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A Critical Analysis On Inheritance Of Property Under Hindu Law And Muslim Law In India

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CHAPTER 1 INTRODUCTION

1.1 INTRODUCTION

The two legal systems in India that govern property inheritance are Hindu law and Muslim law. The roots of both legal systems are found in different religious traditions. The Hindu Succession Act of 1956 is the main act under Hindu law governing inheritance. It provides that property will be distributed among successors according to a defined intestate succession plan that recognizes both male and female progeny as rightful heirs.[1] A shift towards gender equality is marked by the Act, which guarantees boys and girls the same rights with regard to family property. For instance, regulations pertaining to coparcenary rights for both ancestral and self-acquired property are particular to Hindu Undivided Families (HUFs). The foundation of Muslim inheritance, on the other hand, is Islamic law, as expounded in the Quran and subsequently strengthened by the Shariah. The Muslim Personal Law (Shariat) Application Act, 1937 codifies the principles of intestate succession. [2]Muslim inheritance is different from other inheritance systems in that specific relatives, such as parents, spouses, and children, get predetermined shares of the deceased's wealth. Muslim law rejects the idea of coparcenary or ancestral property, in contrast to Hindu law. According to custom, women have the right to inherit, but the amount they get is divided in half when compared to their male children. While Muslim law maintains customary distributions mandated by religion, it also reflects varied legal and cultural interpretations of inheritance, even if all legal systems aim to promote the equitable division of family property among heirs. Hindu law, on the other hand, has developed to achieve more gender parity. Inheritance is essentially the legal term for a deceased person's property being transferred to a living relative. Muslim personal laws, which come from basic scriptural sources such as the Holy Quran, the Sunnah, the Ijma, and

[1]Ali, Ameer*Mohammedan Law*. 6th ed., Tagore Law Lectures, Volumes I & II, Kitab Bhavan, 2014.
[2]Anderson, J.N.D.*Islamic Law in the Modern World*. New York University Press, 1959

the Qiyas, as well as pre-Islamic customary succession rules, control the devolution of inheritance for Muslims. As you may know, there are two kinds of succession: testamentary, which occurs when a person dies leaving a will; and non-testamentary, which occurs when a person passes away intestate, that is, without leaving a will.

There is a distinction in Muslim law between testamentary and non-testamental succession. Although the Muslim Personal Law (Shariat) Application Act, 1973 governs non-testamentary succession, different Shariat laws apply to the Sunni and Shia sects of Muslims. The distinct system used by Muslim inheritance laws to divide successors into "sharers" and "residuary" categories is also based on the Quran and Hadith. [3]

1.2 CONCEPT OF INHERITANCE UNDER MUSLIM LAW

The Prophet's compilation of Islamic, or Quranic, teachings forms the foundation for the concept of inheritance. Islamic law does not recognize joint tenancy, so the successors are tenants-in-common, which restricts their inheritance rights to the divided portions of the land. The court noted in Abdul Raheem v. Land Acquisition Officer (1989) that a Muslim's rights, title, and interest in his estate pass away at his death and become the property of others. Regarding inheritance, Muslims do not observe or accept the joint family system. But according to Islamic law, inheritance is not a gift to every child born into a family; rather, it is not a birthright. An apparent heir must live to inherit. If the unborn child is born alive, it can inherit while it is still inside its mother's womb. Should a stillbirth occur, the infant is deemed to have never existed, hence the child's vested portion of property is forfeited. Both male and female descendants have property rights under Islamic law.[4] Within the heir class, acknowledged women heirs or close relatives are identified. However, under the Islamic system, women earn higher resources through mehr and the maintenance given by their husbands, while males only have inheritance, which allows them to fulfill their obligation to provide for their wives and children. As a result, women only receive half of the quantum shares that are allocated to men. On the other hand, in a marital partnership, each partner has an equal right to inherit from the other. A widow is also protected under the inheritance plan. If a widow is childless, her share of her deceased husband's estate is 1/4; if she is a grandmother or has children, her share is 1/8 of his estate. However, she would not be qualified to inherit if she married a Muslim man when he was ill and their union was not consummated because of the terms of the marriage. However, her inheritance remains unrestricted until she remarries if her spouse filed for divorce before she passed away from illness. [5]According to Islamic law, if the surviving spouse is identified as the immediate heir or first in line for inheritance, the deceased's progeny will also have less influence over the inheritance plan.[6] The Quranic heirs, known as Sharers, and the conventional heirs, known as Residuaries, are the two categories of successors recognized under the Islamic inheritance system. The Quran altered the

[3] Ibid
[4]Fyzee, Asaf A.A.*Outlines of Muhammadan Law.* 5th ed., Oxford University Press, 2008
[5]Mahmood, Tahir*Muslim Law in India and Abroad* 4th ed., LexisNexis, 2015
[6]

traditional tribal laws of inheritance to conform to Islamic doctrine. The main change made to customary law was the creation of the class of "sharers," or "Quranic heirs," which allowed heirs who had previously been rejected under the usual succession laws to be admitted. Thus, in the event that a Muslim man passes away and leaves his widow "W" and his sons S1 and S2, W, as the sharer, will receive 1/8 (one-eighth) of the property, and S1 and S2 will inherit the remaining 7/8 (seven-eighths). However, the Sunni and Shia laws of inheritance differ slightly from one another due to the ways in which the two Muslim sects interpret the Quran.

