CHAPTER IV

HISTORICAL POSITION OF WOMEN IN MUSLIM LAW

Islam is said to be the second largest religion of the world, with a history of only 1500 years. It is also one of the world’s major religions which is highly misinterpreted and misunderstood, and many of those problems are related to how its interpreted and understood by its followers themselves. According to Karen Armstrong, “The Prophet of Islam never thought that he was bringing a new religion, but that he was merely bringing the ‘old faith in the One God’ to the Arabs. It was basically a social reform movement bringing the ‘savage, pagan’ Arabs, the laws of humanity and a society where the weak and vulnerable were treated with respect. Armstrong regards him as a social reformer who was way ahead of his time. She further says that it was astonishing for others in that time and milieu to see a man who not only respected women, but gave importance to their views and the freedom to talk back and discuss. For the prophet of Islam, one of the most important projects was the emancipation of the women, children and vulnerable. In this chapter-------

Position of women in Pre-Islamic Arabia

The society in which the prophet of Islam took birth was a society of uncivilized, barbaric nomads, fighting and feuding with each other constantly. This behaviour and

2 She is the author of the world-wide bestsellers on Islam and its history She is a teacher at the Leo Baeck College for the Study of Judaism in London. In 1999, she had received the Muslim Public Affairs Council Media Award.
3 Muhammad was born posthumously in 532 A.D. in Mecca in Arabia. His uncle Abu Talib took him under his wings at the early age of 6, after both his mother and grandfather had died. He belonged to the powerful and respected Quraish clan of Arabia. Muhammad married Khadija at the age of 25, who was a respected and gifted businesswoman of her time. She was 3 years older to Prophet. He proclaimed prophet hood in his 40th year and devoted his life to the needy and the vulnerable. He was regarded as person of highest character and virtues, even by his enemies. For more see Karen Armstrong, Muhammad: A Biography of the Prophet (Phoenix Press, London, 1st edn., 2000).
the socio-economic condition in pre-Islamic society was largely a result of the arid geographical conditions of the region. The peninsular Arabia was a desert with inhospitable conditions and scarce water, forcing people to live a life of nomadic existence, wandering from one place to another in search of greener pastures and resources. This also made them realize the importance of belonging to strong groups and taking pride in their tribes. The highest virtues for these Arabs were courage and bravery, whereas vendetta was their passion. These tribes owing to the limited resources and water were in constant conflict and war with one another. The nomads were disorganised and scattered, and thus tribes became their political centre and motivator. Thus the social and political structure was based on their familial and tribal relationships and was dominated by men. Women were not part of their membership and played little or no role in the affairs of the family or tribe. Women were regarded as the property of men and were owned and abused like any other property. Thus, according to most of the many scholars of Islam, the position and status of women was abominable in the jahiliya period. She was sold and bought as chattels and animals, she was not a free agent, had almost no legal, political or social standing. Before the marriage, her father and male relatives were her master and after it, the husband became her lord. Polygamy was rampant as well as easy divorce; there were multiple type of sexual unions which were not regarded as marriage. The consent of women in marriage or divorce was of no consequence, neither asked nor required. Female infanticide due to the belief of female being a burden became

6 Ibid.
7 The period before the advent of Islam. The meaning of *jahiliya* is ‘ignorance’. But according to European authors like Goldzihner and Charles Lyall, the word basically means wilderness or intrepidity.
common in Arabian peninsula. Though this view is not agreed upon by many European authors like Goldziher and Charles Lyall, who regard these opinion as exaggerations, and argue on the contrary that the Arab woman was a free-spirited, modest, beautiful and virtuous, respected, loved and honoured by men. According to them it was Islam that had robbed the Arab women of her ancient liberty. For their arguments, they have largely relied on the ahistorical poems and proverbs of the ancient Arab society.9

This contradiction is explained by Ameer Ali in his book. He says that some 100 years before the birth of the Prophet, the Arabs, to some extent, were a civilized society, which treated women with respect and they were favoured and enjoyed certain rights as well as freedom. But this civilization gradually disappeared and the cruelty towards women became the prevalent form, and the position of women deteriorated and she was further robbed of basic freedom and legal rights. 10

The women had no right to inherit and could only dream of owning or disposing of property.11 The women were completely excluded from inheritance, so was the case with minors and orphans. Infact, after the death of a man his widow was also regarded as a property, to be inherited by his heirs. The heirs of a man were firstly his male agnates, with the total exclusion of the cognates. The second category of heirs was the adopted son and relation which were given the same right as the natural born son. And the third and the last category was of ‘heirs by contract’, that is, “two Arabs, for services rendered to each other or for mutual affection would enter into a contract that in the event of his death one of the other would succeed to his estate”.12 The Arab had

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9 JND Anderson  Islamic law in the modern world.....
10 Syed Ameer Ali, Mohammadan Law (English Book Store, New Delhi, 4th edn, 1985)
12 Abdur Rahim, Principles of Mohammadan Jurisprudence (All-Pakistan Legal Decisions, Lahore, 1958)
an unequivocal right to dispose of his property by the way of the will. In this period, the reforms bought by the Prophet were revolutionary and path breaking. Prophet taught the Arabs the advantages of a strong society and its associations.

