biblical instructions to kill every male, female, children and even every breathing animal. One may also compare the wars of Biblical prophets with those of the Prophet Muhammad (PBUH). I think no reasonable person can deny that Islamic concept and practice of Jihad are far superior to the modern concept of war.

The Qur'an on Religious Violence and Forceful Conversion

As we stated before, Jihad or war in Islam may be waged against another country and not against another religion. We do not find a single instruction in the Quran to kill followers of other religion or the heathen outside the battlefield or to compel other people to accept Islam. Islam prohibits violence, hatred and force in religion. There may be war for this reason or that, but not a single Muslim can ever think of insulting other people's religion or to force someone to embrace Islam. Allah says :

"Reville not you those whom they call upon besides Allah, lest they out of spite revile Allah in their ignorance. Thus have We made alluring

*to each people its own doings. In the end will they return to their Lord, and we shall then tell them the truth of all that they did."*²⁴

He further says :

*"And dispute you not with the People of the Book, except with means better (than mere disputation), unless it be with those of them who inflict wrong (and injury); but say, "We believe in the Revelation which has come down to us and in that which came down to you; our God and your God is One; and it is to Him we bow (in Islam)."*²⁵

He says :

*"Let there be no compulsion in religion: Truth stands out clear from error: whoever rejects evil and believes in Allah has grasped the most trustworthy hand-hold, that never breaks. And Allah hears and knows all things".*²⁶

Before arrival of the Prophet (PBUH) in Madina a number of youth of Madina embraced Judaism. When their parents embraced Islam, they wanted to forcibly convert them to Islam. The Prophet did not let them to do so. He said, No compulsion in Faith. So let them follow the religion of their own choice.²⁷

Old Testament versus New Testament

One may observe that most of the above mentioned verses are quoted from the Old Testament. Jesus Christ in the Gospels did not call for revenge or war. On the other hand Islam ordained Jihad that might have opened the doors of atrocities. This observation contradicts the historic facts as well as the Christian faith. In the light of actual facts we see that absence of clear instructions and legislation regarding war in the Gospels led the Christians and Christianity to a perpetual dilemma and was the main cause of atrocities committed by the Church. But before discussing the historic facts we may review the Christian believe. Here we should consider the following things:

1. Terming the Jewish Bible as 'Old Testament' does not mean that its laws and commands are abrogated, invalidated or nullified by the New Testament. Christianity does not believe in abrogation or invalidation of any Divine command, instruction or law. The later prophet or scripture can never nullify or change the instructions of previous prophet or scripture. So every teaching, command, instruction and law of Old Testament is irrevocable and eternal

legislation for the Christians. In this regard famous Christian scholar and preacher Carl Gottaleb Pfander, D. D. says:

*"The Old Testament and the New have never been abrogated and can never be abrogated in their facts, their doctrines and their moral principles."*²⁸

2. Jesus did not claim that he came with a new system or law, but he insisted that he came to fulfil the Law of Moses and previous Prophets. Moreover he urged his followers to strictly abide by the Jewish Law and religious system. He said,

*"Think not that I am come to destroy the law, or the prophets: I am not come to destroy, but to fulfil. For verily I say unto you, Till heaven and earth pass, one jot or one tittle shall in no wise pass from the law, till all be fulfilled. Whosoever therefore shall break one of these least commandments, and shall teach men so, he shall be called the least in the kingdom of heaven: but whosoever shall do and teach them, the same shall be called great in the kingdom of heaven. For I say unto you, that except your righteousness shall exceed the righteousness of the scribes and Pharisees, ye shall in no case enter into the kingdom of heaven."*²⁹

3. Jesus also declared that he left his teachings incomplete, as he said :

*"I have yet many things to say unto you, but ye cannot bear them now. Howbeit when he, the Spirit of truth, is come, he will guide you into all truth: for he shall not speak of himself; but whatsoever he shall hear, that shall he speak: and he will shew you things to come."*³⁰

4. Jesus also praised sword or war and Jihad saying :

*"Think not that I am come to send peace on earth: I came not to send peace, but a sword."*³¹

5. Jesus also instructed to slay his enemies. He said:

*"But those mine enemies, which would not that I should reign over them, bring hither, and slay them before me."*³²

6. The Christians- rulers and laity- and Christianity-represented by the Church- could never avoid war. Naturally a religious person seeks instructions of his/her religion in every aspects of life. In absence of clear instructions about warfare in the Gospels they naturally depended on the instructions of the Old Testament for indiscriminate killing of all combatant and non-combat male,

female and children and wholesale destruction of their property. Furthermore, they interpreted these teachings in their own way assuming that the Holy Ghost is with them that will guide them into all truth. But actually they were guided to all evil.

I am giving an example of such interpretation. Isaac Badarkan was a prominent Arab Protestant Christian. In 1849 he published a book titled "Al-Thalatha Ashrata Risalah" or "The Thirteen Letters" to discuss the corruption of the Church. In this book he mentioned that the Bible Index printed in Rome in Arabic and Latin under the Letter Ha (H) stated :

"It is our Duty towards the heretics to uproot and annihilate them. The Bible teaches us to do so. Because, Jehu the son of Jehoshaphat, king of Israel deceived the false prophets and killed them under the edge of the sword.³³ And Prophet Elijah also slew the prophets of Baal."³⁴

Thus they interpret the teachings and acts of Biblical Prophets and kings to support their brutality. On the other hand, Islam closed the door of such dilemma by giving clear instructions about war or Jihad. A historical preview will disclose it to us.

A Historical Perspective

Leaving the holy Bible, biblical theories of war and religious violence, when we look at the actual history of its people we see that the history of the Jewish and Christian people is full of horrifying violence and bloodshed. The holy bible itself records dreadful brutality of the Jews. To see brutality and religious violence of the Christians we have to look at the history.

History reveals to us that starting from Constantine the Great, who gave Christianity the statehood, the Christian clergy and church waged a 'Zero tolerant' war against every dissident. Not only the followers of other faiths, like Jews and Muslims, but also the Christians having different views about some articles of faith were mercilessly suppressed, killed or burnt alive and their property, books and other belongings destroyed.

Such brutality and violence took two dimensions. In many cases the Christian kings, lords, barons or princes engaged in such inhuman cruelty in the name of Christianity. Such as brutality against the Jews in Spain, France, England and most of the

European countries, against Muslims in Christian Spain, against Muslims and Jews during the Crusades and brutality of Catholics and Protestants against each others during the wars of religion in Europe. Their atrocities included economic exploitation, indiscriminate killing, burning, forcible conversion under the edge of sword, confiscation or destruction of property, mass expulsion etc. Usually the religious leadership represented by the church and the Pope supported such actions. Even sometimes they celebrated such brutality. In August 24/25, 1572, Massacre of Saint Bartholomew's Day took place. About 70,000 Protestants brutally killed by the Catholics in France and Pope Gregory XIII had a medal struck to celebrate the event.³⁵

In other cases the church or the Pope initiated and engaged in such brutality in the name of Christianity. Under the papal order of 'Inquisition' to 'punish heretics and wipe out the spiritual leprosy' thousands of Muslims, Jews and so-called heretic Christians were persecuted and burnt alive. The third Latern council (1179) decreed "the punishment of heretics by the secular arm after prosecution by a bishop". A papal edict in this regard says :

*"we give you a strict command that by whatever means you can, you destroy all these heresies and repel from your dioces all who are polluted by them ... If necessary you may cause the princes and the people to suppress them with the sword."*³⁶

Pope Innocent III proclaimed a sacred war against Albigenes, a Christian sect considered heretic by the church. During the Albigenian Crusade thousands of people were massacred, which is considered- as mentioned in Encyclopaedia Britannica- the first modern case of genocide.³⁷ Arnold Amaury, the papal legate, reported this event to the pope saying: "Our men sparing neither rank, sex, nor age, slew about 20,000 men with the edge of sword; and when a huge slaughter of men had been made, the whole city was pillaged and burnt, the Divine Vengeance wondrously raging against it". At the massacre of Lavaur 400 people were burnt in one pile and 'they made a wonderful blaze and went to burn everlastingly in hell'.³⁸

Even the Protestants could not free themselves from such evil. Martin Luther demanded wholesale slaying of the Jews in the name of Christianity. He wrote: "We are at fault for not slaying

them, rather we allow them to live freely in our midst despite their murder, cursing, blaspheming, lying and defaming."³⁹

A number of scientists, philosophers, thinkers and reformers were also persecuted, killed, burnt or imprisoned by the church. The church even killed and burnt her own people for reading the Bible in vernacular translation. In 1525 William Tyndale brought out an English translation of the Bible. The poor translator was strangled and burned at the stake in 1536 by the Church.⁴⁰

In 1380 when John Wycliffe had done English translation of the Bible, the same treatment was meted out to him. Thirty years after his death, in May 1415, under the decree of the Council of Constance, his eaten up and decomposed bones were dug out from his grave and condemned to ashes and cast into a nearby stream. The readers of his translation were burnt with the copies round their necks, men and women were executed for teaching their children the Lord's Prayer and Ten Commandments in English...⁴¹

Such brutality in the name of Christianity led a number of people to blame Christianity itself. The renowned philosopher of 20th century and Nobel laureate Bertrand Russell (1872-1970) says :

*"You find as you look around the world that every single bit of progress in human feeling, every improvement in the criminal law, every step towards the diminution of war, every step towards better treatment of coloured races, or every mitigation of slavery, every moral progress that there has been in the world, has been consistently opposed by the organized Churches of the world. I say quite deliberately that the Christian religion, as organized in the churches, has been and still is the principal enemy of moral progress in the world."*⁴²

We do not find such brutality and violence in the history of Islam. In fact Islam closed the door of such atrocities and violence through clear instructions about war or Jihad. Nobody can imagine a state without option of war. We may all agree that the doctrine of wholesale forgiveness, such as "whosoever shall smite thee on thy right cheek, turn to him the other also"⁴³ is to be followed in personal affairs, not in state affairs. When a state is attacked by its enemies, we can not ask it to open another frontier to welcome the enemy. All we can do to keep war- when it is inevitable- as less destructive as possible and prevent targeting non-combatant people.

This is what Islam taught and did. It legalized Jihad or war with a lot of clear restrictions. Scopes of transgression are very limited. If someone attempts to do so others have the right to protest, as no person or institution has sanctity or infallibility in explaining or implementing Islamic teaching.

This is why we see that the atrocities committed by Muslim rulers or generals were fewer and much less brutal than those of Christian rulers and the Church. A simple comparison between the Christian and Muslim societies of medieval age discloses the truth. In a time when the Christian church persecuted, killed and burnt scientists, philosophers, thinkers and dissident Christians as heretics and also killed, burnt or forcibly converted the Jews, Muslims and Pagans, we do not find such things in Muslim societies.

Above all, if Islam is to be blamed for legislation of war when inevitable with so many restrictions, then Judaism, the Old Testament and all biblical prophets must be blamed for legalizing and waging brutal warfare, indiscriminate killing and wholesale destruction and Christianity must be blamed for the same, because, though Jesus Christ did not set any new law for war, he confirmed that he had come to fulfil the laws of the Old Testament.

Nowadays most of the Western scholars are not willing to blame Christianity for wrongdoing of its followers. But when the case of Islam comes, most Christian scholars hold Islam responsible for the crimes of its followers. It is notable that Muslim 'secular leadership', such as rulers, kings, sultans and generals, business tycoons- not religious leadership- committed such brutality. We do not find well-known Muslim religious leaders or Imams initiating or commanding any campaign against heretics or infidels. But the Muslim rulers waged wars or invaded other countries, sometimes to protect their own countries and sometimes to occupy other countries in the pretext of 'preemptive just war'. Naturally, in either case they used the name of Islam and Jihad to justify their warfare and provoke the people to participate and support it. Sometimes we find unknown small fanatic groups engaged in such atrocities.

Generally, Christians believe in sanctity and infallibility of the church and the Pope and consider them the absolute authority to

interpret and represent Christianity. Even though they are not willing to consider Christianity responsible for the inhumanity of the church or the Papacy, but they put the blame on the church or the popes personally. Kings of Europe engaged in brutal warfare in the name of Christianity, Catholicism or Protestantism. But people are not blaming the religion, but the rulers only and trying to forgive and forget the past and live in peace and harmony.

The rulers of Iraq, Syria, Egypt, Morocco, Muslim Spain or Turkey in using the name of Islam are like the rulers of Spain, France, England, Austria, Germany or Italy in using the name of Christianity, Catholicism or Protestantism. But Pope Benedict XVI and his supporters are still following the mentality of their medieval predecessors in creating animosity toward Islam and Muslims for past misconduct of Muslim rulers or atrocities of contemporary Muslim fanatics.

Modern Mentality

Nowadays we hear some western secular pundit are calling to 'convert Muslims to Christianity.' We find some American or European well-learned secular politicians and scholars are eager to destroy Muslim Holy Places in Makkah and Madina for crime of unknown Muslim terrorists of Afghanistan or Iraq. Celebrated conservative columnist and commentator Ann Coulter wrote "we should invade their countries, kill their leaders and convert them to Christianity."⁴⁴ It is very likely that these famous and distinguished politicians and columnists will become policy makers of USA or other countries.

A few misguided and deviated Muslim youth may be involved in violence. They may wrongly call their violence and terror activities as 'Jihad'. They are not waging their so-called 'Jihad' to occupy other people's land or to convert others to Islam. They are doing so to protest occupation of their land, express their anger or to revenge killing of their people. Certainly they are wrong in the way of protest and we condemn their terror activities. All Muslim states and organizations are condemning them. Not a single Muslim state or any known Muslim organization is supporting violence.

On the other hand Mr. Bush and his supporters are involved in crusade and violence in the name of God. Mr. Bush told us that it is God who instructed him to invade Iraq. Mr. Blair also put the

burden on God, as he said, 'we are in Iraq with the wishes of God.' We can not, or at least, should not condemn them, because they have very noble cause for killing of thousands of human beings, including indiscriminate killing in Faluja and other places. But we are really horrified, frightened and shocked with the philosophy of forcible conversion!