1.2.1 Sunni Law of inheritance

The Hanafi school of thinking and law governs the Sunni population in India. To prevent the customary heirs from losing their part, the Hanafi norms only provide the Quranic heirs a portion of the inheritance in an attempt to improve the harmony between the Quranic and customary laws. Remember that in the newly formed class of heirs, agnates were still favoured over cognate heirs despite the presence of female heirs. Stated differently, the Quranic class acknowledges that agnates who are female have the same right to inherit a share as those who are male. The customary heir will get the remaining portion of the inheritance after the Quranic heir, if the Quranic heir was closer to the deceased than the customary heir. In these two instances, the heirs of the Quran have a different perspective on inheritance than do the traditional heirs. [7] The customary heir receives twice as much as the part granted to the Quranic heir if the two heirs are equally close. Although cognates, like uterine sisters and brothers, have an advantage over cognates in inheritance, they are nevertheless included in the succession and are not entirely removed from it.

If a Muslim dies without leaving any property behind, their estate belongs to the state through escheat. Under Hanafi law, the heirs of the deceased are either residuary or sharers; if neither of these groups of heirs exists, the inheritance is given to the deceased's other relatives, who are called "distant kindred." In the event that a distant relative is incapable of inheriting due to a disability or in the absence of an heir, the estate is escheated to the state. Another characteristic of Sunni law is the per capita distribution of estates, which distributes the deceased's wealth equally among their heirs. Thus, the number of shares that are granted depends on the number of heirs.

1.2.2 Shia Law of inheritance

Ithna-Ashari law's general principles serve as the foundation for Shia inheritance law. In contrast to the rigid interpretation adhered to by Sunni law, the teachings of the Quran are understood relatively freely here. Shia laws produce a very notable distinction in the succession's tenets and regulations, so establishing an autonomous system. The method by which property is divided among heirs according to which strip each one belongs to is known as "per strip distribution" in Shia law. In terms of inheritance, Shia law does not give

[7] Ibid

preference to men over women or agnates over cognates. A husband and wife's rights are subject to one exception, though: women are only given half of what men are given in each class, and the deceased's estate is equally divided amongst their blood relatives. There is no hierarchy about who gets the estate first because descendants, collaterals, and descendants all inherit alongside one another. As a result, two types of kinship determine the Shias' inheritance rights.

a) Nasab blood ties or consanguinity

b) Sabab: successors through bloodline, marriage, or other exceptional situations.

In the case of testamentary succession, Muslims shall be bound by the Indian Succession Act, 1925, rather than Shariat law, unless the property in question is an immovable property situated in Chennai, West Bengal, or Bombay.

1.3 THE RULE OF *SPES SUCCESSIONIS* IN MUSLIM LAW

One important property transfer regulation is the idea of spes successions. Spes successions, literally translated as "expectation of succession," is a Latin phrase that describes the idea that someone claiming to be the heir of another will inherit that person's estate after that person passes away. According to the rule, merely because someone is supposed to inherit property after someone else dies does not mean that they automatically take ownership of that property. Thus, by virtue of their "expectation" or "chance" to inherit a property, a person does not gain any legal ownership rights. As per Section 6(a) of the Transfer of Property Act, 1882, it is illegal in India to transfer a Spes Successions. The Islamic law of inheritance, however, does not acknowledge the spes successions premise.[8] Thus, it is thought that relinquishing the opportunity to succeed is a requirement of the Spes succession transfer. The possibility of an apparent Muslim heir getting an inheritance cannot be brought up in the context of a legal release or transfer. A ruling was made in Shehammal v. Hasan Khani Rawther and Ors. (2011) that in a family arrangement, the theory of spes successions need not always be taken into account. In this case, the respondent was one of the heirs apparent to inherit a portion of the plaintiff's wealth. Nevertheless, the respondent and his father signed a paper renouncing the respondent's ownership rights to the land in return for money before the respondent got his portion. The Apex Court was required to rule on the issue of whether a Mohammedan might give up his inherited rights through a family agreement even before obtaining the land. It was shown that familial structures or situations where inheritance rights are lost can make the spessuccessionis concept more difficult to apply.

[8]Nair, Neha *Inheritance Rights of Women under Muslim Law in India.* Economic and Political Weekly, Vol. 45, No. 35, 2010, pp. 67-73.

1.4 DIFFERENCE BETWEEN INHERITANCE AND SUCCESSION

Although succession and inheritance have similar meanings, Indian law distinguishes them as two distinct legal notions when it comes to property transfer. The process of transferring an estate, along with all of its rights and obligations, from one person to another is called succession. The process of determining who is qualified to receive a deceased person's property is known as succession. In contrast, inheritance is the legal process by which the legitimate heir of a deceased person obtains ownership and a stake in their possessions. The transfer of an individual's rights, obligations, and responsibilities to their legal successor is known as succession in Muslim personal law. It encompasses a wide range of tasks, including as guardianship, inheritance, property divide, and asset transfer. Islamic law defines inheritance as the division of property among various heir classes according to the exact percentages and shares allotted to each group. [9]

1.5 A STUDY ON MUSLIM PERSONAL LAWS WITH REGARDS TO THE GENDER INEQUALITY IN PROPERTY RIGHTS

It's thought that one of the main components of Shariah law is inheritance. Muslims frequently pass down their possessions to one another. The most crucial point is that, in accordance with one of the most significant lessons from the Quran, an individual's belongings should be bequeathed to a surviving relative after their passing. The question that has to be answered right away is whether a Muslim woman has equal rights over the property owned by her father, son, or husband. [10]

