CHAPTER VI

COMPARATIVE ANALYSIS OF WOMEN PROPERTY RIGHT IN HINDU AND MUSLIM PERSONAL LAW

India is a country of multi-religious and multi-cultural society. There are various religious personal laws in India. But the common point in all these laws is the status of women as all the religious personal laws portray women in subordinate position to men. She has to encounter with so many disparities which lead to so many stumbling blocks in their journey. In the preceding chapters we have studied in detail the different schemes of succession and inheritance followed under the Hindu and Muslim Inheritance system. From time immemorial women has been denied equality and dignity. She is discriminated on the basis of her sex. In India too the path of women is laid with unequal treatment, humiliation and disparities. The women have fewer rights than the men under the religious personal laws. On a whole the religious personal laws give birth to many taboos; for instance patriarchy, early marriage, dowry, domestic violence etc.¹

Due to such taboos there are lots of difficulties for women to live a life with self respect and dignity. These disparities and inequalities hinder the path of woman in the backward direction. Women have to fight against these inequalities to attain something.² Things change with the time, but the mind sets of people regarding women is next to impossible to change. Though enough efforts have been made in the civil laws yet existence of personal laws don’t let the women to come out of that to live a life with their own terms and conditions.g

²Ibid
Globally the economic position of women is much inferior to men, it is very important to understand that deprivation of property rights in itself is a human right abuse\(^3\) and this abuse in essence result as well as facilitate other forms of abuses like Domestic Violence,\(^4\) dowry and poverty and other human right abuses. In India the property right regime is governed by the respective personal laws and these laws have generated debate about the meaning of gender equality\(^5\) in India, since most of religion based personal laws\(^6\) to a great extents give women fewer rights than men.\(^7\) Archana parashar\(^8\) aptly argues that “Though the religious personal laws allow for inclusiveness in religion, the history of these laws in India shows that they have been used selectively as a tool of governance and often to the disadvantage of women. In the past, feminists argued that various differences of identity—such as race, ethnicity, and sexuality—should be recognized and accounted for in the law. But in the case of India’s cultural pluralism, religious difference comes into conflict with gender equality.”

Both the Islamic law of inheritance as well as Hindu succession Act 1956 has its roots in religion and both are a result of a long process of Evolution. Though both the laws are similar in their origin but are very different in their understanding, approach as

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\(^3\) See Jay M. Vogelson, “Women Human rights”, *30 int’l Law*209-210 (1996.) Generally, the right of an individual to own some property and not be deprived of it arbitrarily is recognized human rights.


\(^5\) “Gender Inequality” refers to the obvious or hidden disparities among individuals based on the performance of the gender. The term ‘gender’ depicts the social and cultural notion about the people. Gender is not based on the biological characteristics. This problem in simple terms is known as Gender Biasness, which means gender stratification or making difference between a male and a female. According to Giddens (2006) sociologists define gender inequality as the difference in the status, power and prestige women and men have in groups, collectivises and societies. Michael S. Kimmel, *The Gendered Society* (Oxford University Press New York 2008).

\(^6\) Religious personal law, refer to rules governing the formation of marriage and its dissolution; the respective rights, obligations and capacities of spouses; the relationship between parents and children; marital property; Child Custody Or Guardianship; And Inheritance.

\(^7\) Flavia Agnes (Ed) *Women And Law In India* (Oxford University Press New Delhi, 2016)

well as treatment of women. It has always been argued that as the Hindu succession laws have been codified as well as amended recently in 2005 in light of providing gender equal provision thus it is more progressive and secular than the Muslim law which is uncodified as well as outdated. In this part of the thesis, an attempt has been made to compare the inheritance system of two major personal laws- Hindu and Muslim in India and treatment meted out to women in them.