**Changes Bought By the Advent of Islam in the Arab Society**

The Prophet of Islam gave women a new lease of life and bought quite revolutionary changes in the abominable condition of women. The Qur'an gave women equal and independent identity in all spheres of life political, social as well as spiritual, along with this, it taught men that women were their equal and created from the same soul. “Women were granted religious and spiritual equality, responsibility for the same moral obligations incumbent on all Muslims, and were also permitted and encouraged to attend prayer services in the public mosques”.13

Islam from its very beginning has ascribed a religious code dealing with the all aspects of life. It includes in its ambit public as well as private laws covering from administration to criminality and human rights to personal affairs. Islamic law is said to be of divine origin14 as is in the case of Hindu law. Justice Mahmud tries to explain the notion of Islamic law by saying that “It is to be remembered that the Hindu and Muhammadan Law are so intimately connected with religion that they cannot be disserved form them.” In Islam the law is intermixed with not just religion but also morality. The word Islam means, “submission to the will of God” and the word Muslim means “one who submit to the faith of Islam”. Islamic law or *Shariat*, is the main theme and the guide of ethics, but it cannot be regarded as a law in its proper

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13 *Supra* note 11
14 There are basically two conceptions of law- divine and man-made.
sense, as it encompasses in its ambit all the aspect of one’s life.\textsuperscript{15} It is basically a moral code of ethics prescribing how one should lead a virtuous life. According to Shariat, “what is morally beautiful should be followed and what is morally ugly must not be done.”\textsuperscript{16} And a person is guided by the Prophet’s actions and the Quranic injunctions of what is good and evil, \textit{husn} (beauty) and \textit{qubh} (ugliness). The Shariat is derived from the four important sources – the Holy Quran\textsuperscript{17}, \textsl{Sunnah} of the Prophet\textsuperscript{18}, \textit{Ijma}\textsuperscript{19} and \textit{Qiyas}\textsuperscript{20}. Whereas according to Fyzee “the law in Islam is called Fiqh; it is the name given to whole science of jurisprudence because it implies the exercise of intelligence in deciding a point of law in the absence of a binding command from the Quran or Sunnah.”\textsuperscript{21} Thus \textit{fiqh} is man-made law based on the knowledge of the Quran and \textsl{Sunnah}. The word \textit{fiqh} means intelligence and a \textit{faqih} is a jurist, whom with knowledge and independent judgment arrives at a point of law.

Islam revolutionised the Arabic society, especially in the domain of marriage. It prohibited all the different kind of sexual unions prevalent before, and made marriage a civil contract in which both the husband and wife were equal partners. Consent was made an essential and mandatory ingredient,\textsuperscript{22} with the dower\textsuperscript{23} incumbent upon the

\begin{footnotesize}
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\item \textsuperscript{15} \textit{Supra} note 8
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\item \textsuperscript{18} It is the primary source of Muslim Law, second in point of time and authority, to the quran. according to Quran sunnah is “whatever the prophet gives, accept it, whatever he forbids abstain from it.” 49:7. It is body of the traditional social, legal and Islamic custom of the Islamic community and is based on the life and teaching of the prophet. For detail Discussion See \textit{supra} note 8 chapter 1.
\item \textsuperscript{19} Ijma means consensus opinion of the companions of the prophet as well as qualified legal scholars. It derives its authority both from Quran as well as Sunnah. The Ijma of the prophets companions and his immediate descendants are regarded as of the highest order and after that See \textit{supra} note 8 chapter 1
\item \textsuperscript{20} It means analogical deduction, derived from the other three primary source- Quran, Sunnah and Ijma. It is not a universally accepted source of law. Shia does not accept this as primary source of law. See \textit{supra} note 8 chapter 1 See \textit{supra} note 8 chapter 1
\item \textsuperscript{21} \textit{Supra} note 8
\item \textsuperscript{22} \textit{Supra} note 10
\item \textsuperscript{23} Dower under Islamic law is the sum payable by the husband to the wife at the time of marriage as token of respect. The dower can be both in kind as well as cash. It can be specified or unspecified, prompt or deferred. It should not be confused with consideration in a contract, as absence of dower does not invalidate a marriage. Though not mandatory, it is an essential condition for a valid marriage.
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husband to be given to his wife at the time of marriage, and not to her father any other relative. Monogamy became a rule, with an exception of conditional polygamy, allowed only in cases where it was possible for a person to treat both the wife equally in all aspects. In divorce proceedings, the participation of women became mandatory and maintenance obligatory on the husband in instances of divorce. Women were also given right and power to divorce.

Practices like female infanticide were abolished with emphasis on the importance of daughters in the family, Prophet is reported to have said," if a daughter is born to a person and he brings her up, gives her a good education and trains her in the arts of life, I shall myself stand between him and hellfire." Another quote of the Prophet: "Girls are models of affection and sympathy and a blessing to the family. If a person has one daughter, God will screen him from the fire of hell because of his daughter; if he has two daughters, God will admit him to paradise; if he has three, and God will exempt him from the obligations of charity and Jihad."

According to Quran IV: 4- “You must give your wives their dower as a legal obligation; but if they forgo anything out of dower by their free will; then you accept it and enjoy it as a gift” For further discussion see Tahir Mahmood, Muslim Law In India And Abroad, Chapter 5 (Universal Law Publication 2nd Edition 2016).

24 Supra note 10
25 Quran sur-e-nissa IV: 2-3, 20-21. XXIV: 32 which are: “Marry of the women, who seem good to you, two or three or four; and if ye fear that ye cannot do justice (to so many) then one (only) or (the captives) that your right hands possess. ” Ye are never able to be fair and just as between women, even if it is your ardent desire” Tahir Mahmood Law in Quran: A Draft Code (Universal Publication, New Delhi 2nd Edition, 1996)

27 Apart from right of Talaq provided to husband women were given divorce rights in the form of khula and talaq-e-tafweed or delegated divorce. A mutual consent divorce was also introduced in the name of Mubaraat. For more see Sylvia Vatuk, “Divorce at the Wife Initiative in Muslim Personal Law: What are the Options and what are their Implication for women’s welfare.” In Archana Parashar & Amita Dhanda , Redefining Family Law in India 201 (Routledge, 2008).
29 Awas Malik cited in supra note 26
The practice of inheriting a widow by the heirs of the deceased along with his property was severely condemned by the Prophet and abolished. The women were given inheritance rights as well the right to own and dispose of her property without any incumbent or hindrances. The Prophet replaced the concept of tribe with the family as the primary social unit.  