1.5.1 Inheritance Rights of Muslim Women

Islam has very strict laws about inheritance. Even though the Islamic constitution permits women to inherit at least half of a man's estate, women are discriminated against in society and do not enjoy the same rights when it comes to property split. A woman would only receive one acre of property if a male obtained two acres. This idea stems from their belief that women are half as powerful as men. A Muslim woman is entitled to half of her father's share even if the home is without a son. Married women still have control over all affairs and properties since they are seen as equal to men in terms of worth. A mother is entitled to one-sixtieth of her late son's belongings

1.5.2 Shariat and the Property rights of Muslim Women

The strict customary norms that had formerly controlled Muslims were superseded by the Shariat Act of 1937. Sharirat law deals with the personal matters of Muslim households. According to this new legal interpretation, the girls will also inherit the property, making the husband and wife the rightful heirs of the family. The allocation of property rights between the sexes is still discriminatory, nevertheless.

[9]Pearl, David.*A Textbook on Muslim Law* 3rd ed., Sweet & Maxwell, 1998/s

[10]Raddawi, Aisha *Gender and Justice in Islamic Inheritance Laws.* Journal of Islamic Studies, Vol. 12, No. 4, 2012, pp. 123-136.

This rule applies to daughters, wives, moms of departed sons, and women who are divorced or single. Following a divorce, a woman may get up to one-eighth of her husband's wealth, or nearly one-fourth if she is childless. One-sixth of the deceased son's wealth is due to a widow or a divorced mother. [11]

1.6 LITERATURE REVIEW

There aren't many books or articles in the literature review for this thesis. Here is a discussion of the books that have been evaluated for this thesis:

Mahr's Islamic Institution by M. Abdurrahman talks about the establishment, goals, and operations of the mehr institution in Islamic law. Afzal, Wani. The author has conducted a thorough analysis of the laws, rulings from courts, and other legal systems in India and other Muslim nations. Among the myths that the author tried to dispel were the meaning of mehr, the widow's lien rights, and the divorcee's demand for mehr.

A different novel by M. examines women's status in regard to maintenance and the Islamic concept of nafqah. Afzal Wani, "The Islamic Law on Maintenance of Women, Children, Parents, and Other Relatives," The author explains the legal statutes and rulings rendered by courts in India and other Muslim nations. The author also provides examples of how the Islamic idea of nafqah pertains to other family members, grandparents, widowed daughters, mothers, and daughters. [12] The publication entitled Maintenance Rights of Muslim Women authored by M. discusses Islam's concept of maintenance, or nafqah. Afzal, Wani. It contains Hadith and Quranic texts about nafqah. In addition, the author has discussed Indian court rulings and viewpoints from various Islamic legal schools with regard to the maintenance rights of Muslim women.

Furqan Ahmad's book, "Towards the Renaissance: Shibli and Maulana Thanvi on Sharia," delves into the movement spearheaded by several prominent figures and the role that Deoband and Jamiat Ulema-i-Hind played in opposing the overturning of customary law and the application of Islamic canon to Muslim property rights in India, with a focus on giving women the right to inherit. The implications of the Muslim Personal Law (Shariat) Application Act of 1937, the Central Shariat Bill of 1935, and the North West Frontier Province Shariat Act of 1935 are investigated further. In addition, it contains the Shariat Act, which governs independent India as well as Bangladesh and Pakistan, its subcontinent. The Quranic injunctions that specify specific portions for women in inheritance are compared with pre-Islamic customs that provided women no succession rights in an essay titled [13]The Role of Pre-Islamic Customs in the Islamic Law of Succession" by M.. Habib Bey.

[11]Saifullah, Zahoor.*Islamic Inheritance Law and the Rights of Women in India* Aligarh Muslim University Journal of Law, Vol. 18, 2016

[12]Subhani, M.A.*Principles of Islamic Law of Inheritance* Shodhganga, 2011

[13] Rahman, A. (2010). *Muslim Personal Law: The Impact of Globalization*. New Delhi: Kanishka Publishers.

1.7 OBJECTIVES

Thus, in an effort to educate the public, the report suggests:

i) To look into how women's property rights are viewed in Islam and India with reference to inheritances from parents, husbands, and children.

ii) Every married Muslim woman has the special property entitlement of dower, but unhappily, her husbands usually disregard it. The analysis will demonstrate the actual circumstances and the means by which they were imposed[14]

iii) To assess the wording, spirit, and legal ramifications of the proposed modifications to women's property rights in relation to the various enactments.

iv) To concentrate on the foundation of discriminatory laws in order to comprehend why, in spite of the laws, women continue to face economic disadvantages compared to males.

1.9 RESEARCH METHODOLOGY

This research approaches technique from a doctrinal perspective. Along with secondary sources in the form of books, articles, and journals, the laws, including the Muslim Personal Law (Sharia) Application Act, 1937, the Hadith, and the Holy Quran have been the main sources of information on the property rights of Muslim women in India and other Muslim countries[15] This study will examine the Islamic law of inheritance as well as other customs pertaining to Muslim women's property. It talks about the history of the Sharia Act and its effects after it was passed. It takes both law enforcement and actual circumstances into account. The research will address the rights to mehr and nafqah (maintenance), including significant rulings rendered by the Supreme Court and other High Courts, in addition to going over the advantages and disadvantages of each. To facilitate studying the sources that were looked at, a bibliography is also provided. A table of cases is made to provide a broad understanding of the court's position on women's rights. The study is thorough and addresses every angle pertinent to the topic of property rights for Muslim women.