In comparing the Hindu succession law and Islamic inheritance laws the first comparison undertaken is with regard to: Influence of Religion over Women property Right

Hinduism is the oldest religion in the world and its laws have the oldest ancestry The Hindu seers and sages regarded the law as revelations of God and therefore it were given the highest respect in the society. Hinduism, because of its extreme diversity throughout the ages, has encompassed manifold systems of complex thoughts and customs. There are two views as regards the origin of Hindu Law. According to the first view it is of ‘divine origin’ while the other states that Hindu law is based upon ‘immemorial customs and usages. In the ancient period it was believed that ownership of property has direct relation with the spiritual benefits and property to be used for religious and pious duties. The right to property was based on the theory of propinquity- nearness to relationship. Those who were nearer in degree to the deceased inherit its property and use it for his spiritual benefits. As it was believed that if pind dan is done by male descendants the chances of achieving moksh is the highest, a person’s son, grandson and great grandson were given primacy.

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9 Poonam Pradhan Saxena Family Law lectures Family law II (Lexis Nexis 2016).
10 Pind Daan is a mandatory ritual which is to be performed post death. Pind Daan gives an ultimate relief to the departed soul and paves way into the world of peace. Pv kane

11 Moksh is the highest state of spiritual liberation in Hinduism.
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Furthermore as female cannot perform religious functions, they were denied inheritance. But this does not mean that they had no property rights as the vedic literature prescribed for certain property to unmarried daughters and brother-less daughter. The husband and wife were also treated as joint owners of the property though the women were never given absolute ownership in accordance with divine law. Furthermore the widows had no right in the property. All these rules were said to be based ancient vedic literature, hence divine and unchangeable. With the change in the society and concept of property (birth of private property), the position of women deterioted further. As we have seen in the earlier chapters that commentators of ancient Hindu law refused to recognise female as heirs in the devolution of property except in circumstances clearly laid down.

With the advent of British rule, there was substantial change in the administration as well as law of the Indian state as it was the time when mogul power was on the decline and the law and order condition in the country was at its lowest ebb. As it was believed that scriptures were the most important source of family laws, the British Masters took up the task of translating the scriptures for the purpose of good governance. Thus around 18th century the Hindu law was codified on the basis of the ancient scriptures, in which *manusmriti* was the most favoured by the administrators. Apart from smriti the courts while deciding often when unable to understand relied

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11 Moksha in Hinduism simply means liberation of the Atman soul from the cycle of birth and death forever! The moment human beings reached the stage of enlightenment (kaivalya jnana)... one finally gained moksha (salvation) in that lifetime! Supra note 10

12 Praksh Chand Jain “Women Property Rights under Traditional Hindu Law and Hindu Succession Act 1956: Some observations.” 45 JILI 2003

13 Ibid.

14 Ibid

15 For detailed discussion see chapter III- historical position of women in India.

16 In south India under certain customary laws a daughter could inherit some property, similarly under Mitakshara school, three females were entitled to get share in the partitioned property. That is- father’s wife, widowed mother and paternal grandmother. Supra note 9

upon the principles of justice, equity and good conscience. Thus we that the Hindu 
women right to property before independence were the result of benevolence English 
jurists and the worst distortions of braminical text.\textsuperscript{18}

The first major change brought in the property rights of Indian Hindu women, which 
put a dent in to the classical Hindu law was The Hindu Women Right Property Act, 
1937, which for the first time made widow heir of her husband though her right in the 
property was only of a life interest. This law also paved a way for a secular and 
gender equal property law. The period following the independence can be regarded as 
the golden period for Hindu women. For the first time law was removed from the 
clutches of religion, though the base remains religious, the law was made in tune with 
the gender equal principle. The enactment of Hindu Succession Act 1956, 
revolutionized the position of women, for the first time she became absolute owner of 
her property as well as an equal heir in the property as her male counterpart. The 
Hindu Succession Act laid down uniform and comprehensive rules of succession 
which applied equally to both male and females.\textsuperscript{19} The only features which were 
retained of the classical Hindu law were, firstly the concept of joint family system and 
secondly the devolution of property by rule of survivorship. With this retention the 
concept of coparcenary with all its features was retained.\textsuperscript{20} Despite providing property 
rights to women the act did not make a complete departure from the old concept of 
Stridhanam.\textsuperscript{21} Furthermore the females were still excluded from the purview of 
coparcenary and can in no circumstance demand partition.\textsuperscript{22}