**Inheritance under Islamic Law**

Most of the Muslim jurist regards the Islamic law of inheritance as the finest and most detailed law of inheritance and they often highlight this saying of the Prophet: “Learn the laws of inheritance and teach them to the people; for they are one half of useful knowledge.” Modern writers like Anderson  and Rumsey also give prominent position to Islamic law of inheritance and regard it as an “elaborate system of rules for the devolution of property that is known to the civilized world”. Many have, in general, praised the logical and technical excellence of Islamic system. The Islamic law of inheritance is based on the Quranic injunctions, hadith of the Prophet of Islam, as well as the customs prevalent in the then Arab society. According to Abdur Rahim it’s not wholly correct to suppose that Islam professed to repeal the entire customary law of Arabia, and to replace it with code of altogether new law. The fact is that the groundwork of Muhammadan legal system, like that of other legal system, is to be found in the custom and usages of people among whom it grew and developed.  

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30 Supra note 10  
31 Supra note 9  
33 Supra note 8  
34 Supra note 12  
35 Supra note 12 at 11
superseded them with new principles and rules, the prevalent customs were regarded as important source.

For the first time, a religion gave women not only the right to inherit but also made women the absolute owners of their property. It changed the principles of succession of the pre-Islamic Arabia which were based on the system of tribal warfare, where men participated in the combat and were the natural heirs of a person. The females as non-participators were not entitled to inherit. The inheritance was based on the male agnatic links exclusively.\textsuperscript{36} Thus they completely excluded women, minor, cognates, parents or any other relative. Thus, to bring almost radical changes in the prevalent customs and usages, it was necessary to switch the predominance of tribal affiliations with that of family and kin relationships. Therefore the Quran in the first instance declared that all the close relatives, both male and female shall have a definite share in the property of the deceased, which can be small or large.\textsuperscript{37} According to the Quran after the death of person, there are a few obligations to be fulfilled from the property of a person- paying of his debt, legacies and shares to his relatives in accordance with the rules of succession prescribed in the Holy Quran.\textsuperscript{38} Thus the Quran makes it a mandatory moral obligation on dying person to make satisfactory provisions for his children, parents and relatives. It does not provide for the quantity or amount which can be bequeathed.\textsuperscript{39} There are in all 13 verses dealing with the laws of inheritance

\textsuperscript{36} Ibid

\textsuperscript{37} Sura nissa (4:7) “Right in the property of parents and relatives; are determined by law; also for women; all of them must be given their shares; verily God shall be witness to everything. Supra npte 25

\textsuperscript{38} (4:7) All of these shares will be out of what is left ; after the payments of legacies and debts; your parent and children are your nearest kin; and their shares are ordained by God; verily God is all knowing all wise.” Supra note 25

\textsuperscript{39} (II:180.) It is prescribed for you that, should death approach any of you, if he leaves any assets, it is best that he leave a bequest for his parents and near relatives according to normal usage – a truthful obligation (haq) on the part of the righteous supra note 37
under the Holy Quran. Ten are from chapter IV Sura-al-nissa ayat 7-14, 33 and 76\(^40\) and three from chapter II sura-al-baqra ayat 180-182.\(^41\) In Quran, the shares are fixed in fractions- ½, 1/3, ¼, 1/8, 2/3, as decimal system was not known till then.

The Quran, in its verses, has very categorically declared the heirs as well their share in the deceased property. It regards the parents, children and spouse as a preferential heir and in their absence, collaterals inherit. There rules and shares laid down in Quran in Sura al Nissa are:

1. When a person dies leaving behind parents as well as children- the share of each parent shall be 1/6 and rest of the property will go to the children, with male getting double the female share. In case a person dies leaving behind only parents, the share of mother will be 1/3 and rest will go the father. Whereas in situation where mother exists with brother and sister, her share will be 1/6. Where the person dies leaving behind only children, if there is only one daughter her share shall be half, if they are two or more in number their share shall be 2/3. If they coexist with brothers they will get half of their male counterpart.\(^42\)

2. When a person dies leaving behind a spouse. If a male dies the share of wife is ¼ in case there are no children. In case where there is children, her share in


\(^ {41}\) *Supra* note 37

\(^ {42}\) (4:11) God commands you, with respect to your children, that the male shall inherit the equivalent of the share of two females. If there are only females – two or more, then they should receive two-thirds of what he leaves; but if there is only one female, she is entitled to one-half. To each of his parents, one-sixth of what he leaves, if he has any children; but if he has no children, then his parents will inherit him, the mother receiving one-third. But if he has any brothers (or sisters), then his mother receives one-sixth. (The distribution in all cases) after any will he had made or any debt he had incurred [is taken care of]. Your parents and your children—you know not who of them is nearest to you in terms of benefit. A directive from God; God surely is All-Aware, Wise. *Supra* note 25
1/8. If a female dies the share of husband is ½ if there are no children, if there are children his share is ¼. 43

3. Where the deceased man or women has left no ascendants or descendants, the property will go to the brothers and sisters of the deceased. It there is one sister her share is ½, if there are two or more sisters their share is 2/3 and if there is both brother and sister, the male shall have twice the share of female.44

There is one more verse which talks about uterine brother and sister, and says that in absence of ascendants and descendants of the deceased, the uterine brother or sister, if one in number, shall get 1/6 but if they are two or more (brother and sister) they will 1/3 cumulatively.

4. The last verse is in regard to the poor and disadvantaged relatives, that certain provision should be made for them while writing legacies and distributing wealth.45

Apart from these verses there is nothing in Quran in relation to inheritance and property rights. Therefore, we see that a detailed inheritance system and its related jurisprudence was developed by the jurists of that time. According to Abdur Rab “the traditional Muslim rules of inheritance are derived from the basic structure set out in

43 (4:12) In what your wives leave, your share is a half, if they leave no child; but if they leave a child, you get a fourth; all after payment of legacies and debts. In what you leave, their share is a fourth, if you leave no child; but if you leave a child, they get an eighth; all after payment of legacies and debts. If the man or woman whose inheritance is in question, has left neither ascendants nor descendants, but has left a brother and or a sister, each one of the two gets a sixth; but if more than two, they share in a third; all after payment of legacies and debts; so that no loss is caused (to any one). Thus is it ordained by God; and God is All-Aware, Most Forbearing. Supra note 25

44 (4: 176) They ask you for a legal decision. Say: God directs (thus) about those who leave no descendants or ascendants as heirs. If it is a man that dies, leaving a sister but no child, she shall have half the inheritance. If (such a deceased was) a woman, who left no child, her brother takes her inheritance. If there are two sisters, they shall have two-thirds of the inheritance (between them); if there are brothers and sisters, (they share), the male having twice the share of the female. Thus does God make clear to you (His law), lest you err. And God has knowledge of all things. Supra note 25

45 4: 8-10 “when shares in the estate of deceased are worked out; if there are non-heir relatives and orphans or indigent; they should be given something out of the estate; fear God and speak to them with sympathy; those who distribute should be kind to them; as if he had left behind his own poor kin; they must fear God and decide justly.” Supra note 25
the Quran, which was then elaborated and systematised by the various madhhab or schools of law through jurisprudential methods and interpretations.”