We see that the most ignorant and violent Muslim terrorists do not insult other people's religion. The people of Mr. Pope desecrated the holy book of Muslims and they made insulting cartoons of the holy Prophet of Muslims. Muslims all over the world protested such actions. In some places they burnt US or Danish flags or effigies of their political leaders. But we did not hear any illiterate mullah of Afghanistan, Bangladesh, Indonesia, India or any other country burnt or insulted a copy of the Bible or an effigy of Jesus Christ, or made insulting cartoon of Jesus.

We do not find any ignorant and violent mullah is asking to convert any Christian to Islam. Such an ignorant mullah may ask to kill Mr. Bush, not for being a Christian or an American, or a defender of freedom and democracy, but for being occupier of their land and killer of their people. He may ask destruction for America or Israel, also for the same reason, not for being a democratic state, or for religion of the people of America or Israel. But he will never ask to kill Christians or Jews for their religion or to convert them to Islam.

Conclusion

From above discourse we see that both the bible and the Quran have instructions regarding war, with the following differences:

1. According to the Qur'an, Muslim state may wage Jihad or war against another state and it must be limited to the combatant people. It strictly prohibits attacking any non-combatant target. On the other hand the Bible commands for indiscriminate and brutal killing of all combatant and non-combatant male, female and children, sparing neither rank, sex, nor age. The Bible even teaches to kill unarmed and unaware followers of other religion
2. According to the Qur'an War may be waged against an army, country or state for their aggression and not against a faith or

religion. But according to the Bible war may be waged to annihilate and uproot heresy and to kill heretics, that is, the followers of other faiths.

3. Qur'an commands to respect other people's religion. On the contrary the Bible teaches religious hatred and uses bad and humiliating language for the followers of other religions.
4. Throughout the history Christianity remained non-tolerant and extremely violent to other religions and religious opinions. It named other religions and religious differences as 'heresy' and violently tried to destroy them completely. Also in the pretext of 'preaching' they attacked other people's religious sentiment and developed religious hatred and animosity.
5. It appears that many 'secular' Christians could not get out of this mentality of intolerance toward other religions. Many of them feel very much excited and proud to humiliate religious sentiment of other people in the pretext of 'freedom of thought and expression', but in the same time they enforce blasphemy law, anti-Semitism law, homeland security law and many other laws to forbid people to express their 'free' opinion against holocaust, the Jews or Jesus Christ. Some of these secular Christian pundits advocate for forcible conversion.
6. We saw the Popes in the past initiated and supported religious fanaticism and violence. It is extremely unfortunate that we see Pope Benedict XVI, a pope of 21st century following the footsteps of his medieval predecessors in promoting and patronizing religious hatred or initiating and supporting the crusades of secular rulers. We hope that he would change that course and preach to his own people the message of love and respect to other people's religious sentiment. Instead of giving false, irrational and provocative statements against Islam, he should have told his own people that making cartoons and insulting other people's religion can not please God. He should have told to Mr. Bush that God could not order you to kill thousands of human being in Iraq. He should have told his own people that killing and forcible conversation is not the way of God. But his statement did not fulfil our expectation. He condemned Islam for violence, but did not ask Christians to shun violence.

We do not know the reason. Some may suggest that it is because the non-Jewish or non-Christian people are dogs as described by Jesus Christ, according to the Christian Bible. Violence against dogs is not good, but it is not so horrible. On the contrary violence against human beings or children of God is horrible. This is why the Pope advised Muslims only. We can not agree with such a suggestion. We hope that the Pope will clarify the reason.

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FINANCIAL TRANSACTION IN ISLAMIC LAW : AN INFORMATIVE DISCUSSION

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Introduction

Islam, being a complete code of life (Deen), provides an outstanding and unparallel system that covers every aspect of human life. Islam proved its competency through its brilliance, comprehensiveness and practicability that satisfies the demands of modern life.

Economy in Islam is established upon an idea, which is the direction of all actions by the divine rules and is implemented with the fear of Allah (ST) by the States through some directions and legislations. Muslims are encouraged in financial transactions as an essential part of their lives as Allah (ST) declares:

"And when the prayer is finished, then may you disperse through the lands, and seek of the bounty of Allah; and remember Allah frequently that you may prosper."¹

Thus financial transaction deserves a qualitative value as a part of Islamic Banking System, which is one of the aspects of transactions, all over the world. Islamic banking system is such a type of banking system, which is directed according to the rules of the Holy Qur'an and Sunnah where transaction based interest is completely prohibited. Indeed, the Islamic banking system established economic justice, rationality, efficiency and progress.

In this Article the present Islamic legal business practices will be discussed vividly. It is to show further that how the Islamic law provides the best law in financial transactions.

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Islamic View towards Economic Transaction

According to Al Quran, Allah has approved trade and prohibited usury (riba).² Islamic banking is based on profit and loss sharing system due to the prohibition of riba in the Holy Qur'an. Literally riba means money increase, increase of anything or increment of anything from its original amount.³ But all increases are not considered as riba in Islam. Monetary transaction may increase business activities as well. All increases are not considered as riba. Islam prohibits only those increases that are charged on the loan with a prefixed rate.⁴

In Shari'ah, the meaning of the term riba is used in two senses. The first is "riba-al-nasi'ah" and the second is "riba-al-fadl". The term nasi'ah comes from the root nasa-a which means to postpone, to defer, or to wait, and refers to the time that is allowed for the borrower to repay the loan in return for the 'addition'. So riba-al-nasi'ah means interest on loans. On the other hand, riba-al-fadl means hand-to-hand purchase and sale of commodities. It covers all spot transactions involving cash payment on the one hand and immediate delivery of the commodity on the other.⁵ The word fadal signifies the excess charged in the exchange or sale of things of homogeneous nature or similar of the same species.⁶

The Shari'ah clearly prohibits both forms of riba. Nasi'ah relates to the excess charged in loan transactions. Fadal relates to excess charged in sale transactions. Nasia is forbidden by the clear text of the Qur'an and fadal is prohibited by the Sunnah or traditions of the Prophet (pbuh). The concept of nasi'ah was in vogue in the day of ignorance (Ayyame Jahiliyya) and is forbidden in Islam because of its evil and cruel nature, whereas fadl is prohibited by the Prophet (pbuh) as a precautionary and preventive measure lest it should lead to nasi'ah".⁷ And what is prohibited, as a preventive measure is not unlawful in itself.⁸

It is important to realize that the Islamic law has no objection to true profit as a return on entrepreneurial efforts that benefits the society. Furthermore, in the case of riba-al-fadl, the Islamic community is only interested in ensuring justice and fair play in spot transactions to avoid any exploitation through unfair exchanges.

Attitude of Islamic Law towards Interest

Some Muslim scholars equate interest with *riba*, the term used in the holy Qur'an.⁹ The Islamic rules regarding interest are discussed below:

Shariah law

In the Shari'ah, *riba* technically refers to the premium that must be paid by the borrower to the lender along with the principal amount as a condition for the loan or for an extension in its maturity.¹⁰ So *riba* is the predetermined return on the use of money. In the past there had been a dispute about whether *riba* refers to interest or usury but there is now consensus among Muslim scholars that the term covers all forms of interest and not only excessive interest.¹¹ As an excess over the principal is *riba*, it covers usury and interest both.¹²

Qur'anic Prohibition on Interest

The Islamic restriction on interest is quite explicit and unequivocal. All transactions based on *riba* are strictly prohibited in the Qur'an. The prohibition of *riba* appears in the Qur'an in four different revelations:¹³

The First revelation

Allah (ST) says, "That you give in the form of usury for increasing through the property of other people, will have no increase with Allah. But that you give for charity, seeking the countenance of Allah (will increase): it is those who get a recompense multiplied".¹⁴ It was revealed in Makkah and emphasized deprivation of God's blessing for a man making interest transaction and charity having the essence of manifold rise.

The Second revelation

"That they took usury, though they were forbidden and that they devoured men's wealth wrongfully, We have prepared for those among them, who reject faith, a grievous punishment".¹⁵ In the early period of Madinah it severely condemned interest-referring prohibitions taken place in previous scriptures.

The Third revelation

"O you, who believe! Don't devour usury doubled and multiplied, but fear Allah that you may (really) prosper".¹⁶ It enjoined Muslims to keep away from *riba*.

The Fourth revelation

"Those who devour usury, will not stand except as stands one whom the Satan by his touch has driven to madness, that is because they say: 'Trade is like usury', but Allah has permitted trade and forbidden usury. Allah will shrink riba from all blessings but will increase deeds of charity and Allah does not love any ungrateful sinner".¹⁷ "O, you who believe! Fear Allah and give up what remains (due to you) from riba, if you are indeed believers. And if you do not, then take notice of war (against you) from Allah and His Messenger, and if you repent then you have your principal (without riba) and don't deal unjustly and you shall not be dealt with unjustly".¹⁸

The last verses were revealed at the ending part of the life of the Prophet and his mission, which made riba strictly prohibited.

Sunnatic prohibition on Interest

Awon Ibn Abu Zuhaifa (Rd) reported that he said, "I saw my father buying a blooded slave. The blooded instruments were destroyed by the order of the father. I asked him its reason. He said that the Prophet (pbuh) prohibited from taking the price of dog & blood, and from tattooing on skin and from making tattoo, and from giving and taking interest, and blamed the picture drawer".¹⁹

Abdullah Ibn Masud (Rd) reported that, the Prophet (pbuh) blamed usuree, usurer, witnesses of usury and the compounder of usury contract.²⁰

Abu Huraira (Rd) reported that, the Prophet (pbuh) said: There are seventy-three classes of riba. The lowest class among them is to marry own mother (to commit intercourse with his own mother).²¹

A'yesha (Rd) reported, She said, when the last ayats of Surah Al Baquarah about interest were revealed, the Prophet (pbuh) read those ayats to the people (prohibiting riba) and also prohibited business of wine.²²

Indeed, the prohibition of riba by the Prophet (pbuh) created an immediate law, which was duly maintained by the dedicated companions and the followers. Riba, in the eye of Islamic Law, is not only highly discouraged but also completely barred.

Islamic Principles Relating to Commercial Transaction (Mu'amalat)

Here a number of the important principles of the Shari'ah with regard to commercial transactions are to be highlighted. Some of these, namely, *Ibahah* (permissibility), *Al-taysir* (bringing facility & ease) and *Raf-al-haraj* (removal of hardship) are included among the salient legal maxims (*qawaid kulliyyah*) of Fiqh, whereas the freedom of contract (*hurriyah al-ta'aqud*), ratiocination (*talil*) and customs are substantive topics of Shariah each in their own right. A brief analysis of the above is as follows:

Ibahah (principle of permissibility)

The norm of Shari'ah regarding commercial transactions and contracts is that they are permissible unless there is a clear injunction to the contrary. The presumption of *ibahah* is mainly concerned with those commercial transactions that are permissible and nothing in them is forbidden. As Ibn Taymiyah points out, these are to be permissible unless Allah (ST) and His Messenger have decreed them to be forbidden.²³ But Allah the Most High never prohibited a contract in which there is benefit for Muslims and does not inflict any harm upon them.²⁴ The principle of *ibahah* has been adopted and applied in commercial transactions by almost all the *madhahib* or school of law. Thus the legal maxim of fiqh "*al-asl fi-al-fashya al-ibahab*" (permissibility in the basic norm in regard to things) is considering based on the authority of the Qur'an, which are as follows:

"We have subjugated to you all that is in the heavens and the earth".²⁵ He it is who created for you all that is on the earth.²⁶ Allah has explained to you in detail what is forbidden to you unless you are compelled to it.²⁷ And Allah will not mislead a people after he has guided them, so that he makes clear to them what to fear (and what to avoid)".²⁸

The above Qura'nic declarations imply that it is permissible for mankind to utilize the resources of the universe unless it is prohibited.

Taysir (bringing ease) and Raf al-Haraj (removal of hardship)

Making things easier for people and removing unnecessary hardship from them are among the cardinal objectives (*maqasid*)

of the Shariah. The subject is referred to a number of Qur'anic verses and also to many hadith. As Allah (ST) says, "Allah wishes to lighten your difficulties, for man was created weak",²⁹ He also says, "Allah intends every facility for you, and he does not want to put you into difficulty"³⁰ and "As for him who gives (generously), in pious and accepts what is good, we facilitate for him the way to ease".³¹ He also says that, "And if (debtor) is in straitened circumstances, let there be postponement of the debt till (he is in ease)"³² and Allah further says, "Allah has imposed no hardship (haraj) in religion".³³

While commenting on the Qur'anic verse that 'Allah has imposed no hardship in religion', a famous companion Ibn Abbas regarded it as a concrete manifestation of this to be the fact that Islam validates expiation (kaffarah) and leaves the door open to repentance (tawbah).³⁴

The Sunnah is entirely supportive Of the Qur'anic directives on taysir, e.g., the Prophet (pbuh) instructed two of his leading companions, Abu Musa-al-Ashari and Mu'adh Ibn Jabal, during their departure as judges to the Yemen by saying, "Let the two of you bring ease, not hardship, and give good news, not gloom".³⁵

It is, therefore, firmly established that prohibiting any permissible matter is no less than a sin than permitting any prohibited matter. The Qur'an and Sunnah suggests us to minimize the scope of prohibition and to ease the burden on the people.³⁶

Hurriyah al-Taaqud (freedom of contract)

Muslim jurists have differed as to whether the Islamic legal norm with regard to contracts is permissible, prohibitive, or an intermediate position between two. The majority have taken the view that the parties create a contract by their mutual agreement but that the legal effects of that contract, such as the transfer of ownership in the case of sale, or the permissibility of physical relation in the case of marriage, are determined by the Shari'ah.³⁷

The parties are at liberty to make agreement but stipulations of this kind are to be valid in so far as they are authorized by the sources of Islamic law.

The Hanafis divide contractual stipulations into three types namely, valid (Sahih), irregular (fasid) and void (batil).³⁸ A valid

stipulation is that which either reiterates and endorses the substance of the contract or does not seek to change its requirements. An irregular stipulation is one, which, though advantageous to one or other of the parties, is not validated by the law. Stipulations, which are neither valid nor voidable, are deemed to be wholly null and void (batil).