\textsuperscript{18} Archana Parashar, \textit{Women and family Law Reform In India} 65,( Sage Publication, New Delhi, 1992) 
\textsuperscript{19} \textit{Supra note 12} 
\textsuperscript{20} \textit{Supra note} at 277-278 
\textsuperscript{21} Section 15 of HSA, 1956 provides for separate rule for devolution of property based on the source 
from where she has acquired. 
\textsuperscript{22} Section 6 of HSA 1956; contain the concept of notional partition, which will be applicable only after 
the death of the person.
Thus despite making clear departures from the classical Hindu law, it still had important element of old Hindu law. This defect was taken care by the Hindu Succession (Amendment) Act 2005, which further de-alienated religion from the law. Though under this law also the concept of joint family was retained, but it made daughters coparceners in the same way as son, and making her not only an equal heir but also equal coparceners with all the rights and obligation of a coparceners. Thus it is very clear that effect of religion on the Hindu succession is bare minimum, most of the provisions though having roots in the classical vedic literature, are complete departure from the original. Amendment of Hindu Succession (Amendment) Act, 2005 is a total commitment for the women empowerment and protection of women's right to property with minimum interference in way of religion.

In contrast to Hinduism, Islam is just a 1400 years old and is considered to be a relatively new concept. The present form of Muslim law is the result of a continuous process of development during the fourteen centuries of Islam. According to the classical theory, Islamic law is a divine law, contained in Quran as revealed to the prophet of Islam. The islam is based on the doctrine of good and bad, and to practice good and abhor bad is Shariat. It is belief among the Muslim that everything from law to morals is laid down Quran. The Quran along with Sunnah of the prophet, Ijma of the companion and Qiyas makes the shariah. The entire Islamic law of inheritance is regarded to be based on the injunctions of Quran. On these verses of the Quran the jurist of the time developed elaborate rules of intestate succession. Islam is regarded a first religion which gave women absolute right of the property. the Muslim jurist of the time based on their school of thought

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23 Section 6 of Hindu Succession (Amendment) Act 2005
25 The law of inheritance is found in the verses of chapter IV titled Al-Nissa (women). The numbers of verses are 10 in number- 7 to 14, 33 and 176 of the chapter IV. Tahir Mahmood
interperated the Quranic verses, for one school\textsuperscript{26} the verses of Quran has completely replaced the pre-Islamic traditions and gave an entire regime of new law whereas for the other school\textsuperscript{27} the verses only amended the pre-Islamic customary law.

In similar fashion as the Hindu Law after the advent of colonial rule, the ancient scriptures of Muslim were also translated, for the law of inheritance \textit{Al sirajiyyah} was translated to an extent.\textsuperscript{28} The British administration as stated earlier mostly practiced the policy of non-interference in the personal laws. For almost hundred years there was no reform in the Muslim personal law. The first major task to reform and codify was taken up in 1937 and the Shariat Application Act 1937 was enacted. The main objective behind this enactment was to do away with all the customs which are against the tenets and injunctions of holy Quran. As a Muslim member at time of introduction of the bill pointed out:

“... being Muslim why (women) not get benefit of Islamic law, and why should they be deprived of their genuine right of inheritance on account of customary law which gives man a bigger share than what he is entitled to. (A Muslim women) does not only enjoy the limited right of maintenance but she becomes full owner of the property to her husband... not even have it managed by her husband ...human society must live on the right principles of equity..\textsuperscript{29}

Thus through a legislation it was propounded that all the Muslims Living in India shall be entitled to be governed in accordance with their Shariat. There have been no significant reforms brought in the Muslim personal law especially the inheritance rule. A Muslim women according to the Shariat Application Act 1937, is to be governed by

\textsuperscript{26} Shia School
\textsuperscript{27} Sunni school
\textsuperscript{28} It is been reported that as Muslim law proved to be too complex, the translation process of lot of text was abandoned halfway. Flavia Agnes (ed) \textit{Women And Law In India} (Oxford University Press New Delhi 2016),
\textsuperscript{29} S. Lateef, “defining women through legislation” in Zoya Hasan (ed.), \textit{Forging Identities : Gender, Communities and State}, 43 kali for Women New Delhi (1994).
the traditional rules of inheritance as expounded in the Holy Quran. Thus it is amply clear from the decision that the Muslim Law of inheritance still has deep roots in the religion and is understood to be divine origin and hence difficult to be amended of changed as per its believers.

