

# **A CODE OF MUSLIM PERSONAL LAW**

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# A CODE OF MUSLIM PERSONAL LAW

## *VOLUME II*

*Containing laws of*

Gift, Waqf, Will and Inheritance

Codified and Re-stated in the light of the Holy Qur'ān, Sunnah  
and authentic books of *fiqh*

*By*

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## P R E F A C E

It is a matter of great satisfaction for me that, by the Grace of Allah, I am able to present this second volume of "A Code of Muslim Personal Law" to the legal fraternity of the Muslim 'Ummah, in the fulfilment of my promise given out in the preface to the first volume of the Code which was published at the occasion of the inauguration of the First Asian Islamic Conference held at Karachi in July 1978. It is, again, a fortunate incident that this second volume is being published at the advent of celebrations for the fifteenth century of *Hijra*—a new era of hopes for inaugurating a true Islamic system of life, not only of inaugurating but of working it successfully with a firm determination of giving a practical demonstration of the potentialities of Islam for peace and progress of humanity.

2. The present volume contains the Laws of Gift, *Waqf*, Will and Inheritance, discussed elaborately in the light of the Qur'ān, *Hadith* and the standard books of all the recognized schools of *fiqh*.

3. To illustrate the current application of these laws, the rulings of the superior courts of Indo-Pakistan sub-continent have also been cited on various aspects. This is in addition to numerous quotations from modern legislation in Arab countries, particularly with regard to statutory control of *Waqf*, Will and Inheritance. This effort, I hope, will prove useful to the legal fraternity of all the Muslim countries, particularly Pakistan, at this juncture.

4. I have attempted to deduce the provisions of these laws, in many cases, directly from the holy Qur'ān, *Hadith*, and *Athār* of the Companions of the holy Prophet, and have also drawn, at places, my own conclusions which, in some cases, may not be in strict conformity with the rules of a

particular school of *fiqh*. This approach, I believe, may develop ultimately into a new trend in the current history of Islamic Law. In fact, I was impressed by the current approach in modern legislation in various Arab countries where, by application of the process of *taf'iq*, and *tarjih* the *taḥyīr* (option) was exercised in favour of general convenience and welfare of the 'Ummah. The best example of this process may be found in the Egyptian law of Administration of *Waqf* Properties of 1946, wherein the provisions of law have been derived from all the four sunni schools of *fiqh* and by exercising *Ijtihād*.

5. By citing this example, I mean that in the process of re-interpretation of the provisions of the holy Qur'ān and the *Sunnah* and employing *Ijtihād* in the application of the *Sharī'ah* in the modern world, the Muslim law should be broad-based and the provisions of all the accepted schools of *fiqh* be taken into consideration for the purpose of re-statement and codification of Muslim law, and the balance be held in favour of the one which is more akin to the basic norms of Islam and the genius of the people, so as to meet and answer the challenges of the time. The process so applied will play a magnificent role not only in contributing directly to the intellectual rationale of Islam but also bring an immense uniformity among the different sects of the 'Ummah, which should nevertheless be our ultimate aim."

6. My efforts, such as they are, have been to re-state the formulation of the provisions of Muslim Law on the same old well-understood foundations of the Qur'ān and *Ḥadīth* recognised as such by our learned Jurists from the early formation of *fiqh* onwards. During my search I have always found that the principles of Islamic Jurisprudence are capable of solving all difficulties and handling all situations that might arise in their application in a complex developing society such as ours. I have, in a separate book, suggested the necessary changes that might bring a number of the current legislative enactments of Pakistan within the four corners of the same principles. And I venture to state that the two volumes of this work of mine may be of some help to the legislators, the lawyers and the judge alike.

7. Let me now once again thank my esteemed friend, Mr. Mehdi Ali Siddiqi, (Rtd. Additional District and Sessions Judge), Editor, "Universal Message", Karachi for his reading the manuscript and making valuable suggestions. I am also thankful to my daughter Miss Dur-i-Shahwār for helping me in checking the press-proofs and preparing the errata and index of the book.