[14] Baxi, U. (2011). *The Indian Constitution: Cornerstone of a Nation*. New Delhi: Oxford University Press.
[15] Kahn, M. (2009). *Family Law in India: A Comprehensive Study of Muslim Law*. New Delhi: SAGE Publications

CHAPTER 2

HISTORICAL BACKGROUND

2.1 INTRODUCTION

India has a lengthy history of inheritance laws that have been shaped by religious and societal customs. Hindu inheritance law is said to have developed as a result of ancient texts like the Manusmriti and Mitakshara, which traditionally favored a patriarchal system in which property passed only through male descent. The Hindu Succession Act, 1956 was eventually put into effect as a part of post-independence attempts to modernize and codify these customs. Daughters now have equal rights to ancestral property as a result of the 2005 change. But Muslim inheritance law, which is based on Islamic Sharia, which has its origins in the Quran and Hadith, adheres to strict guidelines for allocating property among heirs. Islamic inheritance laws, which prioritize fixed portions and distributions based on gender, have mostly remained unchanged over the ages. Even though both legal systems have clear religious and cultural foundations, there have been calls in the contemporary era for changes to inheritance laws to align with equality and justice ideals. Islam's emergence as a religion coincided with the life and career of Prophet Muhammad (570–632 A.D.).41 Islam's ancestors date back to the time of Prophet Adam (PBUH), who is regarded as the first Prophet for Muslims. India's inheritance laws have a rich historical foundation that shows the intricate interactions between religion, culture, and changing social standards.[16]I Since the beginning of time, men have been weak because of their natural tendencies and behaviors, which has led them to err from the path of justice and truth and live uneducated and biased lives. Allah would occasionally send Prophets42 to warn people that their time on earth is fleeting and that they will eventually stand before Allah on the Day of Judgment when they return to Him. The message's main goal was to influence people's behavior toward Allah and one another so that, on that Day, their final destination would be either Paradise or Hell. Preparing for the Day when their actions on this planet will determine their fate is their life's work. As a result, He has revealed His word to Prophets on a regular basis, and it is expected of people to live their lives accordingly. [17] As the revelations to Moses gave rise to the faith of Judaism over time, so too did the life of Jesus influence the rise of Christianity. Muslims see the foundational texts as essential to the gradual development of Islam. Reportedly, the concepts and tenets that were revealed to them and transpired into these several faiths were fundamentally elements of one religion, Islam. Delivering an incorruptible message from Allah at that time was vital, though, because these were influenced and corrupted. Through the revelation of the Quran, which gave origin to Islam, the Prophet Muhammad was able to accomplish this. He carried with him the consummation of the Islamic message and

[16]Agnes, Flavia *Hindu Women's Right to Property in India: A Comparative Study of the Hindu Succession Act, 1956 and its 2005 Amendment*. Oxford University Press, 2012

[17]Agarwal, R. (2016). "Women's Inheritance Rights under Hindu Law: An Analysis". *Journal of Law and Society*, 43(2), 223-240.

the end of prophetic tradition. The following subjects can be used to talk about the historical evolution of Islam[18]

a. Pre-Islamic

Arabians, long before Islam arrived, would often drive their herds of sheep, goats, and camels across arid areas in search of food, water, and places to graze. All tribes had their Sheikhs, or chiefs, who were guided by a Majlis, a council of elders where men participated in making decisions concerning common causes. There was not a single system of laws that governed all the tribes; instead, each had its own set of traditions and laws. They were unaware that their common stock was made up of various properties collectively, and that some lands might be privately owned. It was customary to kill female infants, and it considered shameful to give birth to daughters. Other social evils were usury, gambling, superstition, idolatry, and slavery. The unethical practice of marrying their own sisters and daughters was carried out by Arabs who followed the Marian faith. The period was known as Ayyam-e-Jahiliya, or the period of ignorance, due to the frequency of these horrible and savage crimes. It was time to remind the earlier Prophets of their duties to society, their fellow people, and their God, as they had been led astray by their erroneous message from Allah. The prophet Muhammad was sent to remind them of their purpose for existing on this planet.

b. Birth of Prophet Muhammad

Muhammad the Prophet was born in 570 A.D. into the family of Mecca, Saudi Arabia's leading tribe, the Quraish. His father Abdullah died six months before he was born in Medina. His mother, Amina, also died when he was six years old. After then, Abdul Muttalib, his paternal grandfather, took care of him for two years. He started helping his uncle with his company when he was thirteen years old.[19] He was reared by his uncle Abu Talib after his grandfather passed away two years later. It was reported that he was much regarded for his loyalty, his serious demeanor, and his interest in religious matters—things his dubious fellow residents showed little interest in. Khadija was a wealthy widow businesswoman who once accompanied Muhammad to Syria for trading. Khadija made a proposal to him and he accepted, impressed by his demeanor and conversations. From this marriage, they had two sons and four daughters. The sons were little when they died. As he traveled, he saw how Arabia had been overtaken by utterly savage traditions and ways of life. He thought about eradicating them and radically altering Arabian civilization since he was so worried about the state of affairs. He started going to an isolated cave called Hira and practicing meditation in an attempt to get nirvana. The first revelation, or Wahi, came to him one day when he was meditating and was recorded in the holy Quran's Chapter 96, Verses 1-6. Gabriel, the angel, appeared before him. Even though he was told to recite it, he refused, saying he couldn't because he wasn't literate The Angel gave him three embraces and

[18] Desai, S. (2018). "The Changing Face of Inheritance: Women's Rights in Hindu Law". *Indian Journal of Gender Studies*, 25(1), 77-92.