The second line of comparison is with regard to the nature of patriarchy found in both the laws and the level of individuality granted to women within the each law. Patriarchy simply means “the unequal distribution of power between men and women in certain aspects of our societies” but this cannot be called as inclusive definition. According to Aldo Facio\(^{30}\) : “Patriarchy is a form of mental, social, spiritual, economic and political organization/structuring of society produced by the gradual institutionalization of sex based political relations created, maintained and reinforced by different institutions linked closely together to achieve consensus on the lesser value of women and their roles. These institutions interconnect not only with each other to strengthen the structures of domination of men over women, but also with other systems of exclusion, oppression and/or domination based on real or perceived differences between humans, creating States that respond only to the needs and interests of a few powerful men.”\(^{31}\)

Patriarchy thus consists of structures or institutions where the participation of women within the spaces of politics, cultural religiously or economically is excluded.

The religion in essence whether, Hinduism or Islam is perceived to be patriarchal in nature. And when laws are derived from religion they automatically have in themselves the patriarchal connotations. The reason might be that everywhere around the globe the interpretation of the religious principles have been done by men

\(^{30}\) Aldo Facio in *Supra* note 5.

(implying that no females were party to these discourse and discussion) and thus a general bias is created in favour of men. Furthermore, the social norms and the patriarchal mindset prevalent in many countries have obscured many of the original purposes of the religious legislations.³²

The Hindu succession Act 1956 according to Eleanor newbigin³³ is the result of changing nature of Indian patriarchy from colonial rule to independence. To believe that the Hindu succession act is a result of Indian women growing political awareness and participation in the inter-war debates will be an incomplete understanding. Most of the studies ³⁴ done in this regard argue that though, nationalist leaders and male-legislators were willing to tolerate the social reform movements and few even supported the call for women rights debate, all these promises though were almost abandoned once they acquired power. Furthermore the entire evolution of women property right regime is based on the notion of gender and patriarchal authority. The women were neither the subject nor the agent of the reform, but as Mytheli Sreenivas³⁵ aptly points out by invoking discourses on conjugality the male individual right to property was put forward, this with evolution and awakening among the Indian women and few nationalist resulted in the present regime of property rights. Thus the inherent patriarchy in the Hindu succession act can be easily visible by the different scheme of succession for the male and female deceased, furthermore while

³³ Phd thesis. Mytheeli sreenivas as well as flavia agnes gave arguments on the same line.
deciding the heir of female deceased the source of property is to be seen, which is not
there in the case of Hindu male dying intestate.\textsuperscript{36}

In the 174\textsuperscript{th} report of Law commission it has been observed “Again the patrilineal
assumptions of a dominant male ideology are clearly reflected in the laws governing a
Hindu female who dies intestate. The law in her case is markedly different from those
governing Hindu males. The property is to devolve first to her children and husband;
secondly, to her husband’s heirs; thirdly to her father’s heirs, and lastly to her
mother’s heirs. The section 15(2) of HSA is indicative again of a tilt towards the male
as it provides that any property she inherited from her father or mother should
devolve, in the absence of any children, to her father’s heirs and similarly, any
property she inherited from her husband or father-in-law, to her husband’s heirs.
These provisions depict that property continues to be inherited through the male line
from which it came either back to her father’s family or to her husband’s family”\textsuperscript{37}
(Page 32 para 2.5 of the Report).

Though the amendment in the Hindu succession act tried further to bring gender equal
principles and provided daughters with right in ancestral as well as self acquired
property of the person, still the current property right regime suffers from gender
discrimination. Under the rules of succession there is no definition of property as such
and includes all the property whether acquired, by inheritance or by devise or at a
partition or by gift or by her skill or exertion or by purchase or prescription. It does
not differentiate between the property acquired by her through skill or inherited but
only prescribes that when if inherited from father, shall revert back to his heirs and

\textsuperscript{36} Section15(2)
\textsuperscript{37} 174th Report On “Property Rights Of Women: Proposed Reforms Under The Hindu Law”, Law
Commission Of India, 35 (2000)
when from Husband of father in law shall revert back to husband heirs. Thus the scheme Hindu Succession Act does not consider or realize the changed realities of Hindu women. As the LCR observes “the Legislators did not contemplate that Hindu females would be in later years would be having self-acquired property and in certain cases where her heirs in the first category fail, the property would devolve totally upon her husband’s heirs who may be very remotely related as the compared to her own father’s heirs.”