Talil (Ratiocination)

The position of the Shari'ah in the area of mu'amalat, especially with regard to illicit gain (riba), hoarding and risk-taking (gharar), are predicated on the prevention of conflicts, exploitation and injustice among people. These are not, in other words, founded on devotional principles but on rational causes. This is an important Shari'ah principle that is sometimes neglected by those who maintain that the intellect and human reason have no place in the Shari'ah. Many problems in the fields of Islamic economics, banking and finance arise from this inability to understand the proper role of reason in the Shari'ah. Ijtihad is the main vehicle by which the Shari'ah can be adjusted so as to accommodate social change and it relies, to a large extent, on the proper understanding and application of talil.³⁹

Urf (Role of Custom)

The changing needs of a society are often reflected in its customs, which are in many ways the vehicle of society's adjustment to new conditions. Custom plays a role in the development of the Shari'ah in the form of Ijma' (general consensus), maslahah (public good) and fatwa (juristic opinion). It is said in the Qur'an, on the subject of maintenance (nafaqah), that "let those who possess the means provide nafaqah in accordance with their means".⁴⁰ Where the count of Shari'ah determines the precise portion of maintenance by reference to social custom and what people consider to be suitable and fair. Similarly a legal maxim of fiqh says, "What is proven by urf (custom) is like that which is proven by a Shari proof."⁴¹

There is thus unequivocal recognition of the authority of custom as a proof and basis for adjudication, especially in civil transactions and commerce. In order to be valid, urf must fulfil certain conditions e.g., it must be dominant practice and that it does not

violate the injunctions of the Shari'ah or the clear stipulations of a contractual agreement. When *urf* (custom) fulfils all the necessary requirements, it is authoritative.⁴²

Gharar (Uncertainty and Risk-taking)

The literal meaning of the word *gharar* is fraud (*al-khida*), but in transactions the word has often been used to mean risk, uncertainty and hazard. In a contract of sale the word *gharar* often refers to uncertainty and the ignorance of one or both parties of the substance or attributes of the object of sale, or of doubt over this object's existence at the time of contract.⁴³ Muslim jurists have differed widely on the definition of *gharar* but the majority include both ignorance of the material attributes of the subject matter of sale, and also uncertainty regarding its availability and existence.⁴⁴

Depending on its scale and magnitude, *gharar* may render a contract totally null and void, or it may constitute a cause for indemnity and compensation. It is reported in a hadith that the Prophet (pbuh) prohibited the sale of *gharar*.⁴⁵

Bai-al-gha'ib (Sale of the Unseen) & Bai-al-Madum (Sale of non-existence)

With regard to the sale of the unseen, or the sale of what is not visible (*bay al-gha'ib*), such as sale of nuts in their shells, or that of crops not yet grown to maturity or the sale of fish in a pond. The schools of law have held different views on this subject on the ground of their respective perception of *gharar*.⁴⁶ Imam Al-shafeyee considered *gharar* in *bai-al-gha'ib* to be excessive. Imam Malik viewed it be negligible and Abu Hanifah considered it to be no problem so long as the buyer is granted the option of viewing.⁴⁷ Ibn Taymiyah said that "These kind of sales, such as that of the offspring of an unborn animal (*habal-al-habalah*) or the sale of fruit prior to its ripening, are forbidden because of the presence of an element of risk-taking that involves devouring the property of others."⁴⁸

There is also controversy, as noted above, regarding the validity of sale of the non-existent (*bai-al-madum*). Many scholars have stated that there is a general consensus (*ijma*) among the leading schools of law on the prohibition of this sale.⁴⁹ Actually the

presence or absence of gharar in bai-al-madum has been judged and evaluated differently by the scholars, and a clear departure from the earlier assessment has been developed in the subsequent evolution of juristic ijtiḥad.⁵⁰

Bai-bi-sir' al-Suq (Sale at the Market Price)

Sale is, by definition, the change of values between two parties by mutual consent. Muslim jurists have generally held that mutual consent can only materialize if the parties know the price of the object of the sale. There is unanimity among the scholars of the madhahib that the price must be determined at the time of contract, but there is disagreement about the exact nature of this requirement.⁵¹

Subject Matter of Contract

The subject matter or object of the contract must exist, be defined and be deliverable at the time of the contract. It is also said that the subject matter must not only exist but also be owned by the seller at the time of contract because there is the title of a direct translation of a well known ḥadith?"Sell not what is not with you".⁵² But there is a discrepancy in its authenticity and chain of transmission and the rulings that we have may, therefore, be seen as manifestations of juristic ijtiḥad which command no finality and the matter may thus be said to remain open to further interpretation.⁵³

Legal Forms of Business Practice in Islam

Business practices are the types and forms of business activities, ventures, undertakings, schemes or other involvements through which people earn income or profits. A number of business practices, good or bad, emerge and were in practice in the then Arabia during the period of the Prophet (pbuh). Advent of Islam rectified all evils associated with all business transactions. Legal forms of business transaction in Islamic law are administered by the four sources thereof. Such as the Qur'an, the Ḥadith, the Ijma and the Qiyas. The business transactions as approved by Islam are as follows:⁵⁴

Mudarabah Partnership

This is a business contract under which the entrepreneur obtains finance from a financier on the condition that he will conduct the

business alone without taking any help from the financier. This prescribes that under such an arrangement the entrepreneur or the manager will share in the profits of the business as agreed in the contract. If there is any failure in the business, entire losses are to be borne by the financier and the manager will go without reward. This is known as Mudarabah Partnership.

Musharaka Partnership

When some persons jointly make a business, the partners enjoy similar business rights and have unlimited liability to their creditors. They share in the profits of the business in the agreed proportion and bear losses, if any, in proportion to capital supplied. This partnership relationship is known as Musharaka partnership.

Commission (Juala) & Agency (Wakala)

In case of financier being himself a trader, manufacturer, producer or importer, he as a managing party may offer himself to promote the business on a commission basis. In other words, he may earn a commission on the goods procured on behalf of the businessmen. He may also act as agent for the businessman to secure business orders. Islamic business law calls the former activity Juala (commission business) and the latter wakala (agency).

Bai-al-Salam (Deferred delivery)

There can be a contractual agreement between the businessman and the financier that the former will arrange a deferred supply of the goods to be produced, imported or procured by him, at a concession rate, on the condition of an advance payment by the latter (purchaser). This is a business arrangement, which as per Islamic Law, is termed as Bai-al- Salam.

Bai-al-Istisna

When a manufacturer, an artisan or a craftsman takes orders with or without advance payment for manufacturing the articles himself or through hired labourers, the arrangement is known as Bai-al-Istisna.

Muzaraa & Musaqat

A farmer having no land or only a small piece of land may go for a share-cropping arrangement with somebody else's land. This is

known as Muzara'a. If the arrangement is made for planting and tending of fruit trees or maintenance of an orchard, it is termed as Musaqat. Both the schemes are allowed in Islam.

Bai-al-Muajjal & Bai-al-Murabaha

Sale on credit under Islamic law is known as Bai-al-Muajjal and payment by instalment is called Taqsid. There might be two ways of quoting the sale price- a) the seller may quote a lump sum price for cash or credit sale, and b) he may charge on his offer a rate or an amount of profit over and above the known cost price. Quotations of the kinds mentioned above as in (b) are known as Murabaha.

Lease & Hire Purchase

Lease means to permit somebody or obtain the use of something in exchange for rent. Lease in a contract by which the owner of land or of a building allows another person to use it for a specified time, usually in return for rent with money.

Here leasing may take place in a situation when machinery of items involving a huge cost are beyond affordability of the purchaser. In this situation one may take lease of the item from its owner and make instalment payments, including the price of the goods along with a share of profit to the owner, until the full payment is done. The ownership remains with the owner until the price of the goods repaid. In case of hire purchase the mechanism is almost the same except the ownership of the hired item remains joint until the purchaser pays the last instalment and ownership shifts exclusively to him.

Ijara

Ijara is a word that carries the sense of both hire and lease. It is used to express the sale of known benefit in return for its known equivalent. Ijara is of two kinds:

- 1) Use of corporeal property. This may take one of three forms:
 - a) Immovable property, such as land or premises.
 - b) Merchandise, such as furniture, machinery etc,
 - c) Animal such as cattle.
- 2) Personal service such as, working for others as consultancy.

Agency (Wakala)

Wakala means entrusting a person as a businessman to act on his behalf or as his representative. It has been very common practice to appoint an agent (wakil) to facilitate the trade operations i.e., principal and agent relationship.

Trust (Amanah)

The term Amana is used to mean a responsibility arising out of contract of safekeeping (wadia). When an employer hands over his property to an employee, it becomes a trust (amanah). Amanah may be with or without agreement.

The general rule of a trust is that it is not a thing for which compensation has to be paid. However, in the case of destruction or damage to a trust without any fault being committed by the trustee, the trustee should be paid compensation. On the other hand, the one who has wrongfully approached the property in trust, is responsible for indemnifying the loss whether or not he was at fault.

Deposits (Wadia)

Wadia or deposit arises when a person keeps his property with another person for safekeeping allowing him to use it without the intention of receiving any return from it.

Lending for Gratuitous Use (Ariya)

When lending takes place between a lender and the borrower with contention that the former will not charge anything for the use of thing he lent out, it is called Ariya.

Pledge (Ruhn)

A pledge is a security commitment in terms of property provided by the borrower against a loan, the payment of which may be recovered from the value of the property. The Qur'an supports the idea of furnishing a pledge against a debt.

Suretyship (Kifala)

Kifala means an obligation that a person wants to assume in addition to his existing obligation in respect of a demand for something. This may relate to a person, finance or an act.

When it relates to a person, kifala involves production of a person for whom the kifala (bail) has been given. When it relates to

finance, kifala means an obligation to be met in the event of principal debtor's inability to honour his obligation. When it relates to an act, kifala implies timely delivery of the thing contracted by the principal.

Transfer of Debt (Howala)

Howala means transferring a debt from one debtor to another. First debtor is released from debt when Howala takes place. The difference between kifala & howala lies in the fact that in the former case the principal debtor is not released but in the latter case the principal debtor is released.

Islamic Law Relating to Loan Transactions

Islamic law permits loan transactions. The evidence can be seen in the following Qura'nic text. As Allah (ST) says:

' O ye who believe! when ye deal, one with another in lending for a term named reduce it to writing. Let a scribe write down faithfully as between parties: let not the scribe refuse to write: as God has taught him, so let him write. Let him who incurs the liability dictate, but let him fear his Lord Allah, and not diminish aught of what he owes. If the party liable is mentally deficient, or weak, or unable himself to dictate, let his guardian dictate faithfully and get two witnesses out of your own men and if there are not two men, then a man and two women, such as ye choose, for witnesses should not refuse when they are called on (for evidence). Disdain not to reduce to writing (your contract) for a future period, whether it be small or big: it is justified in the sight of Allah, more suitable as evidence. and more convenient to prevent doubts among yourselves but if it be transaction which ye carry out on the spot among yourselves, there is no blame on you if ye reduce it not to writing, But take witnesses whenever ye make a commercial contract: and let neither scribe nor witness suffer harm. If you do (such harm) it would be wickedness in you. So fear God: for it is God that teaches you. And God is well acquainted with all things.⁵⁵

The first part of the text deals with transactions involving future payment, and the second part with transactions in which payment and delivery are made on the spot. As to the transactions of the first part written document is recommended while the transactions performed on the spot require no evidence in writing

except oral witnesses and even these oral witnesses are dispensed with if the parties trust each other: Let the trustee (faithfully) discharge his trust, and let him fear his Lord.

The word *salaf* literally means a loan, which draws forth no profit for the creditor. In its wide sense it includes loans for specified periods i.e. short, intermediate and long-term loans. But if it is immediately to be paid it is called *qard* or loan payable on demand. This is, in fact, a particular kind of *salaf*.⁵⁶

The literal, meaning of *qard* is 'to cut'. It is called so because the property is really cut off when it is given to the borrower. Loan advancing by way of *qard* is, according to the sayings of the prophet, more pleasing to God than alms giving? Its legality is proved, beyond doubt, by the Sunnah or traditions of the Prophet (pbuh) and the *ijma* or the consensus of jurists.⁵⁷

It is narrated by Abu Rafi that the Prophet (pbuh) borrowed a young camel and, when other camels were presented to him, asked Abu Rafi to give away its similar or substitute to the person who had lent him the camel. Abu Rafi told the Prophet (pbuh) that he could not find among the presented camels a young one of the type of the borrowed camel, as they were all of the superior quality. The Prophet (pbuh) asked Abu Rafi to give away a superior one in return for the borrowed camel, for the best (among people) are those who repay (the debt) in the best possible manner. The Shafeyee School describes *Qard* as *hasan* or beautiful which is referred to in the Qur'an: "Who is he that will loan to God a beautiful loan (*qardan hasnanah*), Which Allah will double into his credit and multiply many times? It is Allah that gives (you) want or plenty and to Him shall be your return."⁵⁸ It may be said that, *Qard* is a kind of loan advanced for the benefit of the borrower.⁵⁹

From the above it is proved that the loan, according to Islamic law, may consist of every thing that is valuable. Lending and borrowing are indeed, unavoidable in this worldly life, and, therefore, permissible in Islam. Had it not been permissible the Prophet would never have set an example of a borrower. But it has to be borne in mind that the loan whereby something in excess is exacted becomes unlawful as it amounts to *riba*. To sum up loan under Islamic law, may be classified into *salaf* and *qard*. The

former being for a fixed time and the latter on demand and every loan that draws forth or stipulates profit is unlawful.⁶⁰

Conclusion

Islam came in this world with a great manifesto to emancipate the entire people of the world from indiscipline, conflicts and injustice. Islam emits proper guidelines for everything essential for human life. It adopts the behaviours and manners of the Ummah as legal rules (Ahkame Shari'ah), which is deduced from shari'ah evidences.

Basic Islamic principles regarding financial transaction should be considered and applied in day-to-day monetary transaction. Islamic law has clearly prohibited riba because of its hardship and injustice to the people. At the same time it has considered some basic means of transaction, which have already been applied, in monetary transaction by Islamic banks. If the Islamic principles and means of economic transactions are applied properly and according to shari'ah exploitation free society will be established which is one of the objectives of Islamic law.