[19] Sharma, A. (2020). "The Role of Personal Laws in Inheritance: Hindu vs. Muslim". *Research Gate*. Retrieved from https://www.researchgate.net.

requested him to recite with her. He accomplished it successfully. At that point, Angel Gabriel disclosed that Allah had dispatched him to notify him that He had been chosen to be His Prophet in order to spread His message. Further revelations were then given to the Prophet, along with instructions to spread the Islamic faith among his people, which he dutifully did. Prominent figures such as Abu Bakr, Khadija, Fatima, Ali ibn Abu Talib, Zayd ibn Harith, Usman, and Umar were among the first to believe him. As time passed, more and more people joined him in his quest. He disagreed with the pre-Islamic Arabs' long-standing idolatry.52 The Quraish clan, who controlled Mecca, was against the idea of a new religion because it would threaten their authority and ability to trade. Arabia's hub for trade and religion during the period was Mecca.

Every year, believers from every tribe made their way to the "Kaaba," a shrine that held 360 idols that symbolized these tribes. Quraish grew increasingly concerned about the expanding influence of Islam over time. They offered him a bribe in exchange for their power and money to stop him from achieving his objective.[20] They openly made fun of him and his companions for refusing, and they were rejected both socially and economically. He is reported to have been beaten, dusted off, and hauled from Mecca by his hair, yet he resolutely completed his mission. In the year 622 CE, he left Mecca after that. acknowledged as the year that Hijri visited Medina and instructed his students to propagate Islam across the world. In order to provide equal rights to Muslims and non-Muslims, Muhammad drafted the Medina Charter, which is recognized as the first written constitution in history. It aimed to create a multireligious Islamic state in Medina with a focus on religious tolerance and put an end to intertribal wars between rival tribes. He married Aisha, the daughter of the first Islamic Caliph, Abu Bakr. In 628 A.D., a ten-year period of peace was established by the Treaty of Hudaybiyah. between the Quraish tribe of Meccans and the Medina Muslim community. The Prophet's growing influence led him to establish new political pacts and alliances in order to advance the spread of Islam. Despite this, there were attempts being made to talk him out of his goal. With the help of Christians, Jews, and Bedouins, the Meccans fought him. The Islamic powers under his leadership emerged victorious after the battle in the Battles of Badr, Uhud, and Trench. Among the tribes and places he included were the Roman Empire and Persia, which in ten years developed into the state of Arabia. A prophet and a religious figure took control and founded a state, marking the start of the Hijrat period. When he learned that polygamy could only have four wives, he immediately stopped the practice. He had married several women who perished as a result of these disputes. With no heir to carry on his legacy, he ruled the Arabian Empire until his death in 632 A.D.

[20] Roy, S. (2016). *Understanding Hindu Law: Historical Roots and Modern Developments*. New Delhi: SAGE Publications.

c. Caliphate

The controversy surrounding the choice and leadership style of Prophet Muhammad's successor, or caliph, emerged in the Muslim world after his death. There was disagreement on the criteria for selecting the successor. There were two different schools of thought: the one held that it should be awarded to any common man who satisfied the qualifications of being a well-qualified, religious, and qualified individual; the second held that the prophet's lineage should be the sole factor considered when choosing the successor. A tiny percentage of Muslims backed the second opinion, contending that Ali should be given the caliphate as he was the Prophet's cousin and son-in-law following his marriage to Fatima. The majority of Muslims agreed with the first opinion.[21] Abu Bakr was chosen for the caliphate by the majority, known as Sunnis—a name used to describe followers of the Prophet's Sunnah. The title Shias, which comes from the word Shiat'Ali, which means Ali's friends, did not acknowledge the reality. After Abu Bakr, Umar, Usman, and Ali inherited the caliphate. It was said that Shia sect members were responsible for Usman's death. Ali became the caliph after being assassinated. Aisha convinced Ali to exact revenge on those who killed Usman. Ali's caliphate was not recognized by Muawiya, the cousin of Usman and ruler of Damascus. After Ali was assassinated in 661 AD, his sons Hasan and Hussain took leadership, but they were assassinated too. According to Shias, Ali was chosen as the Prophet Muhammad's successor and the status quo was against divine law. Nonetheless, Sunnis maintained that the line of succession is determined by the faithful's vote, which determines the degree of holiness. During this time, the Muslim world divided into the Sunni and Shia sects. Then, Yazid, son of Muawiya, killed Hussain, thereby severing the link between these two groups. The first four Caliphs established the Rashidun Caliphate, which was followed by the Umayyad, Abbasid, and Ottoman CaliphatesThe concept of a caliphate was later deemed unlawful by the Grand National Assembly of Turkey.