Therefore we see that there are two interpretations with regard to the inheritance law depending on the school of thought the jurist belonged. Both the Shia as well as Sunnis have interpreted the Quranic injunctions quite differently from each other. The Shia school believes that after the coming of verses in the Quran, the entire system of pre-Islamic law and customs has been abolished and superseded by the new superstructure, whereas according to the Sunni school the Quranic Verses only amended the existing pre-Islamic practices and apart from those customs and practices which are in conflict with the Quranic injunction, the others are still in place.

**General principles of inheritance under Islamic Law**

These are some general principles derived from the Quranic verses by method of jurisprudential interpretation.

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47 The Muslims are mainly divided into two broad divisions- Sunni and Shia. The division basically took after the death of the Prophet and the bone of contention was the issue of the “temporal successor” of Muhammad (Khalifa/Caliph). According to the majority/ Sunnis, it should be done by election among the favored companions of the Prophet. Those who supported this were called the Sunni or who follow the Sunnah of the Prophet. Whereas the other groups, which were in minority, believed that the Prophet during His life time has declared Ali-ibn-Abu Talib as his successor and called themselves the Shian-e-Ali (Partisans or Party of Ali). This group was known as Shia. The most important difference between the Shia and Sunni philosophy is the understanding of Imam or the doctrine of Imamat, as according to Shia’s the Imam is not only the temporal head but also the religious head and his interpretation of Islamic law is final on the earth. Whereas the Sunnis believed that Caliph is only a political head and in matters of religion and all Shariat should be followed. Both the schools are further divided. The Sunni school is divided into four sub-schools: Hanafi, Maliki, Hanbali and Shafi’i. In India the majority of Sunnis belong to the Hanafi Sunni. The shia school is further sub-divided into three schools: Zaidiya, Ismailiya and Ithna Asharia, Ithna Ashria Shias are predominantly found in India. The Shia school of law is developed By Imam Jafar-as-Sadaiq, and thus is also referred to as Fiqh-e-Jafari. Noel J. Coulson, *A History Of Islamic Law*, (Edinburgh: Edinburgh University Press 1964).

48 Supa note 8
1. Women have same rights and obligation as men. They have to right to inherit the property as well as hold possess and enjoy. There is no concept of limited property/estate.\textsuperscript{49}

2. Under Islamic law there is no concept of joint family or joint family property and neither there is any distinction between self acquired or an ancestral property.\textsuperscript{50}

3. There is only one scheme of succession- both for male as well as females, and property to be devolved accordingly without any distinction between man and women.\textsuperscript{51}

4. As long as a person is alive no one has a right over her property, it is only after the death of the person that rules of succession comes into purview.

5. Immediately after the death of the person, the heirs are vested with the right of inheritance, it does not matter whether the property is divided or not, their share get ascertained, and if the heirs dies before the division her heirs shall be entitled to inherit her portion. \textsuperscript{52}

6. The Islamic law of inheritance is based on the principles of consanguinity and marriage, therefore it is believed that nearer in degree will exclude the remoter. For example If a person dies leaving behind a son and a Grandson from a pre-deceased son, the grandson shall be excluded because of the presence of son.\textsuperscript{53}

7. Under Islamic principles only the legitimate heirs have a right to inherit. In case of illegitimate children, under the Sunni law is regarded to only have

\textsuperscript{49} Ibid.
\textsuperscript{50} Noel J. Coulson, \textit{Succession in the Muslim Family}, 50( Cambridge: Cambridge University Press 1971).
\textsuperscript{51} \textit{Supra} note 48 at 54
\textsuperscript{52} \textit{Supra} note 12
\textsuperscript{53} \textit{Supra} note 12
mother, from whom they can inherit, and thus also from all the maternal relations. But according to Shia law, illegitimate cannot inherit from anyone.

8. The share of male is always the double of the female in the same category.

9. The concept of doctrine of representation with regard to who are entitled to inherit is absent from both the Shia as well as the Sunni school of law. A concept called “Stirpital Succession” however can be used, that too in a very limited manner. For example- if a person dies leaving behind one grandson (SS) from a pre-deceased son and one grandson(SS2) and one granddaughter(SD) from another pre-deceased son then according to the Shia law, the children shall represent their father and will be getting the share of their father. So the property will be divided into two parts with one part to one son’s family and other part to the other son’s family. So SS= ½ and SS2+SD= ½, now this half property shall be divided between SS2 and SD in the ratio of 2:1. Whereas in Sunni school this limited meaning of representation is also not there, here the property will be divided equally between the three grandchildren and as there is a female here she will get half of both the males. Then shares will be SS = 2/5, SS2 = 2/5, SD = 1/5.

10. Doctrine of Aul and Radd: As the shares of heirs are in fraction there are chances that sometimes the property is left after the distribution of share, whereas on some occasions, the property is less as compared to the number of sharers. Thus it requires an adjustment of share. Thus for simplification and equality the jurists of the time coined two doctrines: doctrine of Aul and

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54 Supra note 48
55 Ibid
56 Supra note 8
The doctrine of Radd. The doctrine of Aul is applied when the sum total of the share exceeds the unity, in this situation the share of all the heirs are proportionally reduced. Except under the Shia law, the shares of the spouse and parents can never be reduced as it is the minimal entitlement to them, but if required the shares can be reduced of the daughters or full or consanguine sister. The doctrine of radd is applied when the sum total of the share is less than the unity and certain property is left and there are no heirs left, in this situation the shares of sharer shall be proportionally increased. Under both the Shia as well as the Sunni school, the spouse does not get any property through radd if there is any blood relative. Apart from this under the Shia law a mother will also not get any property by Radd if the deceased has left two or more than two siblings. This is not the case under the Sunni law.