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A COMPARATIVE STUDY ON MUSLIM AND HINDU PERSONAL LAW WITH SPECIAL REFERENCE TO MARRIAGE: BANGLADESH PERSPECTIVE

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Introduction

Marriage, according to Hindu Law, is a holy sanskar (sacrament) and not a contract unlike Muslim Law. The maxim "conjunctio maritum et matris est de nature" means to keep husband and wife together is the law of nature and the maxim "viresunt in lege una persona" means husband and wife are considered one in law.¹

It is argued that Muslim law does not prescribe equal rights between husband and wife and it shows discrimination on several grounds, namely, wife's right to inheritance, divorce, polygamy, witness etc. On the other hand, it is also argued that a Hindu woman's position under the Hindu law of inheritance, divorce etc is worse than that of Muslim counterpart.

~~Under the Dayabhaga law, the right to inherit arises on the heir's capacity to confer or offer spiritual benefit to the propositus. In other words, heirship depends on the capacity to confer salvation to the souls of the paternal and maternal ancestors through those who live. A widowed, sonless or childless daughter cannot inherit, as she cannot afford spiritual benefit thought a son². Therefore, unmarried daughters and daughters with sons are the inheritors, while married daughters with daughters and childless daughters are excluded. In India, the Hindu Succession Act o 1956 only brought ground-breaking changes to this situation.~~

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In Bangladesh, the limited right of life estate or widow's estate accorded to a woman, is sometimes referred to as her inheritance, although this is an anomaly within the strict understanding of the terms 'inheritance', 'legacy' or 'birthright'.³

Moreover, divorce for Hindus is not possible in Bangladesh, under no circumstances has the Hindu woman any recourse to bring a suit for dissolution of marriage. While a Hindu man may have several wives, there is no stipulation for the equal treatment of any of them, as is the case in Islam. Nor is a husband's polygyny or unequal treatment of any one of his wives grounds for relief for dissolution.⁴ The most she may get is limited relief under the Hindu Married Women's Right to Separate Residence and Maintenance Act, 1946 as Section 2 of which she is entitled her to separate residence and maintenance from her husband on one or more grounds.

In fact, some timely statutory developments have enriched the periphery of the Muslim law in Bangladesh. And at the same time, these statutory laws relating to marriage and its interrelated issues, vis a vis, divorce, dissolution of marriage, maintenance, inheritance, polygamy, etc, have contributed positively to maintain the basic spirit of the Muslim sharia law and the right of the husband and wife simultaneously. Despite advances made in Bangladesh in respect of Muslim law and in India in reforming Hindu law and granting women certain redress in cases of marriage and inheritance and other personal matters, yet discrimination in Hindu laws still prevail in Bangladesh. Noticeably a radical change has been taken recently in Hindu personal law in the form of enactments. Some of the enactments are the Special Marriage Act, 1954, the Hindu Marriage Act, 1955, the Hindu Succession Act, 1956, the Hindu Minority and Guardianship Act, 1956, and the Hindu Adoption and Maintenance Act, 1956.⁵

Marking these important views in mind cited above, in this paper an attempt is made to focus, through a comparative study, the various legal aspects and provisions regarding marriage and marriage related issues in the Muslim and in the Hindu personal law and to trace possible trends of further legislative development both in Muslim and in Hindu personal law in Bangladesh. To do

so, the provisions of the Muslim personal law (sharia and statutory) and the Hindu personal law (divine and statutory) with regard to marriage and marriage related issues like divorce, dissolution of marriage ,inheritance ,maintenance, polygamy, dowry, adoption etc will be discussed here under the following heads. Such as, the pre-Islamic practice of marriage and the ancient practice of Hindu marriage, religious importance of marriage in Muslim and Hindu law, different aspects of marriage and related issues in Muslim as well as in Hindu law, analysis on statutory development on different aspects of marriage of Muslims and Hindus in Bangladesh, a comparison of marriage under Muslim and Hindu law, a concluding remark with recommendations.

Pre-Islamic Practice of Marriage

The relationship of sexes in pre-Islamic Arabia was in an uncertain state. Regular form of marriage in the sense as we understand today was very rare. The sexual unions that existed in that period may only be branded as prostitution, adultery or polyandry.⁶

In those days, four types of relations between man and woman were accepted as marriage. such as,⁷

- i. The first one is a permanent form of relation where a man would marry a girl by making an offer to the parents or guardian of the girl in consideration of a fixed sum of money as dower.
- ii. A custom according to which a man would say to his wife: "Send for so and so and have intercourse with him." The husband would then keep away from her society until she had conceived by the man indicated, but after her pregnancy became apparent, he would return to her.
- iii. A number of men, less than ten, used to go to a woman and have sexual connection with her. If she conceived and was delivered a child, she would send for them, and they would be all bound to come. When they came, the woman would address them saying: "You know what has happened. I have now brought forth a child this is your son." The child would then be ascribed to him and he was not allowed to disclaim its paternity whom she is indicated.

- iv. A number of men used to visit a woman who was a prostitute and used to fix at the door of her tent a flag as a sign of her calling. If a woman of this class conceived or brought forth a child, the men that frequented her house would be assembled, and physionomists used to decide to whom the child belonged.

The Ancient Practice of Hindu Marriage

According to ancient Hindu Law, marriage is the last of the ten sacrament,⁸ and is a tie, a sacred tie, a tie which can never be broken. It is a relation established by birth to birth. Even death cannot break this relation of husband and wife which is not only sacred and religious but is a holy union also (Smrite). Once created this seared tie cannot be untied. The institution of marriage is a sacrament and not a mere socio-legal contract.⁹ Every Hindu, male or female, had to marry. where a person could not remain a perpetual celibate, or student or where he did not desire to be an ascetic (sanyasin), he was enjoined by the Shastra's to marry. But with the changed condition of life, marriage became optional for both, a male and a female.¹⁰ The ancient Hindu Law recognized eight forms of Sastric marriages: (i) Brahma, (ii) Daiva, (iii) Arsha, (iv) Prajapatya, (v) Ashura, (vi) Gandharva, (vii) Rakshasa and (viii) Paishacha. The first four forms of marriage, i.e., Brahma, Daiva, Arsha and Prajapatya which essentially consisted of the gift of the girl by the father to the groom, were called "regular" or dharmya forms of marriages. The remaining four forms: Ashura, Ghandharva, Rakshasa and Paishacha, were termed as "irregular" or adharmya forms of marriages. In Ashura marriage wealth was to be given to the bride's parent by the groom, while Gandharva marriage was the result of an amorous inclination of the bride and the groom reciprocally. Seizure of the bride by force or fraud and marrying her was a Pakshasa form of marriage and when the girl was ravished while sleeping or drink or where she was disordered in mind and afterwards married, the marriage was termed a paishacha marriage.¹¹

One could marry within one's own religion and caste but here also marriage was not possible within one's gatra and pravara, i.e., descendants of three immediate paternal ancestors of founders of one's gotra. No lowest age for marriage was prescribed. Polygamy was permitted but polyandry was illegal.¹²

Religious Importance of Marriage in Muslim and Hindu Law

Marriage is necessarily the basis of social organization and the foundation of important legal rights and obligations. The importance and the imperative character of the institution of marriage needs no comment. Marriage is reorganized in Islam as the basis of society. It is a contract, but it is also a sacred covenant. Temporary marriage is forbidden. Marriage as an institution leads to the uplift of man and is a means for the continuance of the human race. Spouses are strictly enjoined to honor and love for each other.¹³ Islamic law gives to the women a definitely high social status after marriage.¹⁴ The prophet was determined to raise the status of woman. He asked people to see their brides before marrying them¹⁵ and taught that nobility of character is the best reason for marrying a woman¹⁶. But this aspect of Muslim marriage is very often overlooked. On the other hand, the object of Hindu marriage has been more connected with the performance of religious duties and begetting of a son who enables a man to get deliverance from the suffering of hell. Hindu marriage is an indissoluble tie which is solemnized once and for all.¹⁷ It fortifies the concept of oneness which is expressed by an adage, "A woman is half of her husband and completes him."¹⁸

But al Quran ordains every Muslim to marry if they are competent for that. So, marriage is compulsory to the competent Muslim man or woman as the verses of Quran says "And marry such of you as are solitary and the pious of your slaves and maid servants. If they be poor Allah will enrich them of His bounty. Allah is of ample means, and aware."¹⁹. Every Hindu, male or female, is also bound to marry by the Shashtra's if he or she does not want to be an ascetic (sanyasin)²⁰. Marriage in Islamic Law has an object of procreation. Al Quran ordains "O mankind! Be careful of your duty to your Lord who created you from a single soul and from it created its mate and from them twain hath spread abroad a multitude of men and women. ..." ²¹Hence, valid reproduction of human generation also depends on marriage. Not only that, it creates love and honor to each other as well. It brings a reciprocal affection and passions to the marrying parties. The relevant passage of al Quran is that: "He created for you helpmates from yourselves that ye might find rest in them, and He ordained between you love and mercy"²² It shows the concept of marriage in both religions are not the same as the concept of God & world are not the same.

Different Aspects of Marriage under Muslim Law as well as Hindu Law

A. Marriage

Among the Arabs nikah, or "marriage", is a wide term, comprising many different forms of sex relationship.²³ But in Muslim Law it has a very definite legal meaning. It is a contract for the legalization of relationship of man and woman and the procreation of children.²⁴ According to Ameer Ali, marriage is an institution ordained for the protection of society, and in order that human beings may guard themselves from foulness and unchastity.²⁵ Justice Mahamood in the leading case of Abdul Kadir V. Salima Observes: Marriage among Muhammadans is not a sacrament, but purely a civil contract.²⁶ But it has been observed from the nature of the Muslim marriage that it is not just a civil contract. Because, unlike civil contracts, it cannot be made contingent on a future event; and it cannot be for a limited time. It has thus been seen that Abdur Rahim's definition is by far the best, as it gives proper weight age to both the aspects of marriage, namely, temporal and religious.

In Abdur Rahim's language: "The Muhammadan jurists regard the institution of marriage as partaking both of the nature of ibadat or devotional acts and muamalat or dealings among men."²⁷ A similar kind of definition is also found in the law lexicon. Such as, Marriage is a civil and religious contract, whereby a man is joined and united to a woman, for the purposes of civilized society.²⁸ On the other hand, in Hindu Law marriage is treated as a samskara or a sacrament.²⁹ It is the last of the ten sacraments, enjoined by the Hindu religion for generation of men and obligatory in case of every Hindu who does not desire to adopt the life of a Sanyasin.³⁰ Since there is not any statutory enactment in Bangladesh regarding Hindu personal Law, marriage in Hindu Law could be solemnized in one of the eight forms recognized by Law.

B. Conditions of Marriage

It is essential to the validity of a Muslim marriage that there should be a proposal made by or on behalf of the parties to the marriage, and an acceptance of the proposal by or on behalf of the other, in the presence and hearing of two male or one male and two female witnesses who must be sane and adult Mohammedans.³¹ The

proposal and acceptance must both be expressed at one meeting; a proposal made at one meeting and an acceptance made at another meeting do not constitute a valid marriage.³² Marriage may be constituted without any ceremonial; there are no special rites, no officiants, no irksome formalities.³³ The words with which the marriage is contracted must be clear and unambiguous.³⁴ Since no reform has been brought in Bangladesh, the textual old Hindu Law is still applicable among the Hindus in Bangladesh that require three conditions for a valid marriage. Such as,³⁵ i. identity of caste between the parties; ii. parties to be beyond the prohibited degrees of relationship, i.e., are not the same gotra or provara and are the sapinda of each other; iii. Proper performance of ceremonies of marriage.

C. Capacity for Marriage

Every Muslim of sound mind who has attained puberty, may enter into a contract of marriage. Lunatics and minors who have not attained puberty may be validly contracted in marriage by their respective guardians. No lowest age of marriage is mentioned in the Quran. Here the relevant verses of al Quran are: "Prove orphans till they reach the marriageable age; then if you find them of sound judgement, deliver over unto them their fortune;"³⁶. The presumption is that a person attains majority at 15 years of age.³⁷ But the Hedaya lays down that the earliest period for a boy is 12 years and for a girl 9 years.³⁸ A marriage of a Muslim who is of sound mind and has attained the puberty, is void, if it is brought about without his consent.³⁹ In Hindu law also no lowest age for marriage was prescribed before the Hindu Marriage Act, 1955. One could marry at any age.⁴⁰ The marriage of Hindu children can be arranged by their guardian, and though the child Marriage Restraint Act, 1929 limits the marriage of children (if male under 21 years and if female, under 18 years), it does not affect the validity of such marriage.

D. Guardianship in Marriage

An Indian scholar Mr. Tyabji defines 'guardian' as follows: "A guardian for marriage is a person authorized by law to make a valid contract for effecting the marriage of a minor or person of unsound mind."⁴¹ "The right to contract a minor in marriage belongs successively to the (1) father, (2) paternal grand father how high so ever, and (3) brother and male relations on the fathers side in the

order of inheritance enumerated in the Table of Residuaries. In default of paternal relations, the right devolves upon the mother, maternal uncle or aunt and other maternal relations within the prohibited degrees. In default of maternal kindred, it devolves upon the ruling authority."⁴²

Option of Puberty

When a minor is married by his lawful guardian, other than the father or paternal grand father, such a marriage can be repudiated by the minor on attaining the age of puberty.⁴³ By the older law, a minor girl contracted in marriage by her father or grandfather could not exercise the option of puberty; this restriction has now been removed by the Dissolution of Muslim Marriage Act, 1939.⁴⁴ Unlike the Muslim girl, a Hindu girl has no option on reaching puberty to repudiate the marriage. But in India, many of these disabilities have been removed by the Hindu Marriage Act 1955. One mentionable note is that the consent of the guardian is not a condition precedent to the validity of the Hindu child marriage. (22 Bom 509) The primary duty and the co-relative right of giving a girl in marriage rests with the father. But where father has deserted the mother and daughter, the mother can give the daughter in marriage without the consent of the father. (11 Bom 247) According to Mitakshara school, the following persons in order can be guardian in Hindu marriage of a child-(i) Father, (ii) Paternal grand father, (iii) The Brother, (iv) Other paternal relations of the girl in order of propinquity, (v) The maternal grand father, (vi) The Maternal uncle, (vii) Mother. But stepmother has no right to give in marriage. (7 W.R 321).