The entire scheme of succession looks women from the prism of her relationships. The heirs are not described as brother, sister, her brother-in-law etc., but as heirs of her parents and heirs of her husband. Is it perceived that she have no identity of her own? The Hindu succession Act as well as the amendment aimed at providing gender equal laws, but their premise being the Mitakshara law, its concept of stridhana and inheritance by a female in a double capacity frustrate the object as women is denied her individuality as well as identity. This revision of the once inherited property on the basis of the source, makes the women only temporary owner of the property. Till the time a women is not treated as an identity distinct from her parents and husband, the task of gender equality is incomplete.

The Islamic Inheritance rules also suffers from the patriarchal interpretations, though it has been stressed through Quranic Injunctions as well as Sunnah of the prophet that men and women are equal gender and none has preference over the other. Prophet of Islam gave women new lease of life and bought revolutionary changes in the abominable condition of women. Qur'an gave women equal and independent identity

in all spheres of life political social as well as spiritual. Despite this as Fatima Mernissi remarks, “the newly converted Meccan aristocrats did not mind sharing Heaven and the rewards of the Hereafter with their Muslim sisters. What hurt their egos (and economic interests) was that they were being required to share their worldly possessions in this world with women who until the dawn of Islam were little more than the chattels and property of these very men. Over the centuries, this entitlement of women to half the share of a man in a comparable situation became the fixed, unchangeable and only share that she was entitled to.”

This was justified on the ground that this classification is based more on the lifestyle and roles of individual in the society than on the Sexes as practiced in the Islamic society. The society at large has assigned certain gender specific roles in which men are predominantly the provider and women the care-giver. And the law of inheritance is said to be closely related to the conduct of men and women in the society. Man has been assigned all the obligations as well responsibilities with regard to running a family and otherwise. Whereas women has only being given responsibility of herself, she need not to provide for her children or any other person. Also a way of life and the laws of inheritance are closely related with the conduct of men and women in the society. Thus we see the patriarchal social construct became the part of the Islamic rules of Inheritance. The Islamic law of inheritance provides women with individuality as well as identify her as a distinct identity, but within the social construct of the gender, Muslim women suffer the humiliations as well as discriminations. The inherent patriarchy within the religion denies her the right to be free and independent. With respect to Equal right in the property of the rights of

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41 Fatima Mernissi, *Women and Islam: An Historical and Theological Inquiry*, 26 (Kali For Women, New Delhi, 1991)
42 Ibid.
43 Ibid.
Hindu women are much advanced and secured that their Muslim Counterparts. With the enactment of Hindu Succession Act and Recent Amendment of 2005, women as a class have much better, defined and equal right within the property of the deceased same as the a man in situation. Whereas the traditional rules on inheritance under Islamic Law still give women half the rights than their male counterparts. The property is always divided in the ration of 2:1 when male and female of same degree inherits together. In addition to this the Muslim law in India majorly been uncodified or governed by outdated legislations are obscure, ambiguous and unequal.

A very interesting fact with regard to the Hindu and Islamic law of succession is that though there has been constant amendment and development within the Hindu law of succession, the Islamic law for a century has been static. There is neither codification nor any reform made in Islamic Law for almost a century. Though there has been increasing debates and discussion within the government as well as non-government organisation including women organisation with regard to improvement of property rights of Hindu Women, there is little or negligible efforts taken with regard to Muslim women. Though there are efforts with regard to the Law of marriage, divorce and maintenance, the right to property remains a forgotten topic.

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44 There has been in last 18 years four law commission reports with regard to improvement of property rights of Hindu women along with the amendment of 2005 which has to an extent provided gender neutral laws. Apart from that there has been studies conducted by individuals as well as organisation with respect to affect of property rights on Hindu women and suggestion and mechanism for improvement.