Introduction Of Islamic Law In India

The first Muslim military invasion on the Indian Sub-continent was in early 8th century by Mohd. Qasim in Sindh but he never established Muslim rule in India. Along with this there were Muslim traders who came in the 8th century for trade through the ancient trade routes of the Arabian sea but these settlers, mostly settled along the Malabar coast, adopted the local customs and were not following Islamic law or Shariat in any form.

The starting point of Muslim rule in India is the armed intervention by Mahmud of Ghaznvi in 11th century and the establishment of a ruling dynasty by Qutub-uddin

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57 Ibid
59 Hamid Khan, The Islamic Law of Inheritance: A Comparative Study of Recent Reforms in Muslim Countries (Oxford University Press, Karachi 2007). Further more in maliki and shaifi school a widow even in absence of any blood relative does not get any return .
60 Ibid
Aibak in 1150. They for the first time introduced Shariat or Islamic law was. The Afghans and Turkish sultans who followed Aibak were mostly Hanafi Sunnis. They appointed Ulema and clerics for administration and interpretation of laws, both civil and criminal. Its is to be noted that though the administration as well as criminal law of the country during the Muslim rule was influenced heavily by sharia, the individual population was free to apply their own customs and rules with regard to their personal life and family.62

This period sees an interesting amalgamation of Muslim and Hindu law customs, ceremonies and rituals. A large number of converted Muslims followed their earlier non-Islamic customs and practices of caste system as well as joint family system. The population consisting of Hindus, Jains, Buddhists as well as Muslims, by large followed the local laws and custom.

There was a rise of what we can call as amphibian communities63 whose laws were so intermingled that to give them a definite religious identity was becoming increasingly difficult and posed difficult questions for jurists of law.64 Most modern scholars believe that the Muslim identity by the 18th century was part of what is known as “composite culture”, where Muslim identities were merged with local, regional Hindu idiom.65 Although Islamic law as compared to other religious law continued giving women much more rights and freedom with respect to family law and inheritance, i.e., women were equal partners in the marriage and had an economic right called Mehr.

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62 Ibid
63 The case of the khojas, Cutchi Memons and other converted Muslim trading communities of Gujrat, which followed the joint family system of property and devolution The matrilineal practices of Mopilla community of Malabar and the case of Satpanthis and Pirpanthis of Gujrat, Khandesh and Cutch is also very interesting. The later follow atharveda, worship muslim tombs and saints and also used to fast in the month of Ramzaan. They buried their death with the prayers of both Hindu and Muslims traditions. See JDM Derret Religion, Law and State in India (free Press New York 1968) and supra note at 65.
64 Flavia Agnes, Law, Gender and Inequality, 20-21 (Oxford University Press, New Delhi, 2004).
had the right to dissolve the marriage as well as were given definite property rights though not equal were first of a kind. But despite so many positive reforms for the safeguard of women’s rights, there was clear decline and decay in the rights over the course of later periods, due to the dominance of patriarchal norms and socio-cultural reasons. The practice of child marriage and purdah system coupled with poverty and illiteracy and interpretation of Islamic text by the ‘men’ both in center as well as on the periphery, preserved the traditional male domination and privilege.\textsuperscript{66} The system of dowry peculiar to the Hindu society crept in to the Muslim communities and slowly the amount of \textit{Mahr} became much lower that the dowry demanded by the groom ‘s family.\textsuperscript{67} The condition of women in general as stated earlier in the chapter at the advent of colonial rule was abysmal.

\textit{Colonial Rule and Islamic Law}

It is very important to understand relationship and historical perpect of colonial rule and Islamic law in India as the processes of reform or to an extent lack of reform, especially in the minority communities, lies in the principles adopted by the colonial masters of non-interference in the personal law of the communities and also the appeasement policy towards the minority communities. Furthermore, where in situations intervention is sought, it is seen as infringement of the rights of minorities. We shall examine this aspect further to compliment our understanding of the development of Islamic law in India.

As previously discussed in the chapter, under the colonial rule the strict distinction between law and customs governing the Hindus and Muslims were made, which were

\textsuperscript{66} \textit{Supra} note 8.

\textsuperscript{67} In a recent study of Muslim women conducted by Women Research and Action Group, Bombay (WRAG) during 1944-46, most communities confirmed that they do follow the custom Mahr but it is now reduced to a mere formality of token respect and invariably the dowry amount is much higher than the Mahr. \textit{supra} note 62
primarily based on the assumption that scriptures were the most important source of law for these religious communities. And hence in colonial rule there was strict construction of individual identities along the religious lines.68 This construction differentially affected the Muslim as well as Hindu communities in relation to personal law, gender and identity politics.69

In case of Muslim law, the adherence to scripture text was more strict and stringent than the majority community, owing to the belief that Islam is a monolithic faith with a set of rules and principles derived from the Holy Book. The colonial understanding of Muslim law was deeply embedded in the religion and scriptural text, thus it became important for the colonial masters to understand the text which led to translation of two most authoritative work of Muslim law, Hedaya70 and Fatwa-i-Alamgiri,71 in English in late 18th century. David Pearl explains that the Islamic law applied in India during the colonial time was actually Anglo-Muhammadan Law72 as “Indian courts from the early part of 19th century have tended to treat these two sources as authentic source of Muslim Law. This raised difficult problems over the relationship between the primary source of Muslim law, namely Quran and Sunnah, and the two since the latter were relied on to the exclusion of earliest sources.” Justice Ameer Ali in the case of *Imambandi v. Mustaddi*73 pointed out that: “Both Mr. Hamilton and Mr. Neil Baillie in their renderings have, with the object of elucidation, occasionally added

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69 Jana Everett “ All the Women were Hindus and all the Muslim were Men: State, Identity Politics and Gender, 1917-1951”  2071-2080 36 *EPW* (2001).