Karachi-33,  
5th March, 1980.

DR. TANZIL-UR-RAHMAN

## TRIBUTÈS

"We have assembled here to launch\* a magnificent book entitled "A Code of Muslim Personal Law" written by Dr. Tanzil-ur-Rehman, an eminent scholar of Islamic Law. The book runs into about 770 pages but is all the same the first volume of the treatise on the subject of *Muslim Personal Law* and embraces a statement of the law in a codified form relating to Marriage, Dower, Maintenance, Divorce, Dissolution of Marriage, *Khul'a Mubarat*, *Iddat*, Parentage, Legitimacy and Custody of Children, etc. The second volume according to the undertaking given by the learned Author in his Preface, will contain statement of the law relating to Gift, *Waqf*, Will and Inheritance. Upto now, by and large, the books that have appeared on the subject of Muslim Personal Law have dealt with that subject as though it covered the same ground as the Anglo-Mohammaden Law—that is, the law that was applied by the pre-partition British Indian Courts of the Sub-continent to settle issues relating to Muslim Personal Law. Now of course, there is no such limitation on the power of the courts and the courts in Pakistan are fully entitled to settle these issues in the light of Holy Qur'an, Sunnah and authentic books of Fiqh. After the establishment of Pakistan the institutes of Anglo-Mohammaden Law have been replaced by the Muslim laws *stricto-sensu* and Dr. Tanzil-ur-Rehman who draws on the rules of conduct of nearly all the recognised schools of thought in

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\*This speech was delivered by Mr. A. K. Brohi, as chief guest, at the book-launching ceremony held at Hotel Inter-continental, Rawalpindi on 30th January, 1979. It was attended by Supreme Court Judges, Secretary, Ministry of Law, Chairman and members of the Council of Islamic Ideology, President and members of Rawalpindi Bar Association, scholars of the Islamic Research Institute and a galaxy of Rawalpindi/Islamabad.

Islam like the *Hanafi*, *Maliki*, *Shafi'i*, *Hanbali*, *Zahiri* and *Shi'a*, etc. presents to us a clear-cut, systematic and methodical exposition of the views of the great jurists on diverse aspects of Muslim Personal Law as also the way those very matters were being looked at by the courts of law in the pre-partition times. In the context of present developments which have taken place in the sphere of application of Muslim Personal Law for the determination of issues that come up before the courts, his book would appear to be practically an invaluable asset both for the members of the Bar and the Bench, as there is an extended discussion on various topics of Muslim Personal Law with copious cross-references to the original sources.

Quite at the very commencement of the book there is a list of the reference books which have been consulted by Dr. Tanzil-ur-Rehman in order to be able to present a comprehensive survey of the legal problems that he has discussed. A bare glance at the books mentioned in this list will show the range of his scholarship and the magnitude of the legal erudition that has gone in the writing of the present book. The need for such a book as the one presented by Dr. Tanzil-ur-Rehman in the form of codified propositions that analytically set-forth elements of Muslim Personal Law is all the great, now that Shariah has become justiciable in the country and our courts would be looking at Islamic Law strictly from the point of view of Islamic injunctions contained in the Holy Qur'ān and the Sunnah of the Holy Prophet.

I hope that the second volume of this magnificent treatise of Islamic law would soon be made available to the Bar and the Bench as also to other scholars of Islamic law so that administration of justice according to Shariah proceeds in this country in the light of all available resources that can throw light on various aspects of the legal problems that arise when Muslim Personal Law is applied to determine the Muslims' rights, obligations, liabilities and duties."

(A. K. BROHI)

Federal Minister for Law and Parliamentary  
Affairs, Govt. of Pakistan.

Islamabad,  
January 30, 1979.

My dear Dr. Tanzil-ur-Rahman.