E. Dower

Mohr or dower is a sum of money or other property which the wife is entitled to receive from the husband in consideration of the marriage.⁴⁵ The amount of dower may be settled by the parties at the time of marriage or after. This is specified dower. When dower is payable on demand, it is prompt dower. When dower is payable on the dissolution of marriage by death or divorce, it is deferred dower. In such cases where dower has not been settled at the time of the marriage, proper dower should be fixed with reference to the social position of the wife's family and her own personal qualifications. Sura 4, Ayat 4 of the al Quram requires, "Give women

their dowries as a free gift. But if they of themselves be pleased to give you a portion thereof, consume it with enjoyment and pleasure." So, dower is an essential condition of a Muslim marriage.

Under Hindu law dower is not a requirement⁴⁶ rather dowry is practiced.

F. Ceremonies

Muslim marriage may be constituted without any ceremonial functions; there are no special rites, no officiants, no irksome formalities.⁴⁷ Whereas, marriage among Hindus being a religious and sacred tie, there are three important stages wherein certain ceremonies were to be performed. They are:⁴⁸i. Betrothal (Vakdan) or a formal promise to give the girl in marriage; ii. Kanyadan, or actual giving away of the girl in marriage or formal donation of the bride by her father; iii. Saptapadi, which consists in performing a ceremony of taking seven steps before the sacred fire by the bride and the groom. It is pertinent to mention that the ceremony of saptapadi is necessary to complete a marriage performed according to the orthodox rites.⁴⁹ Further, it is to be noted that cohabitation is not necessary to complete a marriage.⁵⁰ Ironically, many of the present practices of Muslim Marriage have nothing to do with strict Muslim Law of Marriage, rather these are imported from the non Muslim culture.

G. Forms and Effects of Marriage

Classification of Muslim Marriages

A marriage may be valid (Sahih), or irregular (fasid), or void from the beginning (batil).⁵¹ For example,

- i. Valid: A valid marriage is one which confirms in all respects with the legal requirements, and there should be no prohibition affecting the parties. "A valid marriage confers upon the wife the right to dower, maintenance and residence in her husband's house, imposes on her the obligation to be faithful and obedient to him, to admit him to sexual relation, and to observe the iddat. It creates between the parties prohibited degrees of relation and reciprocal rights of inheritance."⁵²
- ii. Void: A marriage which has no legal results is termed as void. A marriage forbidden by the rules of blood relationship is void.

"A void marriage is no marriage at all. It does not create any civil rights or obligations between the parties; the offspring of a void marriage are illegitimate."⁵³

- iii. Irregular: A marriage which is relatively unlawful and may be made regular by removing the unlawfulness, is irregular. For example: A marriage without witnesses. "An irregular marriage may be terminated by either party, either before or after consummation. An irregular marriage has no legal effect before consummation; after consummation the wife is entitled to dower, proper or specified whichever is less; she is bound to observe iddat for a duration of three courses; the issue of the marriage is legitimate; this type of marriage does not create mutual rights of inheritance."⁵⁴

Kinds of Hindu Marriage

The ancient Hindu Law recognized eight forms of marriage of which four are approved and four unapproved forms. It is to be noted that the Hindu belonging to any class may marry either in the Brahma form or the Ashura form. (3 All 738, Sarker Sastri's P-71; 188 Mainyes p-1230 to 135)

Effect of hindu marriage on bride

"The girl becomes the member of her husband's family. She acquires gatra of her husband and Sapindaship akin to her husband. All relations and ties within parent's family come to an end" [1993 Andra pra.229] The lawfully wedded wife acquires from the moment of her marriage a right to the property belonging to her husband at the times and also to any property that may subsequently be acquired by him though it is limited over a certain amount of property to be enjoyed only during her life time.

H. Dissolution of Marriage

Marriage though for life, but it can be dissolved due to some valid reasons.

Muslim Marriage

Modes of dissolution are: ⁵⁵.

- A) By the death of husband or wife,
B) By the act of the parties: that is,
1. By the husband- through I. Talaq: which are: (a) Talaq-ul-Sunnat: Ahsan (most approved) and Hassan (approved), (b)

Talaq-ul-Biddat: Triple divorce and One irrevocable divorce (in writing generally). II. Ila (vow of continence). III. Zihar (Injurious comparison).

2. By the wife (Talaq-e-Tafwiz) or delegated divorce.

3. By Mutual consent: that is: I. Khula (redemption) and II. Mubara'a (mutual freeing).

C) By Judicial Process, that is: 1. Lian (mutual imprecation) and 2. Faskh (judicial annulment).

Hindu Marriage

"A marriage from Hindu point of view is regarded as an indissoluble union of husband and wife and extending to the next world. It is pertinent to mention that an apostasy or conversion to another faith or desertion does not effect the dissolution of marriage in Hindu Law. Not only that a loss of caste and change of religion does not operate as dissolution of marriage."⁵⁶

I. Divorce

The word talaq is usually rendered as repudiation. Divorce is generally referred to as talaq, meaning repudiation or a cutting off of the marital tie. In the opinion of Fyzee a Muslim husband of sound mind may divorce his wife whenever he so desires without assigning any cause.⁵⁷ It is not true. He should have valid reasons to apply the power as the last resort.

A talaq may be effected in any of the following ways:⁵⁸ 1. **Talaq Ahsan:** This consists of single pronouncement of divorce made during a period between menstruations (tuhr) followed by abstinence from sexual relation for the period of iddat. 2. **Talaq Hasan:** This consists of three pronouncements made during successive purification, no intercourse taking place during any of the three purification. 3. **Talaq-ul-Biddat:** This consists of (i) Three pronouncements made during a single purification either in one sentence, or in separate sentences, or (ii) a single pronouncement made during a purification clearly indicating an intention irrevocably to dissolve the marriage.

"Although the power to give divorce belongs primarily to the husband, he may delegate the power to the wife or to a third person, either absolutely or conditionally, and either for a particular period or permanently. An agreement made, whether

before or after marriage, by which it is provided that the wife should be at liberty to divorce herself in specified contingencies is valid, if the conditions are of a reasonable nature and are not opposed to the policy of the Mohomedan Law.⁵⁹

With regard to the permissibility of divorce al Quran says-"And if he hath divorced her (the third time), then she is not lawful unto him thereafter until she hath wedded another husband." (Al-Baqarah, 2:230)

"Divorce is not known to the Hindu Law. (1933 Bom 1381). But though Hindu Law does not contemplate divorce, yet it has been held that where it is recognized as an established custom, it would have, the force of law.⁶⁰ So, neither party to a marriage can divorce the other unless divorce is allowed by custom. Death does not dissolve a Hindu marriage, therefore, a widow cannot remarry. But this situation has been changed by the Hindu widows Remarriage Act, 1856. In Bangladesh a Hindu does not have the option of divorce but the woman can have separate residence and maintenance under the Hindu Married Women Right to Separate Residence and Maintenance Act, 1946.

J. Disabilities in Marriage

Disabilities in Muslim Marriage

There are seven limitations to the unfettered capacity of a Muslim to marry any person of the opposite sex. The prohibition may be on the following grounds.⁶¹

Number

As to plurality of husbands or wives, the rule in Islam is that a Muslim man may marry any number of wives, not exceeding four; as al Quran pronounces: And if fear that you will not deal fairly by the orphans, marry of the women, who seem good to you, two or three or four; and if you fear that you cannot do justice to them then one only or the captives that your right hands possess. Thus it is more likely that he will not do injustice. (Al-Nisha, 4:3) A Muslim woman can marry one man only.

Difference of religion

Muslim belonging to different schools may intermarry freely and a mere difference of a schools of law, such as shiite or Sunnite, is entirely immaterial. Under Hanafi Law, a man may marry a

Muslim woman or a Kitabya, but a Muslim woman cannot marry any one except a Muslim. A Muslim, however, cannot marry an idolatress or a fire worshipper; and a Muslim woman cannot even marry a Kitabi. As al-Quran provides "Wed not idolatresses till they believe; for Lo! a believing bondwoman is better than an idolatress though she please you; and give not your daughters in marriage to idolaters till they believe, for Lo! a believing slave is better than an idolater though he pleases you." (Al-Baqarah, 2:221)

Relationship

Law with regard to relations with whom to be married or not to be married is appeared in Sura Al-Nisha 4: 22, 23, 24, And 25. Such as,

- a. Consanguinity : A Muslim is prohibited to marry- a. his own ascendants or descendants; b. his father's or mother's descendants; and c. the sisters or brothers of any ascendants.
- b. Affinity : It is unlawful for a Muslim to marry- a. Ascendants or descendants of the wife; and b. The wife of any ascendant or descendant.

Fosterage

Muslim Law prohibits marriage within certain limits of fosterage. A man may not for instance, marry his foster-mother, or his foster sister.

Unlawful Conjunction

A man is also prohibited to have two wives at the same time, who are related to each other by consanguinity, affinity or fosterage, that they could not have lawfully intermarried with each other if they had been of different sexes.

Iddat

A widow, a divorced woman or a woman who is pregnant by illicit intercourse are prohibited from remarrying or marrying during the period of iddat. The objective of iddat is to ascertain whether the woman is pregnant or not and to ascertain the paternity of the child. The period of Iddat in case of (a) the marriage dissolved by death is 4 months and 10 days or, if the woman is pregnant, till delivery, whichever is longer; (b) and the marriage is consummated and dissolved by divorce, it is three courses, or till delivery in case of pregnancy. As al-Quran provides: "Women who are divorced shall wait, keeping themselves apart, three monthly courses..." (Al-Baqarah, 2:228)

Miscellaneous

There are some irregular prohibitions

- a. The Doctrine of Equality in Marriage : It is the doctrine of kufu or equality of spouses. Under Hanafi law, there are six requisites to equality: 1. Nasab (Family or descent), 2. Islam (Religion), 3. Profession, 4. Freedom, 5. Honesty (Religiosity), 6. Means (financial capacity).

The Hanafis accordingly hold that equality between the two parties is a necessary condition in marriage.

- b. Illicit intercourse and undue familiarity : It is totally prohibited and punishable offence.
- c. Pilgrimage : In Ithna Ashari and shafi law Muslim may not marry during pilgrimage.
- d. Divorce : When a man divorces a woman, and the divorce is effective as a triple Talaq, remarriage between them is impossible unless the woman observes Idda, lawfully marries another husband, the second marriage is consummated, and the second husband lawfully and effectively divorces her.

Disabilities in Hindu Marriage⁶²

Number

A Hindu man may marry any number of wives though he has a wife or wives living. But only one husband at a time is allowed under Hindu Law. So, polygamy is permissible but polyandry is prohibited.

Prohibited degrees in Hindu marriage

Rules regarding the prohibited degrees are: a. A man cannot marry a girl of same gotra or provara. But this rule does not apply to Shudra as they don't have gotra of their own. It is to be noted that Hindu Marriage Disabilities Removal Act, 1946 has been introduced a great change in permitting sagotra marriage. b. A man cannot marry a girl who is sapinda.

Inter caste marriage

According to the provision of shastric Hindu law, inter caste marriages are invalid. But now the inter caste marriages are sanctioned by the Act 888 of 1923 which has amended the special marriage Act 1872.

An Analysis on Statutory Development in Different Aspect of Marriage of Muslim and Hindus in Bangladesh

Bangladeshi legal system is a mixed arrangement of laws that consists of a combined influence of indigenous Indian, Moghul and English legal imprints. Upon independence in 1971, Bangladesh inherited this vast mixed body of legal system. This large compendium of laws was adopted by the Bangladesh (Adaptation of Existing Bangladesh Laws) Order 1972. Moreover, Article 149 of the Constitution of Bangladesh provides that, "Subject to the provisions of this constitution all existing laws shall continue to have effect not with standing any other provisions of the constitution." A vast area of family laws is governed by the civil law. But the aspects of marriage, divorce, dower, restitution of conjugal rights are governed separately by each religious community's "religious personal law" system. We will now look into the different statutory provisions on marriage in Muslim personal law applied in Bangladesh:

Application of Shariat Law

Related Statute : The Muslim Personal Law (Shariat) Application Act, 1937.

This Act has been enacted to make provision for the application of the Muslim personal law (Shariat) to Muslims.

According to sect. of this act, Muslim personal law shall be the rule of decision, in cases where the parties are Muslims, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females including property inherited or obtained under contract or gift or any other provision of personal law, marriage, dissolution of marriage, including Talaq, illa, zihar, lian, khula and mubarat, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institution and charitable and religious endowments) notwithstanding any custom or usage to the contrary. So, in Bangladesh Muslim personal law is followed in Muslim marriages.

Age of marriage

Related Statute : The Child Marriage Restraint Act, 1929.

This Act has been brought about to restrain the solemnization of child marriage. Under this Act, child means a person who if a male,

is under twenty one years of age, and if female, is under eighteen years of age. Section 4 of this Act lays down provision for punishment of male adult above twenty one years of age marrying a child or of female adult above eighteen years of age marrying a child, and the punishment is simple imprisonment which may extend to one month or fine which may extend to one thousand taka or both. There are provisions regarding the punishment for solemnization of a child marriage also. Parents and guardians also be punished in certain situation under section 6 of this Act, if they do any act to promote the marriage or permit it to be solemnized, or negligently fails to prevent it from being solemnized And here also the punishment may extend to one month imprisonment or one thousand taka or both. So, the statutory minimum age of Muslim marriage is now, for a male, twenty-one years and for a female, it is eighteen years of age. This age provision is not in line with the law of Islam

Decree for dissolution of marriage by women

Related statute : The Dissolution of Muslim Marriages Act,1939
Grounds for decree for dissolution of marriage are incorporated in section 2 which provides that a woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the following grounds, namely: I) that the whereabouts of the husband have not been known for a period of four years; II) that the husband has neglected or has failed to provide for her maintenance for a period of two years; III) that the husband has taken an additional wife violating the provisions of Muslim Family Laws Ordinance 1961; IV) that the husband has been sentenced to imprisonment for a period of seven years or upwards; V) that the husband failed to perform, without reasonable cause, his marital obligations for a period of three years; VI) that the husband was impotent at the time of the marriage and continues to be so; VII) that the husband has been insane for a period of two years or is suffering from leprosy or a virulent venereal disease; VIII) that she, having been given in marriage by her father or other guardian before she attained the age of eighteen years, repudiated the marriage before attaining the age of nineteen years; provided that the marriage has not been

consummated; IX) that the husband treats her with cruelty, that is to say (a) habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment, or (b) associates with women of evil repute or leads an infamous life, or (c) attempts to force her to lead an immoral life, or (d) disposes of her property or prevents her exercising her legal rights over it, or (e) obstructs her in the observance of her religious profession or practice, or (f) if he has more wives than one, does not treat her equitably in accordance with the injunction of the Quran. X) On any other ground which is recognized as valid for the dissolution of marriages under Muslim Law. It is to be said that these statutory provisions are somehow deviated from the strict principles of Sharia.