71 This is in essence a collection of responses by a Muslim jurist, composed from Hanafi sources in 1663 on the orders of Aurangzeb.

72 Pearl and Menski and other writers have used this term to highlight the interference of English legal principles, specifically the value of precedents in deciding matters pertaining to Islamic law instead of the original sources. David Pearl and Werner Menski, *Muslim Family Law* (Brite Books, Lahore, 1998).

73 1917 45 L.R.I.A
phrases which do not exist in the original, but on the whole the English version of Hedaya and of the Fatwa-i-Alamgiri are valuable works on Muhammadan Law."

By the late 19th century, the situation was such that case laws became more popular and attractive sources as compared to the earlier sources which came to be looked upon as haphazard and inaccessible. According to Fyzee, "the law that emerged in this way was somewhat at variance with its original sources but the post-colonial states have found it difficult to undo this long restructuring process." The reason for this as Pearl and Menski explain is, primarily, the doctrine of precedent, then English being the language of the court, the hierarchical court structure and lastly the reporting which over the time gave authoritative value to those decisions and case laws which were contrary to Muslim Law in principle as well as substance. Also the colonial ruler introduced the doctrine of "justice, equity and good conscience" in the Muslim law as a device to counter the lacuna of their ignorance of Muslim law thus further reducing the impact and concepts of Muslim law. Therefore, it became increasingly difficult for the reformers as well as post colonial state to break the mould and undo the damage done by the Anglo-Muhammadan law.

With regard to the cases of Islamic inheritance, the colonial state depended on the translation of Al-Sirajiya, another important Hanafi text. The text provided for division of property of a man among his spouse and children. Specific shares were

74 The primary sources of Islamic law- Quran and Sunnah.
75 Supra note 64
76 Supra note 70
77 Supra Note 70 at 35. A case in point is Abdul Fata Mahomed Ishak v. Russomoy Dhur Chowdhary, where a family waqf created by brothers was held to be invalid as the privy council saw this arrangement as an expedient device to benefit the family alone and waqf is basically a nature of gifts to poor so the waqf was invalid.
78 Charles Hamilton's four volume translation of the Hedaya, a collection of Hanafi legal opinions was published in 1791 and for much of colonial rule, the English translation of this Islamic text. The Hedaya did not include any discussion of inheritance practices, and British knowledge of Indian Muslim inheritance developed on the basis of William Jones' translation of another Islamic text, Sirajiyya, which appeared the following year in 1792. Michael Anderson, “Islamic Law and the Colonial Encounter” in David Arnold and Peter Robb (eds) Ideologies and Institutions: A SOAS South Asia Reader 171- 174 (Curzon, Richmond, 1995)
provided for each. These rules were regarded to be much more equitable than the
English succession. Despite being a clear directive of inclusion of share of daughter in
the father’s property, the colonial court ignored it in favour of discriminatory
customary practices which denied women the right to inherit or gave her only limited
interest in the property. This was also done in an erratic manner as some Muslim
families and clans were excluded and others were not. 79 Though some of the Islamic
principles were applied very strictly, like women’s right to mehr was taken to be an
essential and absolute right. This attitude benefited the Indian Muslim women as she
was recognised as property owing legal person. 80 This acknowledgement, according
to Eleanor Newbigin 81 became the defining feature of Muslim family practices
against the Hindu majorities, and making Muslim individuals as property owing in
contradiction to presumption of jointness of Hindu Families.

The changes bought in the nineteenth century in the administrative and economic life
of the individuals resulted in urban expansion and opening up on new ventures and
economic structure. The Indian Muslim experience of these expanding opportunities
was greatly influenced by the prevalent structure of property law in the country. 82

The colonial interpretation of Islamic law made it very difficult for the affluent
Muslim families to build and protect their wealth from the fragmentation due to
division of property between the spouse and children and ultimately going of property
in the hands of distant kindred. 83 On the contrary in the other Islamic states where

79 Noel J Coulson “A Comparison of the Law of Succession in the Islamic and British Legal Systems”
26(2) The American Journal of Comparative Law 227-229(1977)
80 Ibid
81 Eleanor Newbigin “Personal Law and Citizenship in India’s Transition to Independence” 45(1)
Modern Asian Studies, (2011)
82 Ibid
83 Muslims governed by customary legal systems, especially those in Punjab and Bengal, were not
affected by this reading of waqf law in quite the same way. Gregory C Kozolowski Muslim endowments
and Society in Britain India 71 (Cambridge University Press, 1985)
shariah was followed, due to the applicability of waqf law, which is a kind of trust made under Islamic law for charitable endowments (making and maintain of hospitals, orphanage etc) and religious purposes (mosques, Imambaras etc). Apart from this the property owner can also create waqf for their family members and future generations- referred to as waqf-al-aulad. 84The striking feature of these waqf is that once a waqf property is created it is for eternity and it cannot be sold, seized or succeeded. The corpus of property is regarded to be vested in God and only the usufruct or the fruit can be appropriated. 85 Thus a vigorous campaigned was started by Muslim thinkers and lawyers to reform the existing legal structure. SS Ahmed Khan, an eminent social reformer and thinker, regarded the current waqf law as oppressive. He also fought for Muslim to have English education and became part of the British administration in order to improve their socio-economic conditions. He focussed on modernization of the Islamic law and was met with severe criticism from the traditionalists. The breakthrough in the reform law was achieved by the interference of lawyers like Ameer Ali who argued that family waqf was not an innovation but has been part of Islamic legal system for centuries. This cause for further taken up by another prominent lawyer as well as politician, Mohammad Ali Jinnah, who had links with both the Congress as well as the Muslim League. He believed in Hindu-Muslim cooperation but argued that due to distinct identities and interest, the need of two communities cannot be assimilated. He and his colleagues centred their argument around the fact that the colonial interpretation of the ancient Islamic texts is flawed and against the true principle of Islamic law, thus there is a

84 Id at 72
85. The word waqf literally means ‘detention’ and connotes ‘tying up of the property in perpetuity. The institution of waqf has developed with Islam. There was no waqf in the pre-Islamic Arabia nor there is direct mention of it in the Quran. Though there are verses which provides for charity and benevolent attitude which has come to become the basis of Waqf law. The two verses are- XXVI:19 and III:86 of Quran. Ibid
need to reform the current legal system and bring it in consonance with Islamic family law.\textsuperscript{86} Due to these efforts the Mussalmaan Waqf Validating Act was passed in 1913, this legislation made Family Waqf legitimate in India. Though the waqf law was bought in line to an extent, the laws relating to property in general remained same.