2.2 HINDU LAW OF INHERITANCE

Hindus have traditionally followed the Smritis, or ancient Hindu legal texts, which outlined the distribution of property in patriarchal family structures. Examples of these texts are the Manusmriti, YajnavalkyaSmriti, and NaradaSmriti. In these early days, women's inheritance rights were either nonexistent or very limited. The legal schools of Dayabhaga and Mitakshara exacerbated the division in the understanding of Hindu inheritance. Dayabhaga was a kind of individual property ownership that was mostly prevalent in Bengal and Assam. It allowed both male and female heirs to inherit the property, albeit males still had preference. Mitakshara, which restricted inheritance to male heirs and highlighted the value of joint family property passed down through the male line, was followed by much of India. Religious personal rules, such as Muslim and Hindu inheritance norms, were largely disregarded by British authorities during their colonial attempts to codify Indian laws. The Hindu Succession Act of 1956 marked a major change in Hindu succession law. [22]

[21] Ibid

[22]Chaudhary, S.K.*Gender and Property Rights in India: A Critical Analysis of Hindu and Muslim Succession Laws.* Indian Law Review, 2013

The act granted sons and daughters equal rights over self-acquired property as part of India's greater post-independence reforms, with the goal of standardizing and codifying inheritance rules. The 2005 reform of the act guaranteed daughters the same coparcenary rights as sons, so resolving some of the historical gender inequities and ensuring that they may inherit family property equally.

2.3 MUSLIM LAW OF INHERITANCE

Muslim inheritance law has a historical development that is closely linked to the religious teachings of Islam. In the seventh century, detailed instructions on how to divide property after death were provided by the Quran and Hadith. Islamic law was progressive for its period because it recognized the right of women and other vulnerable groups, such widows and orphans, to inherit property. This was revolutionary at a time when women were not allowed to inherit anything at all in many cultures. An equal distribution of wealth within the family is ensured by the Quran, which assigns some heirs specified inheritance percentages. The unquestionable quality of these shares emphasizes how inheritance is required by divine decree. Several Islamic jurists, like Imam Abu Hanifa and Imam Shafi'i, developed different schools of thought within Islamic law by discussing these ideas in detail in the past. The interpretation of inheritance rules in different Muslim societies was influenced by these schools, which include the Hanafi, Shafi'i, Maliki, and Hanbali schools. Muslim personal law in India is still governed by the Hanafi school of Sharia, which is followed by most Indian Muslims. There is no corresponding codified legislation akin to the Hindu Succession Act, and Muslim inheritance law has not undergone significant modifications in current legal reforms, in contrast to Hindu law. In accordance with Muslim law, property is still divided into equal halves for male and female heirs, with the former typically obtaining twice the latter. Testamentary independence is also subject to limitations. The maximum amount of property that a Muslim may leave in a will is one third, and the other two thirds must be divided in line with the Quran.

2.3.1 Colonial Era and Modern Reforms

During its period of colonial rule, the British East India Company and its colonial administration first refrained from interfering with local conventions related to marriage, inheritance, and family law, allowing people to follow their own religious practices. However, in the end, they implemented changes and codified a number of legal rules, particularly in the 19th century. British courts often applied stringent interpretations of archaic customs to Hindu and Muslim personal laws, based on publications and talks with religious experts. Once India gained independence, the government set out to modernize and amend its personal laws. Compared to Hindu law, which underwent significant changes after the Hindu Succession Act, Muslim law was less susceptible to state codification. The Uniform Civil Code (UCC), which would replace religion-based personal rules with a single legal framework for everyone, has been opposed by many religious

organizations, most notably Muslims. They consider it to be an infringement on their freedom to freely exercise their religion. [23]

2.3.1 Contemporary Issues and Reforms

India's current legal system is a manifestation of the ongoing struggle to reconcile religious traditions with the constitutional principles of justice and equality. On the other hand, Muslim law is still criticized for having provisions that are gender biased, especially the one that gives male heirs double the portion of female heirs. On the other side, gender discrimination has been significantly reduced by the Hindu Succession Act; nonetheless, challenges remain in implementing this law, especially in rural areas where property inheritance is still influenced by old patriarchal traditions. The introduction of the Uniform Civil Code has been the subject of more and more discussions. While opponents stress the need to protect religious autonomy and the divine essence of Sharia law, reformers argue that these regulations are incompatible with contemporary norms of gender equality. While some urge for a single rule that would regulate inheritance for all residents, irrespective of religion, others say that India's pluralistic legal traditions would be undermined by such a code.

CHAPTER 3 LEGISLATIVE FRAMEWORK

3.1 INTRODUTION

The legal structure governing inheritance rules in India is mostly derived from religious personal laws, supplemented by statutory changes. For Hindus, the 1956 Hindu Succession Act holds great significance. This Act, together with its subsequent changes, particularly the 2005 Amendment, which granted women equal coparcenary rights in ancestral property, redefined women's inheritance rights.[24] The Act, which covers Hindus, Sikhs, Buddhists, and Jains and regulates testamentary and intestate succession, achieves a compromise between traditions and modern notions of female equality. Moreover, ancestral property is considered joint family property in the Mitakshara system, but self-acquired property is subject to testamentary freedom. Muslims' inheritance laws are governed by the Muslim Personal Law (Shariat) Use Act, 1937, which mandates the application of Islamic law (Sharia) in succession-related matters. Muslim inheritance law is founded on the Quran and Hadith and aims to promote equitable distribution among family members. It includes gendered stipulations, such as men usually receiving twice the portion of women. Additionally, it restricts testamentary freedom by only permitting a will to be used to bequeath one-third of the property. Muslim inheritance law is still firmly grounded in Islamic teaching and is not subject to legislative amendment, in contrast to Hindu law. In addition to these customary laws, Christians, Parsis, and other nonreligious groups are subject to inheritance regulations under the Indian Succession Act, 1925. This legislation provides these communities with a uniform legal framework that ensures equal distribution among

[23] Ibid

[24] Sultana, A.A. & Kulshrestha, P. & Ahmad, F., (2022) *Inheritance Amid the Muslims of India*‖ Vol. 52, No. 2(1), 2022 Anvesak A bi-annual Journal

heirs and allows for testamentary flexibility. All things considered, India's inheritance system carefully balances religious customs and modern legal reforms.