Effect of conversion to another religion by women

Related statute : The Dissolution of Muslim Marriages Act, 1939
The relevant law is sec. 4 which provides that the renunciation of Islam by a married Muslim woman or her conversion to a faith other than Islam shall not by itself operate to dissolve her marriage, provided that after such renunciation, or conversion, the woman shall be entitled to obtain a decree for the dissolution of her marriage on any of the grounds mentioned in sec. 2. It

provided further that the provisions of this section shall not apply to a woman converted to Islam from some other faith who re-embraces her former faith. This provision is not in line with Islamic law with regard to apostasy.

Divorce

Related Ordinance : The Muslim Family Laws Ordinance, 1961.
The relevant law is sect. 7 which implies that no divorce will become effective from the moment of pronouncement. A notice must be given to the chairman of the Arbitration council, who will call a meeting of both parties within thirty days of receiving the notice and attempt to bring about a reconciliation. The time starts to run from the moment the husband gives notice to the Arbitration council. Whether or not the chairman calls for a meeting, the divorce will become effective ninety days after pronouncement, or where the wife is pregnant, after delivery. The wife is entitled to her dower as well as maintenance until

the divorce becomes effective. She is required, however, to observe iddah (waiting period) so that if she is pregnant, no question will arise regarding the paternity of her child and its right to inherit from its father. In addition, her observance of iddah provides a period during which reconciliation may take place.

If the husband has made one or two declarations of divorce in the approved forms (talaq-al-sunna) following Qur'anic prescriptions, a reconciliation, either a formal revocation of the repudiation (talaq) or resumption of conjugal life, can take place during the iddah. When one or two declarations in the approved forms have been made, and the iddah period has expired, a regular re-marriage is necessary. Once the divorce becomes effective, either through the talaq-al-sunna or talaq-al-bid'a forms, the divorce is considered irrevocable, and it is not possible for the husband to re-marry his wife unless she has gone through an intervening marriage. This statutory provision with regard to giving of notice to the chairman and so on is a clear violation of the spirit of the law of Al-Quran with regard to divorce.

Polygamy

Related Ordinance : The Muslim Family Laws Ordinance, 1961.

The relevant law is sec. 6 which provides that no man during the subsistence of an existing marriage, shall, except with the previous permission in writing of the Arbitration Council, contract another marriage, nor shall, any such marriage contracted without such permission be registered under this ordinance.

Any man who contracts another marriage without the permission of the Arbitration council shall- (a) Pay immediately the entire amount of dower, whether prompt or deferred, due to existing wife or wives, which amount, if not so paid, shall be recoverable as arrears of revenue; and (b) On conviction upon complaint be punishable with simple imprisonment which may extend to one year or with fine which may extend to ten thousand taka, or with both. Though the law is to check the unruly polygamy but yeti violates the right of a husband, as given by Allah, for having another wife in case of needs, provided a husband could do proper justice to his wives.

Dower

Related Ordinance : The Muslim Family Laws Ordinance, 1961.

The relevant law is S. 10 which provides that dower is payable on demand if there is no mention of process of payment in the marriage deed.

Registration of marriage and divorce

Related Statute : The Muslim Marriages and Divorces (Registration) Act, 1974.

Registration of marriage is made compulsory under section 3 of this Act.

The rules regulating registration of divorce are governed by S. 6 of the Act. But clause 3 of this section refuses to register a divorce by a wife (talaq-i-tafweej) except on the production of a document registered under the Registration Act, 1908 (16 or 1908), by which the husband delegates the power of divorce to the wife, or of an attested copy of an entry in the register of marriages showing that such delegation has been made.

Dowry

Related statute : The Dowry Prohibition Act, 1980.

The relevant law is Sec. 3 of this Act which lays down provision for the penalty for giving or taking dowry. Under this section, if any person, after the commencement of this act, gives or takes or abets the giving or taking of dowry, he shall be punishable with imprisonment which may extend to one year or with fine which may extend to five thousand taka, or with both.

These aspects are to regulate the Marriage to be good and remained intact. But this have not been functioning well due to the lack of knowledge of Islam and its application in private and public life of Muslim. Further study is needed in this regard.

Statutory Contributions on the Marriage in Hindu Personal Law System in Bangladesh

Remarriage of Widow

Related Statute : The Hindu Widow's Remarriage Act, 1856.

Remarriage of widow is now legalized by the Hindu widow Remarriage Act 1856 (Act XV of 1856), According to this Act, it is said that no religious ceremonies are necessary in the case of marriage of widow. However, a Hindu widow by remarrying a

member of other religion forfeits her right to the estate of her husband. (12 DLR 634; S.C, 29 DLR 140 S.C; Vide also ord. No, VIII of 1973)

Under the general principle of Hindu law, a widow entering into a lawful wedlock for the second time can not retain the property of her previous husband. (29 DLR 137 S.C) So, widow's right to inherit her husband's property is conditional on her capacity to confer spiritual benefits in her dead husband-Loss of such right following her remarriage is a characteristics of the Hindu law founded on text as well as on the underlying principle regarding law of inheritance. (29 DLR 138 S.C; 27 DLR 127 AD)

Separation

Related Statute : The Hindu Married Women's Right to Separate Residence and Maintenance Act, 1946.

Divorce for Hindus is not possible in Bangladesh; under no circumstances has the Hindu woman any recourse to bring a suit for dissolution of marriage. The most she may get is limited relief under the Hindu Married Women's Right to Separate Residence and Maintenance Act, 1946, under section 2 of which she is entitled to separate residence and maintenance from her husband on one or more of the following grounds: (i) If he is suffering from any loathsome disease not contracted from her, (ii) If he is guilty of such cruelty towards her as renders it unsafe or undesirable for her to live with him, (iii) If he is guilty of desertion, that is to say, of abandoning her without her consent or against her wish, (iv) If he marries again. (v) If he ceases to be a Hindu by conversion to another religion, (vi) If he keeps a concubine in the house or habitually resides with a concubine and (vii) Any other justifiable cause.

Sagotra Marriage

Related statute : The Hindu Marriage Disabilities Removal Act, 1946.

This Act permits sagotra Marriage in Hindus. Two persons are sagatra i.e of the same family, if both of them are descendants in the male line from the rishi or sage after whose name he is called.

It is to be noted that the law of Islam is divine in origin and other than that all are human made religious law.

A Comparison at a Glance

Subject Matter	Marriage under Muslim personal Law	Marriage under Hindu personal law
1. Age	Male Twenty one years of age; Female eighteen years of age. Child Marriage Restraint Act, 1929.	Same.
2. Consent	Express or implied consent by both parties are necessary.	Declaration of consent by either party, not a necessity.
3. Witness	Two male witnesses, or one male and two female witnesses are necessary.	Witness at marriage is not a requirement.
4. Nature of Marriage	Not just a sacrament, Also a civil contract.	Sacrament.
5. Marriage by Guardian	Possible.	Possible.
6. Right to repudiate by option of puberty	Allowed.	Not allowed.
7. Dower	Mandatory element of marriage. Women are entitled to it as of right.	Not required.
8. Ceremony	Not prescribed.	Certain ceremonies are mandatorily maintained.
9. Forms of Marriage	Three : i. Valid (Sahih) ii. Void (Batil) iii. Irregular (Fasid)	Eight forms of shastric Hindu marriage are practiced.
10. Registration	Required by statute.	Not required.
11. Dowry	Prohibited by "The Dowry Prohibition Act, 1980". Not required by religion. Socially sanctioned. Prohibited by religion.	Giving or taking prohibited by Law. The Dowry prohibition Act. 1980. Prohibited by statutes.
12. Child Marriage	Punishable by Law, but Marriage valid.	Same.

13. Polygamy	Polyandry illegal but polygyny legal, though subsequent marriage subject to permission of present wife. Polygamy is punishable under S. 494 of penal code.	Polyandry illegal. Polygyny legal. Polygyny punishable, under penal code.
14. Maintenance	Women entitled to it as of right.	Same.
15. Adoption	In case of need it is allowed but the adopted child cannot inherit as of right.	Only Men have the right to adopt a male child. Women have no right to adopt. Female Children cannot be adopted.
16. Cast	No legal recognition of caste/group.	Recognised. Intercaste marriage is allowed and legal.
17. Difference of religion	Men can marry women of religions of Christianity and Jews. Women cannot.	Marriage with non-Hindus is prohibited for both men and women.
18. Divorce	Husband has the absolute right to divorce. Wife has a limited right to initiate a suit for divorce.	No legal recognition, either for men or women.
19. Remarriage after divorce	Women have to observe iddah for a period of 90 days, they cannot remarry during this period. But after iddah they can remarry. In case of irrevocable divorce a second marriage with a third party is necessary.	Not allowed since divorce is not recognized.
20. Inheritance	Reciprocal right of inheritance exists in valid marriage.	Hindu women do not inherit. Only limited right to property, called women property.

Conclusion & Recommendations

This brief study reveals that the Muslim and Hindu personal law (both divine and statutory) have a great contribution to protect the

rights of married man and woman, to legalize cohabitation or give birth of child between husband and wife and above all, to impose some legal duties and obligations upon the parties so that they can live as husband and wife as friends.

It is pertinent to note that unlike the tremendous statutory development of Muslim law in Bangladesh and development of Hindu law in India, some enactments are required in Hindu law in Bangladesh especially on the marriage related issues, such as, adoption, divorce dissolution of marriage, inheritance of Hindu woman, dowry, polygamy and so on. Indeed, in connection with the Muslim marriage, through enactments, the state has taken some good initiatives for the sake of the Muslim and Hindu couple. Nonetheless, all are not sufficient.

And, in order to adopt the statutory provisions for the development of Hindu and Muslim personal law without violating the divine spirit of the law, some recommendations are put forward below:

1. Unlike some superb enactments of India, i.e. the Special Marriage Act, 1954, the Hindu Marriage Act, 1955 (which lays down the provisions of polygamy, women's consent at the time of marriage, registration of marriage, the dissolution of marriage by a decree of divorce etc) the Hindu Succession Act, 1956 under which inheritors have been classified in to two i.e. the first class of inheritors includes 12 persons and the second class of inheritors includes nine persons) the Hindu Minority and Guardianship Act, 1956 which stipulates the status of the mother as well as natural guardians of the minor children in respect of the child's person as well as his or her property and provides similar power to a mother with the father to appoint a testamentary guardian of their minor might be adopted in Bangladesh.
2. The separate Hindu Family and Marriage Code consisting of widow's remarriage, deposition of property, inheritance, and women's right to property, removal of marriage disabilities, right to separate residence and maintenance, polygamy, dowry, adoption etc, including ADR mechanism, might be adopted.
3. The separate Muslim Family and Marriage Code consisting of marriage, dissolution of marriage and divorces, maintenance,

dower, restitution of conjugal rights, guardianship and custody of children, inheritance, including ADR mechanism, might be adopted.

4. The Uniform Personal Code including, inter alia, restraint of child marriage, prohibition of dowry, , registration of births, marriages and deaths, cruelty to woman including severe punishment, might be adopted.

5. The state and the law commission along with the Muslim and the Hindu scholars should come forward for necessary adoption and reformation of statutory law.

6. A highly scholarly and qualified commission consisting of ulama, faqh and experts of Islamic as well as conventional law are to be formed to scrutinize the existing Muslim law so as to find out how far they are in line with Islam and for the findings of its way out. Because, some aspects of Muslim personal law have been distorted since British rule over here.

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A LEGAL OUTLOOK OF MARINE ENVIRONMENTAL POLLUTION AND ITS CONTROL MEASURES: A FACTUAL STUDY

Nahid Ferdousi*

Introduction

Almighty Allah made this universe and we, as a creature for some purpose and set a balance in everything. All the things around us such as plants, water, air, animals etc together make our environment rich. The relationship between human and his environment is two way process. If one disturbs, other will automatically be the victim. The environment provides man with the essential life support systems, which comprises air, water and land. About 71% of earth's surface has covered by oceans. They provide us with food, energy and water and they sustain the livelihoods of hundreds of millions of people.¹ They are the main highway for international trade as well as the main stabilizer of the world's climate.² It is found out that more than 90-% of "Biomass" is directly related with marine environment. Primary food of more than 350 million people is fish, 95% of which is collected from marine areas. Again 70% of total oxygen comes from marine trees.³ Marine environment is a necessary part of our life cycle. But recently marine environment became polluted from a variety of sources. These include land - based sources, dumping at sea activities, pollution from vessels and sea-bed activities contaminants that pose the greatest threat to the marine environment and resulting in the destruction of "Biomass" and "Ecological balance". Consequently, marine pollution is a growing problem for people of the coastal areas, tourist and marine species. Marine pollutants can affect directly on human health and marine organisms. Illness can also be taken place from ingestion of seafood. This pollution is threatening to human health. Every year almost 55 thousand people are dying due to marine environment

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pollution. Human health is at risk from the presence of pathogens. Toxic also can affects on marine organisms and human health.⁴ During the Gulf war of 1991 marine environment of that area was seriously contaminated due to release of oil, which caused death of thousand of marine lives of that area. However, it ultimately depends on the government and non-government organizations to improve the situation by reducing contamination and minimizing the risk to health for future generations.⁵

Realizing the grave consequences of pollution of marine environment, large-scale measures have been under taken by various national and international pollution control agencies. In this paper an attempt has been taken to describe the sources of marine pollution, effects of pollution on human health, development of legal instruments for protection of pollution, socio- legal control measures, identification of major groups and their role in the protection , Islamic concept of environmental pollution and a concluding remarks.