Thank you for your letter of the 15th of July 1978, and the valuable set of your books\* on various aspects of Muslim law as well as the English-Urdu Law Lexicon. Although I have not had time to do more than to glance at the table of contents so as to have a cursory idea of the manner of presentation of the subjects discussed by you, I can say at once that the books show the amount of labour and pains you have put into them. I am sure that they would prove very useful not only to the members of the Bench and the Bar, but also to the members of the public at large who wish to be informed on various aspects of Muslim law. At this juncture when the nation seems to be serious about the introduction of the Islamic laws and the Islamic way of life, you have done a real service by producing these excellent books.

May I express the hope that you will continue with such useful work.

With kind regards.

Your Sincerely,

Rawalpindi,  
July 26, 1978.

(S. ANWARUL HAQ)  
Chief Justice of Pakistan.

Dr. Tanzilur Rahman's first volume of "A Code of Muslim Personal Law" is clear and concise, comprehensive and complete as regards the topics covered therein. The book meets the long demand for a scholarly and systematic treatise on Muslim personal law of Marriage, Dissolution of marriage, Dower, Maintenance of wife and children and other related subject. The authentic and absorbing work will prove useful to the scholars and students, jurists and judges. It is hoped that the future volumes will maintain the same standard.

Karachi,  
27th February, 1980

(SYED SHARIFUDDIN PIRZADA)  
Federal Minister for Law & Parliamentary Affairs and Attorney General of Pakistan.

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\*The books here refer to the author's "A Code of Muslim Personal Law" (Vol. I) and "Majma'ah Qawanin-i-Islam" (Vols. I to IV) and *Islam ka Nazam-i-Adalat*.



“The first Volume of the compendious Code of Muslim Personal Law planned by Dr. Tanzil-ur-Rehman, deals with Family Laws. It furnishes a handsome proof of his scholarship and of his determination to provide, for students and practitioners alike, a comprehensive aid for the implementation of Islamic Law in Pakistan, through the Courts. It is well adapted to the manner of working of our Courts, dealing as it does, with original sources and early scholastic commentaries, as well as judicial authorities from the various regimes that have operated in India and Pakistan, since the advent of Islam in the Sub-continent.

The utility of this work, in the period, now commencing, of establishment of true Islamic Law to govern every aspect of human activity in Pakistan, cannot be over-estimated. And it is impossible to praise Dr. Tanzil-ur-Rehman too highly for the studious application and perspicacity that shine through his work.”

Lahore,  
17th December, 1978.

(MR. JUSTICE A. R. CORNELIUS),  
Retd. Chief Justice of Pakistan.

“Dr. Tanzil-ur-Rehman’s first volume of “A Code of Muslim Personal Law” is a mine of information about subjects as Marriage, Divorce, Dissolution of Marriage, Dower, Maintenance of wife, children and other relatives, Parentage and Legitimacy, Custody of children and other related topics. I understand that subjects left over will be dealt with in a subsequent volume. I would look forward to that volume.

Dr. Tanzil-ur-Rahman has already to his credit a five volume compendium in Urdu, on Muslim Personal Law, which he has compiled for the Islamic Research Institute, Islamabad. The learned Author has had illustrious predecessors in this field.....Whereas the works of the author’s learned predecessors (barring Amir Ali) were principally oriented towards precedents set by courts in this Sub-continent in British times, Dr. Tanzil-ur-Rahman has based himself primarily on the fundamental “*Nusus*” — the Holy Qur’an and Sunnah — and has tried to elucidate the matter under discussion in the light of case-law as well as the opinions of acknowledged masters of the various schools of Muslim Jurisprudence including Sunni and Shi’ah scholars.

The usefulness of Dr. Tanzil-ur-Rahman’s work has been enhanced by the fact that he has also taken note of recent developments of Muslim Law by legislative enactment in various Muslim countries. He has not hesitated to indicate his own preferences among contending views on any point and though all scholars may not agree with him in his conclusions, the opinions he favours, have been well brought out, with due regard to original sources.

The Author's style is lucid and clear and the commentary comprehensive and well-reasoned. The book is an important contribution to the legal literature on the subject. The learned author has not failed to point out departures from the *Nusus* in some of the recent enactments designed to modernise Islamic law and has made valuable suggestions for improvements. The printing and get-up of the book are excellent. This is a timely and most useful publication at a time when the Islamisation of Laws is very much in the air in Pakistan."