45 Between 2004 and 2008, the debate on the gender-just formulation of the nikahnama or Islamic marriage contract made waves among the muslim communities of India. Within three years, two women organisation Bazme Khwateen, and Bhartiya Muslim Mahila Andolan formulated their own gender just nikahnama. Apart from this the orthodox clergy- Sunni as Shia Muslim personal law board came up with their own versions of nikahnama.

46 The recent SC judgment on Triple Talaq, Shayra Bano v. Union Of India which declared Triple Talaq unconstitutional. Also a Bill is pending in the parliament in regard to Triple Talaq, The Muslim women (Protection on Marriage )Bill 2017.

47 After the landmark Judgment of SC in the case of Mohammad Ahmed Khan v. Shah Bano, the position of Muslim women with regard to maintenance has changed and considerable improved. The MWD act, 1986, Muslim women along with the proactive judiciary has conferredable affected the rights of w
Another difference between the two laws is with regard to the bequeathing of property. Under the traditional Islamic Law, both the schools put restriction on the amount of property that can be bequeathed through will. According Islamic rules of inheritance a person cannot will more than 1/3 of his estate to any person. Further under the Sunni law any bequest made to any one heir is invalid unless ratified by the other heirs. Whereas under the Hindu Law, there is no restriction on the extent of property bequeathed by the deceased, even a coparcener can also bequeath his interest in the property.

A very striking and unusual feature of Hindu law is the concept of Hindu Joint family. In law, every Hindu Family is presumed to be joint Hindu Family unless a contrary is proved, implying that every property is singly as well as jointly owned by the male members of the family. Within this joint family there is a smaller institution of coparcenary- consisting of common male ancestor and his lineal descendants.\(^{48}\) All the coparceners have unity of possession and common interest in the property. Though under the Hindu law by successive legislations and amendment most of the classical concept of Hindu law has been either abolished or diluted. This one feature of joint family remains a integral part, the main reason for its retention can be ascribe to the tax benefit\(^{49}\) a karta of a Hindu Undivided family is entitled to. It has been observed by the authors\(^{50}\) that this Joint family is antithesis to the existence of gender equality and the joint family system hinders the growth and development of women, she is burdened with heavy and unnecessary duties in the name of family and its sustenance. This is the direct outcome of the patriarchal system and has direct association with religion and India’s ancient culture, that a threat to joint family

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48 Earlier only male descendants were part of coparcenary but after the amendment of 2005, daughters are also coparceners and have same right as the son.

49 Section 171 of IT Act 1961.

50 Supra note 39
system is perceived as treat to India’s ancient culture and Hindu religion. On the contrary under the Muslim Law there is no concept of Joint family, the entire law presupposes the existence of nuclear family and only direct relations. The inheritance rule are also based on the principle of consanguinity and affinity, further more the primary principle is the nearness to the deceased exclude the remoter. Despite that there are many Muslim communities in India which follows this concept of Joint Family system and denies women their rightful inheritance.

A very interesting feature which is part of both the Hindu as well as Islamic law of inheritance is the exclusion of women from the agricultural property. though under Muslim law there is no difference between the agricultural and non-agricultural property yet the socio-economic condition has resulted in them to adopting this rule. Under both the laws there is multiplicity in inheritance law depending upon the geographical, cultural and social conditions, with the common denominator of subjugating and discriminating women.

Thus we see that under both the laws the rules made by patriarchal set up has denied women a roof over her head as well as no property to regard as her own. This in turn has made her survival very difficult and her biggest problem. Contemporary Indian society has refused to give up traditional ideologies and continue to emulate the age old pattern of stereotyping of roles and ownership pattern of material assets. The inequitable family law, especially the inheritance laws has given validity to these injustices and indignity.

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51 Ibid.
52 Tahir Mahmood Muslim Law in India and Abroad (Universal Law Publication, New Delhi, 2016).
53 In the UT of Daman and Diu, the widow has only life interest in the property of the husband. Further more a general rule of all female heirs and their descendants to be excluded by the male heirs of the same degree. Similarly under the Mapilas Muslim, daughters are denied inheritance. Supra note 52.
54 Supra Note 39
55 Ibid.