Marine Pollution

The major types of marine pollution are as under :

i) Domestic sewerage - Food processing wastes, ii) Pesticides - Oregano-chlorine, oregano- phosphorus compound, various metal containing compounds, iii) Inorganic wastes- Acids and alkalis, sulphite, titanium dioxide wastes, mercury, lead, zinc, iv) Chromium and arsenic, v) Radioactive materials, vi) Oil and oil dispersants, vii) Petrochemicals and organic chemicals- aromatic solvents, aliphatic solvents, plastic intermediate and it's by products, viii) Organic wastes- Pulp and paper wastes, ix) Other non- Industrial wastes, x) Military wastes, xi) Heat, xii) Detergents, xiii) Solid objects.⁶

Sources of Marine Pollution

The degradation of marine environment is the results of pollution from various sources. Such as, i) Pollution by dumping, ii) Pollution from land-based sources, iii) Pollution from vessels, iv) Pollution from seabed activities.

i) Pollution by dumping

Pollution by dumping accounts for approximately 10 percent or less of the pollutants that enter the sea each year. It can cause

significant environmental damage, especially the concentrated marine areas. Most of the wastes materials traditionally are dumped at the sea include dredged material (accounting for 80-90 percent of all materials dumped), industrial wastes, and sewage sludge.

Dredging

Material dug from rivers, harbors, and channels to keep them clear the way for ships is the single largest source of ocean dumping, far exceeding sewage sludge and industrial and radioactive wastes combined. Dredged material contains large amounts of sediment and may contain oil, grease and heavy metals along with other bottom contaminants such as poly-chlorinated biphenyls, pesticides, and pathogens, which can harm not only marine species but humans as well if the contaminants enter the food chain in high concentration.

Sewage sludge

Depending on its content and concentration, sewage sludge may be relatively harmless, but it can also contain poly-chlorinated biphenyls, pesticides, and toxic heavy metals such as lead, mercury and cadmium, as well as disease-causing microorganisms and pathogens. These noxious substances can fatally poison marine species, or they can impede their growth and damage their sensory and reproductive function.

Industrial waste

With the increasing financial costs of treating and disposing of industrial waste on land, a number of industrial and third world nations have turned to the oceans to get rid of a wide range of organic and inorganic residues, sludge's, and debris. Chemical pollutants have reduced oxygen levels and endangered marine life in coastal waters in the North Adriatic Sea, the Persian Gulf, the Black Sea, and the Arabian Sea near Karachi, Pakistan.⁷

Incinerated hazardous waste

Although incineration destroys much of the waste, some remains intact and enters the ocean. In addition, spills and leaks can occur as the wastes are carried to a docked incinerating boat. Hazardous waste can be toxic, carcinogenic, or lethal to marine life. People may also be at risk if they consume such contaminated fish.⁸

ii) Land-based coastal pollution

Over 80 percent of all Ocean pollution comes from Land-based activities. This pollution reaches the Oceans either from "point or non point" sources. Point sources include pipes, ditches, canals, or similar channels that regularly release pollution in a specific area. Sewage and industrial waste are commonly introduced into waters from point sources. Non-point pollution covers all types of unregulated runoff from the land, including runoff from urban and agricultural areas.

Municipal sewage

The discharge of sewage and other municipal and industrial effluents from coastal cities into the sea is probably increasing, especially in the third world. Even in relatively developed areas, sewage and industrial wastes are often pumped in to the sea without treatment. The most polluted seas are off the densely populated coasts of India, Pakistan, and Bangladesh, and near the coastal cities of Thailand, Malaysia, Indonesia, and the Philippines.

Urban runoff

Domestic and industrial effluents such as food wastes, solid wastes, and pesticides from lawns, toxic chemicals, heavy metals, and sediments from construction sites are commonly washed into storm sewers. Rain and snowmelt carry these pollutants from lawns, streets, and waste dumps through the storm sewers into waterways and eventually into coastal waters. Nearly half the oil that pollutes marine waters comes from urban runoff.

Agricultural runoff

Fertilizers, herbicides, and pesticides run from farmland into streams and rivers, eventually making their way into coastal waters. These pollutants are persistent contaminators of coastal waters, steadily moving up the food chain and increasing in concentration with each step.

iii) Pollution from vessels

Vessel pollution contributes use of between 40% - 45% of the total marine pollution on a world wide basin. Pollution from vessels is caused by operational discharges from ships such as cleaning of tanks ballasting or by accident such by sinking of large oil tankers.

The bulk of sea-borne oil pollution results from washing tankers out with seawater and releasing oily ballast water into the ocean. Oil pollution can kill or seriously harm marine life.⁹

It has been estimated that the total influx of oil in the world oceans is 4897×10^3 tons per year almost equally through out by ocean-based sources (2407×10^3 tons) like automobiles, industries, oil re-finings that finally reach the seas. According to another estimate, more than 6 million tons of oil is reaching in sea in every year and the shore shelf oil extraction has emerged as the biggest single source (44%). Accident of tankers and break down of oil wells contribute only 6%. Beside oil and other petroleum, products there are numerous other kinds of toxic chemicals and garbage that are discharged into the sea and at regional levels, they become highly toxic.¹⁰

iv) Pollution from seabed activities

Pollution from seabed activities is caused by the release of harmful substances arising directly from the exploration, exploitation and processing of seabed materials. It accounts for only one percent of pollution of the marine environment, although in certain regions, such as the Gulf, the proportion is considerably higher due to oil exploration activities.¹¹

The main source of marine pollution is Oil. It has been estimated that the total influx of oil in the world oceans is 4897×10^3 tons per year almost equal as like ocean-based sources (2407×10^3 tons) like automobiles, industries, oil re-finings that finally reach the seas. According to other estimate, more than 6 million tons of oil is reaching in sea per year and the shore shelf oil extraction has emerged as the biggest single source (44%). Accident of tankers and break down of oil wells contribute only 6%. Beside oil and other petroleum products there are numerous other kinds of toxic chemicals and garbage that are discharged into the sea and at regional levels, they become highly toxic.¹²

Effects of Marine Pollution

Marine organisms that are affected by the sea pollution and its effects are as follows:

- a. Human health risks from the presence of pathogens;
- b. Eutrophication due to nutrients and organics;

- c. Toxic effects on marine organisms and humans;
- d. Resource use conflicts with other uses of the sea, such as fishing and recreation.

The main effects of marine pollution of human health are as under.

i) Infectious diseases related to the bathing/swimming in marine coastal waters contaminated by wastewater discharge

There is massive epidemiological evidence that enteric and respiratory diseases can be caused by bathing or swimming at marine coastal beaches contaminated with pathogenic microorganisms, i.e., exposure to pollution from domestic wastewater sources.

In 1998 WHO estimated that bathing what had previously been considered "acceptable" marine waters with a mean concentration of 50 faecal streptococci/100 ml will result in infection and illness in 5% of the adult bathers after a single marine bathing exposure. Consequently higher risk-of-disease rates are caused for children (who are more susceptible than adults).

In 1999, the World Tourism Organization estimated that local residents and foreign tourists spend 1-2 billion marine-exposure-days at beach resorts each year. From these global figures and the WHO risk estimates for gastroenteritis and respiratory infections at various levels of each pollution a highly tentative estimate has been made that some 250 million clinical cases of mild gastroenteritis and upper respiratory disease are caused every year by bathing in contaminated seawater. This situation has gone unnoticed and unreported for so long.

ii) Infectious diseases related to the consumption of seafood harvested in marine coastal waters contaminated by wastewater discharge

Seafood - and particularly mollusks normally eaten uncooked is a commonly implicated vehicle for the transmission of infectious diseases caused by enteric micro-organisms (including bacteria and viruses) that enter the marine environment through the disposal of urban and domestic wastewater. Infectious hepatitis A (HAV), a most serious and debilitating disease of the liver, is the gravest virus disease very frequently transmitted by shellfish.

Thus, eating raw or lightly steamed shellfish harvested from such contaminated. But it is considered acceptable - marine waters can cause infection and disease in a significant percent of the exposed population.¹² Based on reports from the FAO, it has been estimated that some 8 million tons of mollusks, including clams, oysters, mussels and cockles, are harvested and marketed globally each year. Assuming that one-kilogram of gross shellfish, including shells, is required for each shellfish meal or serving. In 1999 UNEP has estimated that some 8 billion shellfish meals are consumed globally per year.¹³ Each year there are about 2.5 million clinical cases of infectious hepatitis globally, with some 25,000 fatalities and 25,000 cases of long-term disabilities from liver damage caused by eating contaminated shellfish.

iii) Diseases associated with contamination of shellfish and other seafood with toxins from Toxic Algae Blooms

Marine bio-toxins cause a large number of poisonings in human annually, many with serious sequel and causing frequent fatalities. Most of these poisonings are in the subtropical or tropical circum global belt region bounded by Florida, the Mediterranean and Japan in the north and the northern edge of Australia, the southern tip of Africa and Chile in the South.

The human diseases most frequently associated with marine bio-toxins are amnesic shellfish poisoning (ASP), paralytic shellfish poisoning (PSP), ciguatera poisoning, and the more recently identified neuron toxic shellfish poisoning (NSP) and diarrhetic shellfish poisoning (DSP).

Most of these diseases are apparently associated with fish and seafood that feed on toxic marine algae and toxic algae blooms, such as red tides. PSP in particular can lead to severe neuron toxic effects that cause paralysis and death.

The case fatality rate is low (about 0.1%). It is estimated that the total population in the circum global belt where the disease is endemic is about 400 million people, 10% of whom live near sea-coasts and frequently eat locally caught fish and seafood.

In Canada, which has one of the best marine bio -toxin monitoring and control programs, there are an estimated 1000 cases per year of illness cause by seafood toxins, with 150 cases per year of PSP and 350 cases of ciguatera poisoning.¹⁴

Development of Legal Instruments for Protection of Marine Environment

International rules for the protection of the marine environment are established under regional and global treaties, and other international acts, and the rules of customary law are reflected in these acts and non-binding soft law obligations. Early international efforts addressed discharges of oil and can be traced back to the 1926 of the preliminary conference on oil pollution of navigable waters, held in Washington.

1954: The first treaty to address oil pollution of the sea was the 1954 international convention for the prevention of pollution of the sea by oil (1954 oil pollution convention), based on a draft text from the 1926 Washington Conference.

1958: The oil pollution convention of 1954 was followed by environmental protection, provisions in the 1958 high seas fishing and conservation convention, the 1958 convention on the continental shelf, and the 1958 convention on the high seas.

1959: In 1959 the IMCO (now IMO) assembly assumed responsibility for the 1954-oil pollution convention and many of the UN's functions in relation to oil pollution.

1979-1971: A major oil spill such as the accidents involving the "Torrey Canyon" in 1967, the Amoco Cadiz in 1978, and the Exxon Valdez in 1989 often triggered subsequent international efforts. These led to the adoption under IMO auspices of the 1969 intervention convention, the 1969 CLC, the 1971 oil pollution fund convention, and the 1991 IMO amendments to MARPOL 73/78 requiring double hulls on new oil tankers.

1972: Following the Torrey Canyon accident, the UN general assembly gave increased attention to the protection of the marine environment, and in 1969, it adopted a resolution promoting effective measures for the prevention and control of marine pollution. This called on the UN to prepare reports for the 1972 Stockholm conference. Marine pollution was an important issue at the Stockholm conference but the Stockholm conference did not adopt a proposed global convention on ocean dumping, as the text had not been completed. The United States had introduced a text

in 1971 at the IMO intergovernmental working group on marine pollution, but it was not until December 1972 that the global convention on the prevention of marine pollution by dumping of wastes and other matter (1972 London Convention) was adopted.

This was followed by several months the adoption of the regional convention for the prevention of marine pollution by dumping from ships and aircraft (1972 Oslo Dumping Convention).

1973: In 1973 the international convention for the prevention of pollution from ships (MARPOL 73) was adopted under IMO auspices and in 1976 UNEP established the regional seas program, which has led to over thirty regional treaties.

1982: In 1982, the international community finally adopted the United Nations Convention on the Law of Sea (UNCLOS), which addressed pollution of the marine environment comprehensively, with a view to establishing rules and standards of global application.

It entered in to forces on 16 November 1994. UNCLOS aims at regulating all aspects of uses of the oceans, including protection and conservation of the marine environment. UNCLOS 111 empowers the coastal states to adopt national legislation in compliance with its provision to take prevention, reduction and control measures within national jurisdiction. The coastal state can adopt international conventions in accordance with UNCLOS 111 to take collective measures for prevention, reduction and control of marine environment pollution beyond the national jurisdiction.

1992: During 1992 a 'second generation' of regional environmental treaties was introduced with the adoption of the 1992 convention on the protection of the Baltic (1992 Baltic Sea Convention) to supersede the 1974 Baltic convention and the 1992 convention for the protection of the marine environment of the North-East Atlantic (1992 OSPAR Convention) to supersede the 1972 Oslo dumping convention and the 1974 Paris convention. Both instruments adopt a more comprehensive approach by addressing marine pollution from all sources and introduce new principles, substantive rules and institution arrangements.¹⁵

Legal Control Measures of Marine Pollution

The environmental problems of the oceans are addressed in numerous conventions and agreements. There are also international rules for the protection of the marine environment are established under regional and global treaties, and other international acts, and the rules of customary law are reflected in these acts and non-binding soft law obligations.¹⁶

Some of the mentionable International conventions are:

1. Brussels convention on Civil Liability for Oil Pollution Damage, 1969.
2. International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971.
3. London Dumping Conference, 1972.
4. United Nations Convention on the Law of the Sea, 1982 (UNCLOS 111).
5. Vienna Convention, 1985.
6. Montreal Protocol, 1987.¹⁷

The UN Conference on Environment & Development 1992 developed an action program towards sustainable development. Chapters 17 & 18 of Agenda 21 specifically related to the protection and improvement of marine and freshwater environments, recognizing 'human health to be the most important objective for development'. Inadequate controls and pro agricultural practices were seen as 'environmentally destructive for both ecological and human health'.¹⁸

Bangladesh Perspective

The Legal System of Bangladesh, inherited from the British, Provides limited safe guard for the country's environment. However, experts say that the country's legal system needs some reorientation. In recent times, some important steps have been made possible in the legal battle for environment.¹⁹ With the boost of population, Bangladesh will gradually turn its attention to rich marine resources for food and other needs of its people. It is reported by scientists that resources on sea are much more prolific than those on land. As our land- resources are being exhausted, it will be necessary for Bangladesh to depend increasingly on the sea resources. Therefore, Bangladesh should be more concerned about

its marine ecology. To be not only more but extra careful is allowing other nationals to use our water resource at sea and seaports as well.