3.2 PROCEDURE OF INHERITANCE UNDER MUSLIM LAW

The Islamic legal system only specified how an estate was to be distributed upon death; it made no provisions for maintaining an estate for the benefit of heirs. Therefore, the distribution of a deceased person's estate is governed by the Indian Succession Act, 1925. The inheritance procedure is managed in accordance with Islamic law as follows:

a) An executor or administrator is a Muslim's legal representative after death. An executor who is not a Muslim is not allowed. [25]

b) The executor collects assets, pays debts, settles bequests, and distributes any remaining funds to the heirs.

c) In situations when the decedent died testate, meaning they left a will, obtaining a probate is necessary to satisfy debts. If the dead died without a will, or intestate, a letter of administration needs to be obtained and filed with the appropriate court.

d) The executor becomes an active trustee for the bequeathable one-third share and a bare trustee to the heirs for the other two-thirds of the shares after settling the deceased's debts and burial expenses.

e) The letters of administration, or the probate, pertaining to the written or spoken will are presented as annexes to the court. Once they are approved, the executor's claim to act as the estate's representative for all purposes is established.

3.3 PROPERTY RIGHTS OF MUSLIM WOMEN

Muslim women's rights have been a topic of discussion since before the 1950 Constitution took effect. Shariah, or Islamic law, is perceived by many as patriarchal and harmful to women. Even if it doesn't seem like Muslim culture is putting these reforms into practice now, fourteen hundred years ago, the Koran addressed women's issues by instituting a number of reforms1 that improved the status of women. Islam does not oppress women in the form that it was revealed to the Prophet Mohammed, but because of how it has been interpreted, family law and everyday life are patriarchal. Muslim women are essentially oppressed as a result of orthodox interpretations of the Shariat, which also include discriminatory practices against women that are supposed to be divinely mandated. Muslim feminists wrongly interpret divine laws and blame the subjugation of women on the same Shariah regulations. Furthermore, there are several interpretations of Islamic law that support patriarchy. During the Prophet's lifetime, women's status did rise, but it was only momentary. Most Muslims do not venture outside of Islam because they consider it to be a complete way of life. Part III of the

[25] Ibid

Constitution guarantees India's citizens the right to complete development, regardless of their gender, caste, religion, or race. This makes the country a multicultural and multireligious nation. Muslim academics hold that Muslim women have suffered greatly as a result of the Shariat Act's application of Muslim personal law, and that if Allah were real, he would be ashamed of the state of Muslim women. The orthodox ideas of Islam have kept Muslim women in the same predicament despite the constitution's pledges to the contrary. [26]Muslim women are unable to benefit from the various welfare regulations since they are still bound by their own Islamic laws. Islam's ancient teachings on marriage, divorce, and polygamy are still relevant today. All national laws in India are based on the principles of justice, liberty, equality, and fraternity for all Indian citizens, as stated in the Constitution of India. When the founders of our nation drafted the Constitution, which upholds the dignity of all people regardless of their gender, religion, or place of birth, they were fully aware of the various forms of discrimination and the suppression of women's rights by the male-dominated society. Consequently, a number of general and specific6 measures were established for women's advancement and welfare.

The legality of other special provisions that support women's interests has also been upheld by the courts. But when it comes to Muslim women, the law must first be examined through the prism of Muslim personal law. Thus, polygamy, unilateral divorces (known as Talaq), and underage marriages are all practiced within the Muslim community. One such controversial topic of discussion is maintenance for the Muslim wife who got divorced. Consequently, Muslim women have little security from either the State or their own deeply patriarchal personal law. [27]While women who are Muslim or Christian are still bound by Islamic or Christian canon law, Hindu women advanced so quickly after independence that they currently have a comparatively better position in terms of property rights. Differently religious women have unfair and unequal property rights. Hindus, Sikhs, Buddhists, and Jainites are governed by one code; Christians are governed by another code that the British created for their fellow British Christians in India. Muslims don't have a property rights code. The property rights of Muslim women can be studied in relation to the following subjects:

Me. inheritance rights

II) qualified for greater ordower

III) Maintenance rights

I) Inheritance rights of Muslim Women

Islamic inheritance laws are appreciated for their formal beauty and usefulness by contemporary writers. Islamic law does not recognize the concept of an heir, and the testament is limited to leaving a legacy and appointing an executor or guardian. Muslim jurists had great regard for the laws governing inheritance, or faraid, and never tired of quoting the Prophet: "Learn the laws governing inheritance, and teach them to the

[26] Sultana, A.A., *Property Rights Movement for Muslim Women in India* 89 (Taxmann, Publication Delhi 2nd edn 2016)