With subsequent expansion of the representation of Indians in the legislature after the 1919 as well as 1935 political reforms, a new category of Indians got power in their hands to make changes according to their interest. The colonial masters had, from inception, citing the policy of non-interference and neutrality, stayed away from the debates surrounding reform in the personal law of the communities.\textsuperscript{87} But with the entry of Indians into the legislature, the debates centred around reform in personal law gained momentum so as to fulfil to a large extent economic and social interest of many legislators themselves. The Muslim legislators during this period demanded reform in the existing personal law system as it was in contradiction with the true principles of Islamic Jurisprudence and against the ethos of a modern Islamic society.\textsuperscript{88}

According to Newbigin,\textsuperscript{89} the period of 1920-30s witnessed deepening of the religious divide and strengthening of the communal forces. The government of India Act 1935 gave opportunity to both Hindu as well as Muslim Legislators to influence for reforms in their respective personal laws. This period saw the rise of three major legislations- GV Deshmukh Hindu’s women property rights\textsuperscript{90}, second MHM Abdullah’s Shariat Application act and the last Maulana Thanvi’s Dissolution of Muslim Marriage Act. All these laws were formulated in the wake of providing women a better social and

\textsuperscript{86} Khalid Rashid, \textit{Wakf administration in India} 23-35 (Vikas, New Delhi, 1978)
\textsuperscript{87} Eleanor Newbigin \textit{The Hindu Family and Emergence of Modern India: Law Citizenship and Community}, 136 (Cambridge University Press, 2013)
\textsuperscript{88} Ibid
\textsuperscript{89} Eleanor Newbigin, ‘The Codification of Personal Law and Secular Citizenship: Revisiting the History of Law Reform in Late Colonial India’, 46 (1) \textit{Indian Economic and Social History Review} 85 (2009), pp. 83-104.
\textsuperscript{90} This aspect has been previously discussed in the chapter II of this thesis.
economic status.91 The Shariat Application Act demanded that the Muslim community in totality should be governed by the Shariat laws.92 This bill was first introduced in 1935 by M.H.M Abdullah93 who argued that the application of shariah law on women will improve their conditions, as they were more progressive and provide women with definite property rights, whereas the succession laws based on the concept of joint family were discriminatory to women.94 The objective of the bill stated:

“...the bill aims at securing uniformity of law among Muslims in all their social and personal relations. By doing so it also recognises and does justice to the claims of women for inheriting family property who, under customary law are debarred from succeeding the same. If Shariat law is applied they will automatically be entitled to inherit the same.”95

According to Abdullah, he wanted to improve the condition of women by removing the customary practices allowed by the flawed interpretation of Islamic legal system by the colonial administrators. According to him, Islamic law in its true nature provides for not only complete women rights, but also women emancipation by giving them a social status and economic identity.96 He, in his statement of object and reason behind the Shariat Application Act stated,

“The state of Muslim Women under customary law is simply disgraceful. The Muslim women's organisations have condemned customary law as it adversely affects their rights and have demanded that the Muslim Personal Law (Shariat) should be made

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91 Supra note 62
92 Ibid
93 This bill was virtually a replica of a measure proposed, but never formally introduced, by Mian Abdul Haye, an urban representative of the Punjab Unionist Party, in 1929, at the height of the agitation against Mother India. See supra note 85
94 Supra note 62
95 S. Lateef ‘Defining women through Legislation” in Zoya Hasan (ed.) Forging Identities: Gender, Communities and the State, New Delhi Kali for women 1994.
96 Janaki Nair, Women and Law in Colonial India: A Social History, 193 (Kali for Women, Delhi, 1996)
applicable to them. The introduction of the Muslim Personal Law will automatically raise them to the position to which they are naturally entitled.\textsuperscript{97}

Despite this long claim by M.H. Abdullah, there was no concrete provision or step for the upliftment of the status of women, and it was argued on the same line as colonial interpretation being wrong and the Shariat to be applied as done earlier during the passing of Waqf Act.

Both the supporters as well as the opponents of the bill agreed that it was a deeply religious bill, establishing Shariat as the only source of law and making religion the sole basis of a law. When the government sought opinion on the bill, the deputy commissioner Akola of centre province, questioned the feasibility of a bill which could not be developed or amended by the legislative interventions. He argued “However excellent a law the Shariat might have been in the past and however excellent it might be even today, it cannot be said that there is nothing superior to it, or nothing more satisfactory than it can be evolved in the march of human progress.”\textsuperscript{98}

But surprisingly for many lawyers and legislators this was the most important reason to support the bill. This bill was opposed by the converted Muslim communities of Mapilas\textsuperscript{99}, who though Muslims followed a majority of Hindu customs. Mr M.J. Merchant argued:

“All Moslems are not true Moslems. Some of them accept only vital principles of Islam yet are Moslems. Why should they be forced by an enactment to accept other

\textsuperscript{97} \textit{Ibid}


\textsuperscript{99} They are the affluent and politically active group among the Muslims of south India. They follow matrilineal joint family system. And are governed by the Muslim Marumakkattayam Act 1963
principles which they are not prepared to follow and which are not among the
totalitarian principles which a person has to accept to become a Moslem?"100

The Muslim community in general opposed this move and blamed the government for
dividing the community on the basis of its custom. The bill owed it enactment to the
intervention of Jinnah, who, though participating only in the last session, provided a
piecemeal by non-application of Shariat laws on the agricultural holdings.101

Apart from this inheritance aspect, the entire Muslim community was to be governed
by Shariat laws in all other aspects. This move of Jinnah which was in complete
contradiction of tall claims made for the protection and empowerment of women was
primarily in order to unify the Muslim community as a whole to have a strong
political base as well as “religious hold over the community”. 102