About the marine pollution Bangladesh is a party of United Nations Convention on the Law of the Sea (UNCLOS) 1982, Intervention Convention and Basel Convention. Bangladesh is obligated to establish preventive measures according to the international legal regime of marine pollution since it is a party of some selected conventions. Moreover, according to the IMO Resolution Article 868 (20), Bangladesh has plenty to do as part state including enactment of new laws and their implementation. As a flag state, it should be aware about, amongst all, the reporting and recording procedure, ships operational procedures, ballast system design and ballast water management plans to the ships flying her flag according to the resolution. Presently it does not have any domestic legal instrument regarding ballast water and vessel fouling. However, there has been a good amount of awareness in different level over the last few years regarding the issue.

National laws Related to Marine Pollution, which are existing in Bangladesh, are,

1. The Territorial Waters and Marine Zones Act, 1974.
2. Territorial Waters and Maritime Zones Rules, 1977.
3. The National Environmental Policy, 1992.
4. The Coast Guard Act, 1994.²⁰

Territorial Waters and Marine Zones Act 1974 deal with maritime matters within the national jurisdiction of Bangladesh. Section- 8 of this Act mention about the control of marine pollution. The Government may, with a view to preventing and controlling marine pollution and preserving the quality and ecological balance in the marine environment in the high seas adjacent to the territorial waters, take such measures, as it may deem appropriate for the purpose. However, the Act is not updated and adequate to cover the entire ambit of marine environment. In addition, there is the Territorial Water and Maritime Zones Rules, 1977 to deal with regulation of foreign ships in the territorial waters and the regulation of conduct of persons in the economic zone.

Social Control Measures of Marine Pollution

It is important to note that law cannot cure the Environment. Cure in again left to the scientists and technologists. What the law does is that it prescribes the norms of behavior, duties to be performed by the management of industries. For curing the marine environmental pollution not only needs but it law also need contribution of the scientists and technologists.

Individual

Man can do in their home and community to help protect marine resources and raise awareness of the marine environment.

At home, by avoiding, using or disposing of substances that could damage the marine environment. For example: use of phosphate free detergents, dispose of unwanted hazardous house hold chemicals such as pesticides in sanitary, landfills or take advantage of approved community collection points, composing of food wasters or put then in the trash of instead of the garbage disposal. Review of habits and lifestyle of this would require educating people.

State/ Group of States

Government of all countries can implement and enforced of international rules- regulations for conservation of environment. The major problem of marine pollution control is the enforcement; it is a particular problem with regard to pollution from ships. Flag States who have the primary responsibility for enforcement in most parts of the ocean are often not able or not willing to enforce effectively the rules and regulations on pollution control. At Government level, special programs should be started to aware the people living in or near those polluted areas about the health hazards of the marine pollution.

International Organizations

Internationally a number of environmental organizations have played a particularly important role in developing international law. For protect marine environmental pollution should be implement and enforcement of international rules regulations.

Civil Society

Individual citizen have traditionally expressed their involvement in the development and application on international

environmental law through the activities of environmental organizations. Besides, social workers, local government and leaders should be involved to seek public participation in the seminars, symposiums, conferences and workshops both in urban and rural areas. Municipal Corporation should make proper management for the removal of marine garbage.²¹

Using Mass Media

Mass media can play also a vital role in order to create awareness among the public about the problems of marine pollution due to suspended particles.²²

Islamic Concept of Environment Pollution

Pollution is a serious menace as it has been seen in this article. The serious consequence of environment pollution has been proven a threat not only against the life of human being, but it is a threat against all living creature. Consciousness of destructiveness of environmental pollution is a recent phenomenon, but Islamic law has provided concrete provision on it at least 1400 years ago. Islam considers man as vicegerent of God. As such, no body has the right to kill the vicegerent by any means. Entire earth and heaven and whatever is in between of these are belonged to Allah.²³

Everything He has created with uprightness and in pure state.²⁴ Everything Allah has created is in order of fitness' with definite purpose and role. As Allah says, do they not see that we have created for them of what our hands have created the cattle. So that they are their owners and we have subdued them to them so that some of them they have for riding and some they eat. And they have other benefits from them and they get milk to drink, will they not be grateful?²⁵ The gratefulness is non identical to distortion.

Everything is created on its proper measurement and order of fitness.²⁶ Allah has created balance of everything and commands not to transgress the balance.²⁷ Allah is sound free from defect. His creation is also sound free from any defect. Its objective is to derive benefit of it. Due benefits are only to be derived if each thing remain in its pure state. For example air is to refresh but polluted air is dangerous to health. Life remains in water but polluted water carries virus. Because of this reason Allah commands not to cause any mischievous and destructive act that can destroy the pure

nature of the creature. As regards destruction, He says, Give full measure and weight in justice and reduce not the things that are due to people and do not commit mischief in the land, causing corruption.²⁸ Causing mischief is termed as more dangerous than manslaughter.²⁹ Since everything is created as clean and pure, its original status is to be remained infect to get perfect benefit of it. No body is allowed to corrupt it or distort it by whatsoever form. As Almighty Allah says, do not mix up truth with false hood and nor conceal the truth knowingly.³⁰

It means do not amalgamate bad product with good product; bad thing with good thing, impure wastage with pure thing and so on. Observance of this law would tell a dumper not to dump his wastage at the pure water of the sea, do not spread out injurious smoke at a fresh air, do not mix up rough oil with pure oil etc. This brief information is very much pioneer in providing the law relating to environmental pollution that covers marine pollution too. Due observance of the law of Islam in this regard would be able to curb down the pollution means.

Conclusion

The environmental problems of the oceans, Polar Regions and outer space- areas often called the "global commons" - are addressed in numerous conventions and agreements. There are also principles of customary international law bind all states, which regulate the control of marine pollution and the sustainable use of natural resources. Islamic laws, International rules, regulations and standards are essential to ensure the minimum standard of protection and to harmonize national approaches, policies and legislation. With regard to all areas in question, it can be said that states share the general obligation to protect the environment and share the duty to cooperate for the protection of the environment and the sustainable use of the resources. Many marine environmental agreements have produced independent action plans, strategies and funding mechanisms leading to a proliferation of autonomous and semi-autonomous legal regimes and institutions. Furthermore, of high priority is the effective implementation and enforcement of international rules, regulations and standards. Better enforcement is not only a matter of legal techniques. It is, above all, a matter of political will and

commitment. So the need for promoting marine environment to the future generations is essential element for achieving quality of human health. Also for prevention, reduction and control of marine environment pollution an integrated approach is needed at national and international level under national and international legislation. And finally, it is to be said that we have to think globally and act locally.

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 30. Al Bakara, 2: 42

Rules of Writing Articles for Journal of Islamic Law and Judiciary

The rules of writing articles varies from place to place. The Journal of Islamic Law and Judiciary has decided to follow the following rules.

Part - I

INSTRUCTION FOR THE WRITERS

1. The writers/ contributors are requested to send two hard copies as well as soft copy.
2. The space of writing should be between 1.5 to 2.00 point
3. The writing should be clear, free of ambiguity and original
4. No copy will be sent back to the writer
5. The editorial board reserved the right of correction, amendment whatsoever
6. All references should be put in the end notes.

Part - II

RULES OF REFERENCE

1. **The following rules should be followed for quoting a book. Such as,**
 - a. Last part of the name of the author, then coma,
 - b. Full name (except last part of the name) of the author, then coma,
 - c. Name of the book (to be italicized), then coma,
 - d. Name of publisher, then coma,
 - e. Name of place of publication, then coma,
 - f. Year of publication, then coma,
 - g. Edition, then coma,
 - h. Volume, then coma,
 - i. Page number, then full stop.

Illustration: Dr. Muhammad Hamidullah in his book *Introduction to Islam* wrote: Islamic law ordains justice to all and observance of certain rules regarding the non-Muslims.

Pattern of reference: Hamidullah, Dr. Muhammad, *Introduction to Islam*, Shah Ashraf Publishers & Book Sellers, Lahore, Pakistan, 1983, edn. 3rd, vol.1, p.166.

2. Concise form of reference

- a. If same reference is used in the same chapter then subsequent

reference can be concized or shortened. For example: Hamidullah, *Introduction to Islam*, p. 170.

- b. **Using Ibid:** ibid is used in subsequent reference if it is the same book and same page. If the page is different then after ibid the page number is to be used. For example: ibid. 60.
- c. **Using of op. cit:** It is to be used for subsequent references to avoid the whole information of the book or article. Here quoting of the name of the author, book and page number is enough. For example: Rahman, Dr Tanzilur, *A Code of Muslim Personal Law*, Islamic Publishers, Pakistan, 1990, vol. 1, p. 350.
Rahman, Dr Tanzilur, *A Code of Muslim Personal Law*, op. cit, p. 360.
- d. **Using passim:** It is used when information referred to is mentioned at a number of places or scattered about a chapter or section. For example.
a. Mawdudi, Syed Abul A`ala, *Four Basic Quranic Terms*, Islamic Publications Ltd., Lahore, Pakistan, 1972, chap 6 passim.
- e. **Using pp.** For quoting more than one pages the term pp is to be used. For example, pp. 150-158.
- f. **Using edt, edn:** edt to be used for edited and edn to be used for edition. for example;
Chowdhury, Obaidul Haq, edt., *Hand Book of Muslim Family Law*, DLR (Publisher), Dhaka, Bangladesh, edn. 1st, vol. 2, 1993, p-155.
- g. **Using of below and above:**
These are the substitute of infra & supra. Below and above to be used after the number of foot note in case using the same thing or same section or material in the same of chapter. For example, 1. above, page 15, below, page 150-151.
- h. **Using nd. means No date, et. al. means and others, eg.** means for example, viz. means namely, vs. means against. Trans, means translation. cf. means approximately, compared to.

3. Quoting of Public Documents

It requires to write the name of the country then full stop, then year, full stop, then name of the document. In case of a parliament Act. the following style is to be followed. For example,
Bangladesh. 2005. Marriage & Divorce Act 1962 (Revised 2005) (Act. 505).

4. Quoting of International Documents

For this case, the following example to be followed:

United Nations. 1974. *The Charter of Economic Rights & Duties*. General Assembly Resolution 321. 29. UN G.O. A. R. UN Document A/9361. New York. United Nations.

UNESCO. 1960. Director General of UNESCO report. Paris. UNESCO.

5. Quoting of Article from Journal

The Rules are as follows:

Name of Author, full-stop, year, full-stop, title of Article, full-stop. Name of Journal (*italic*) full-stop. Number of volume (**bold**) number of issue (in bracket) colon, page number of the whole Article, full-stop. For example: Dr. ABM. Mahbubul Islam. 2005. Sources of Islamic Constitution. *IIUC Studies*. Vol. 2. (3): pp. 146-162.

6. Quoting Newspaper

Name of the writer, full-stop, year, full stop, Name of Article, full stop. Name of newspaper, date, full stop, page number, full stop. For Example. ASM. Tofazzel Haque. 2005. Human Rights in Islam and Conventional Law: A Comparative Study. *Daily Star*. 25 June: 8.
Md. Asaduzzaman. 2005. Women Rights: An Islamic Overview. *Daily Independent*. 12 July : 6.

7. Quoting Encyclopedia and Dictionary:

Name of the book, full-stop, edition, full stop, name of author, full stop. For example, *The Encyclopedia of Islam*. (*italic*) 1960. 2nd Ed. Islamic Foundation Bangladesh.

8. Quoting al Quran and al Hadith:

There are two way of transliteration which are known al Shamsia and al-Qamaria. For example: Alif Lam Mim Dhalikal Kitabu or Alif Lam Mim Dhalika al Kitabu.

9. Using of reference for ayat and Surah and Hadith:

Name of the Book (i.e. Al Quran) coma, name of the sura, coma, number of sura, colon, and number of ayah. Hadith, name of the book, coma, status of the hadith- sahih or sunan, coma, name of chapter and name of section, if possible number of the hadith, full stop. For example:
Al Quran, Al Baqarah, 2:217. Al Quran, Al Imran, 3:110.

For Hadith

Al-Bukhari, Sahih, (k). Al Qada, (b) or chapter (ch) sariqah. (If possible Hadith Number).

Editor

Journal of Islamic Law & Judiciary



মসজিদ কাউন্সিল একটি সমাজসেবামূলক
দ্বিনী প্রতিষ্ঠান।

মসজিদ ভিত্তিক সমাজ উন্নয়নের লক্ষ্যে

মসজিদ কাউন্সিল

নিরলসভাবে কাজ করে যাচ্ছে।

এক নজরে মসজিদ কাউন্সিল



- মসজিদ ভিত্তিক উপানুষ্ঠানিক শিক্ষা
- ভিলেজ পাইপ ওয়াটার সাগ্রাই প্রকল্প
- ইমাম প্রশিক্ষণ কর্মসূচী
- যাকাত ভিত্তিক সমন্বিত আদর্শ গ্রাম প্রকল্প
- চিলড্রেন ওয়েলফেয়ার প্রোগ্রাম (ইয়াতিম, প্রতিবন্ধী, পরিত্যক্ত ও ঠিকানাবিহীন শিশু প্রতিপালন ও পুনর্বাসন)
- সুদক্ষ আয়বর্ধনমূলক প্রকল্প
- এলমে বীন শিক্ষা ও দাওয়া প্রকল্প
- ইসলামী গবেষণা ও প্রকাশনা প্রকল্প
- এইচআইভি ও এইডস বিষয়ক ইমাম প্রশিক্ষণ প্রকল্প
- আন্তঃধর্মীয় সম্প্রীতি ও সহযোগীতামূলক উন্নয়ন প্রকল্প
- ফ্রি ফ্রাইডে ক্লিনিক
- নারী ও শিশু অধিকার বাস্তবায়ন প্রকল্প
- মাদক বিরোধী প্রচারণা
- সন্ত্রাস বিরোধী প্রচারণা

মসজিদ কাউন্সিল একটি সমাজসেবামূলক দ্বিনী প্রতিষ্ঠান। মসজিদ ভিত্তিক সমাজ উন্নয়নের লক্ষ্যে নিরলসভাবে কাজ করে যাচ্ছে।



যোগাযোগ



মসজিদ কাউন্সিল ফর কমিউনিটি এডভান্সমেন্ট

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