Lahore,  
28-11-1978.

(MR. JUSTICE S. A. RAHMAN),  
Retd. Chief Justice of Pakistan.

"A Code of Muslim Personal Law" is unique in so many respects; the most outstanding being the quotations from the Holy Qur'an, *Ḥadīth* and other authorities on Islamic jurisprudence, which not only support the propositions formulated by the learned author but also introduce one who is interested in the subject to the rich heritage that has been left for us by illustrious scholars, whose *Taqwa* and *Ijtihad* is indeed enviable. While going through the Code I felt in the company of the great and I am sure that all those who have access to this, whether as students, Jurists or Judges, they shall find the contribution of the author of immense value. Another feature which gives the Code a position of eminence amongst similar efforts is to be found in the fact that the learned author has taken good care of comparing modern trends in legislation and thought in the Islamic countries and has also referred to the recent rulings of the Superior Courts of Pakistan. He has not only given the divergent views of our Masters and reasons therefor but has also quoted the verses of the Holy Qur'an and *Aḥādīth* on which their views are grounded. He has also endeavoured to resolve the conflict wherever it has come to surface and has shown no hesitation in making his own observations which to my mind are not only weighty, but are also entitled to great respect.

It augurs well that the Code has come at a time when the most important legislative measure, truly speaking, a land-mark in the contemporary history of Islam, namely Legislation for the constitution of Shariat Benches has been promulgated. Those who have some doubts about the working of the Shariat Benches should feel satisfied that the country has the talent and learning in many quarters hitherto unknown which can be harnessed for the successful switch over from the British inspired Statute Law to the revealed law as contained in the Holy Qur'an and Sunnah, which incidentally happens to be *sine qua non* for the transformation of the whole system and thus enable the Muslims of this country as also those living under Muslim States to order their lives in accordance with Qur'an and Sunnah."

Peshawar,  
27th December, 1978

(MR. JUSTICE ABDUL HAKEEM KHAN),  
Chief Justice, Peshawar High Court.

“The study of Muslim personal law is an important core of Islamic studies. Since the end of the Second World War many Muslim countries have attained independence and have been trying to tackle the problems of legislation, for which they have to take into consideration the entire literature on *fiqh*. The learned author has done a great service in presenting it in a codified form. In the author’s words ‘The work is based on the holy Qur’ān and Sunnah and the original Arabic text-books of acknowledged authority. It gives copious references so that a searching reader may be in a position to go direct to the original sources without much inconvenience and find for himself the details of the relevant law on the subject, if needed.’

The learned author has drawn on all recognised schools of law in Islam and has also cited the current laws that are enforced in Muslim countries. He also has a bibliography and an index. The utility of the book would have increased had he added an index of the cases, at least of the important ones which have a bearing on the modern problems. There is no denying the fact that there has set in a process of interpretation of laws and in some cases legislation is initiated in order to make Islamic law attuned to contemporary situation. Muslims live all the world over and it is time that they establish an International Institution of Ijtihad which should draw representatives having insight into the spirit of modern times from various countries as well as from all important schools of law. If nothing else, such a body could exercise great influence on the modern legal thinking and acquire an authenticity that will give it a position of acknowledged leadership in the field of Ijtihad. Whether such an institution comes into being through an agreement or it grows and acquires consensus of the Muslims all the world over is not important at the moment. The author’s effort, though based on his individual work, makes it all the more important because no such comprehensive compendia, to the best of the present reviewer’s knowledge, is available which gives information regarding not only classical authorities on *fiqh* of different schools but also brings within the focus of the legislative measures undertaken in various Muslim countries matters that are of contemporary relevance.

The author must be congratulated for his good work. It is hoped that he may revise the book with care to improve upon certain phrases and expressions and avoid printer’s devil”.

*Islamic Culture*, Hyderabad Deccan, India, (October, 1979).

# A CODE OF MUSLIM PERSONAL LAW

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