The second important legislation was the Dissolution of Muslim Marriage Act 1939,
which was passed because of the constant efforts of Islamic jurist Asif Ali Fyzee and
Maulana Thanvi. The main objective of the bill was to pull Muslim women out of
their misery by providing them with a solid ground for dissolution of marriage within
the fold of Islamic law. Men had the power to unilaterally divorce a woman according
to their wishes and fancies, whereas a Muslim woman was trapped in a loveless,
abusive marriage with the only solution leading to her becoming an apostate, and
committing apostasy103 dissolves marriage automatically under the Shariat. On this
recommendation, a bill was introduced in 1936 by Muhammad Ahmed Kazmi and
was passed after three years in 1939. Though there was a much deeper political

100 Supra note 87
101 Supra note 96
102 Supra note 62 at 70.
103 When a Muslim leaves Islam and converts to some other religion, it is called apostasy and the
person is called an apostate. Under Islamic law, a marriage with apostate is Haraam (prohibited) and
thus void.
agenda of unifying Indian Muslims, this bill is a landmark legislation in the field of Muslim women’s familial rights.  

It should be noted here that though both of these legislations were passed for the betterment and empowerment of Muslim women, the Muslim legislators never had the support of women organisations in contrast to the Hindu male legislators who, by the end of 1920s, had not only got support but also acceptance from the women’s organisations. Though the laws were made for women, the representation of women was abysmal. Furthermore, though the AIWC as a women organisation aspired to represent women all across India, the majority of its members were Hindu and many of the recommendation submitted were in tow with the problems suffered by Hindu women. Whereas the Muslim women organisations, which already were meagre in number, majorly talked about rights under the Islamic law and not reform as such. Thus as Parashar points out, “women leaders were unable to set the agenda for public debate or legislative action”.

Moreover, the majority of educated Muslim women believed that the Quran had provided them with equal rights and opportunities and if these are upheld as against the customary practices, the condition of Muslim women shall considerably improve. Therefore, they also campaigned for the application of Shariat as the basis for Muslim law in India. Begum Sultan Amir Amiruddin pointing the benefits of Shariat stated:

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104 Supra note 62 at 71
105 Supra note 67
106 Archana Parashar, Women and Family law Reform In India : Uniform Civil Code and Gender Equality 35 (Sage New Delhi 1992)
108 Begum Sultan Mir, The Legal Status of Muslim Women, cited in supra note 67
“Muslim women intend to merely secure restitution of privilege granted to them by their Prophet.”

There was a small fraction which did believe that the solution for Muslim women did not lie in Shariat, but a common civil code as done by Muslim countries like Turkey and Iraq. This created a split in the Muslim women organisation and further reduced their voices in the drafting of bills as well as policy making.

This agreement among women for building a “religious based gender identity” benefitted them in the form of short term solutions, but resulted in a long term vulnerability to patriarchal domination. As Jalal notes, “Muslim women’s consent to religion based gender identity in arena of Shariat resulted in their position be defined by the dominant values and political preoccupation of Muslim men.” Thus the Shariat Application Act 1937 became the basis of Muslim Personal law in India.

Thus for the Indian Muslim representatives, the partition of the country on communal lines and the formation of a secular state in the wake of the prevalent socio-political condition, resulted in dire need to protect their Muslim identity and autonomy from the Hindu-majority state. As debates about Hindu law were drawn into wider discussions about state-building, Indian Muslim leaders sought assurances that their community would be allowed to follow their 'religious' practices, including their very recently acquired 'traditional' system of law. In agreeing to uphold the autonomy of the Muslim community, the new Indian government was not creating new differences between Hindu and Muslim citizens' relationship to civil legal structures, but was cementing a difference that had been developing for several decades prior to 1947 and

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109 Shereefah Hamid ali ibid
111 After the independence, debate was focussed and much more influenced by the rigid and conservative view of the role of women in family in particular, and their position in society in general. Supra note 100.
was intensified during the communal riots the nation witnessed immediately after the Independence.\textsuperscript{112}

The contextualization of legal history of Muslim personal law in pre-colonial and post-colonial India is crucial for the understanding of Muslim personal Law in India as it tends to be tangled in the generalized assumptions of Muslim Personal Law as homogenous, rigid and unchangeable. It is needed to be kept in consideration that apart from an obscure Shariat Application Act (which in no way enhanced the position of women) and piecemeal reform on divorce in the form of DMMA, 1939, no measures were taken to codify and reform the Islamic law by the colonial masters.

According to Ashis Nandy\textsuperscript{113} those who were in position and had power were able to craft a difference for themselves, but in essence, they marginalized the already vulnerable group- read women, who found themselves excluded from the possibilities to renegotiate identities and subjectivities.

What is known today as Muslim law is therefore, according to Engineer\textsuperscript{114} as well as Tahir Mahmood,\textsuperscript{115} is a colonial construct which primarily reflects the political struggles between the British administration and the various sections of Muslim Communities in the subcontinent.

Thus, women's rights of inheritance under the Muslim law do not give rise to the same kinds of problems as under the Hindu law. For example, unlike the Hindu law, the right of inheritance is adequately protected. On the other hand, the notion that the law is a revealed law and is therefore immutable presents considerable difficulty in

\textsuperscript{112}\textit{Supra} note 87
\textsuperscript{113} Ashis Nandy, “The politics of secularism and the recovery of religious tolerance ”, in Veena Das (ed), Mirrors of Violence: Communities, Riots and Survivors in South-Asia (Oxford University Press New Delhi, 1990).
\textsuperscript{114} Asghar Ali Engineer Islam Women and Gender, 23- 42 (Gyan Publishing house, New Delhi, 2005).
\textsuperscript{115} \textit{Supra} note 38.
introducing any reform. In India, as we can gather from the earlier discussions, no attempt has yet been made to modernize the Muslim law. The above historical review has highlighted the fact that the social and political forces considerably influenced the Muslim law in its origin and subsequent development in India.