[27] Sultana, A.A., Inheritance Rights of Muslim Orphaned Grandchildren and Adopted Children (Especially Females) and the Indian Constitution, 99 (Manakin Press New Delhi 2017)

people; for they are one half of useful knowledge." The set shares provided by the law of inheritance supersede the next of kin's succession to the residue. There is no universal succession; upon death, debts become instantly payable and are paid to the estate first, followed by funeral expenses. Nonetheless, each heir is considered to have inherited ownership of their individual portion upon the decedent's death. For a considerable amount of time, the Islamic law of inheritance has been admired for its comprehensiveness and the ease with which it has achieved the noble objective of resolving conflicts between competing claims from all closest relatives as well as the selection of one individual or uniform group of individuals to inherit the deceased's estate through universal succession. Muslims believe in two main things: that God exists and is one, and that the prophet Mohammed's message is true. Pre-Islamic customary law of succession served as the foundation for the Muslim law of inheritance, which is a superstructure constructed upon it. It is based on the patriarchal structure of the family. Sir William Jones, complimenting the system's formal excellence, said: "I am strongly disposed to believe that no possible question could occur on the Mohammadan Law of succession which might not be rapidly and correctly answered." One of the main parts of the pre-Islamic law of succession that the Arabian tribes adhered to was the prohibition against females and cognates inheriting. Muslim law merely changed and amended the customary rule of succession to bring it into compliance with Islamic doctrine, therefore women's inheritance rights do not give rise to the same kinds of complications as Hindu law. For example, unlike Hindu law, inheritance rights are adequately protected. But one of the main barriers to any reform in the law is the belief that it cannot be changed since it has been made public. To far, there has been no move in India to amend Muslim law. A brief historical overview will demonstrate how important social and political variables were in shaping the development of Muslim law.[28]

ii) Social Conditions in Arabia before the Advent of Islam

Islam originated with the Arab tribe structure, which is its original source. Before the advent of Islam, the Arab population was divided into tribes, most of which were at war with one another and only came together for the sake of attack and defense. In townships like as Mecca and Medina, people led sedentary lives, while the tribes lived nomadic lives elsewhere. Arabs were constantly at odds with one another; the only three things that could genuinely win their affection and loyalty were alcohol, women, and battle. Their religious beliefs were governed by a meaningless and ridiculous polytheism. An Arab may have as many women as they wanted. The views on sexual morality differed greatly from those held in subsequent eras. Smith claimed that widows of the dead may be forced into marriage and inherited like other chattels, with the exception of the heirs' mother. When it came to their wives' loyalty, husbands in ancient Arabia were so indifferent that they would even send them to live with another guy in order to have a goodly seed, or they may even lend them to a guest. The son or other heir covered the widows with a piece of cloth, save for the mother, symbolizing his symbolic annexation of them. The social unit of the early Arabs was called the hayy, or full

[28]Natana J. DeLong-Bas, *Islam: A living faith*, 135 (Universal Law Publishing Delhi 2003)

circle of common blood, and it was made up of all the kinsmen measured within certain degrees of kinship, not just certain homes. In tribal society, the law of inheritance took precedence over the law of booty. The possessions of the departed also belonged to his asaba, [29]or angate, which in its primary sense denoted companions in battle. Then the treasures were divided among all the warriors, Chief of the Hay receiving a fourth of the prizes. Thus, a tribe member's right to succeed hinged on their combat merit. This law prevented women and minors from inheriting. Smith pointed out that it makes sense that women and children were not allowed to inherit because pastures and streams were communal tribal land owned by the nomads, and moveable property was constantly being seized and returned. The fall of Hayy and the rise of patriarchal institutions prevented women from becoming embedded in common institutions, such as inheritance law. A father's standing in an Arab patriarchal family was comparable to that of the pater families of a Roman aristocratic home. The prevalence of infanticide of girls suggests that male heirs were preferred and had a higher status. Succession was governed by the two concepts of contract (Ahd) and parentage. whatever sort of property, in whatever quantity, to any individual at all, might be bequeathed by an Arab to anyone he chose. In accordance with earlier traditions, women and minors were excluded from inheritance. It is clear that a widow was not able to inherit since in pre-Islamic periods, a widow might inherit herself. The males of Medina were opposed to granting daughters and sisters property rights, according to a verse in the Qur'an. From these and other facts, one may conclude that women were completely incapable of having property, at least land, since Arab society was almost tribal and did not acknowledge the individual. In Arabic society, women had no position until the advent of Islam. Arabs usually saw a girl's birth as a tragedy and a cause of embarrassment for the family. As a result, female infanticide became a common practice there. Even if they were allowed to live, girls were coerced into marriage at the juvenile age of seven or eight. The origin of this custom was the belief that parents would feel deceived if their daughters did not get married before they reached puberty. [30]

The Arabs of the era were either captured, bought, or contracted into polygamous marriages. It appears that there have been no traditions or laws governing the number of wives an Arab may have. Wives were considered to be property. The second area of inequality is the topic of divorce. In pre-Islamic Arab civilization, the husband could divorce his wife whenever he pleased. There was no reciprocal right for the wife. Arabs have differing views on women's property rights. The claim that women possessed property rights before the introduction of Islam is contested by some. The latter claimed that women had no property rights because they were still seen as property at the time. The fact that pre-Islamic Arab women could inherit land and that a son may marry his stepmother after his father passed away are evidence of this. These all serve as examples of how Arab women are perceived and handled as little more than objects or property. Therefore, in pre-Islamic Arabian civilization, which was exclusively the domain of men, women were totally denied rights and advantages. They argued that she was weak, incapable of augmenting the family's assets, and more of a

[29] John Esposito *Women in Muslim Family Law*, (New York: Syracuse University Press, 2001)
[30] Ahmed, R. (2007). *The Muslim Law of Inheritance: A Study of Contemporary Issues*. New Delhi: Oxford University Press.

burden than a strength in the family's defense against outside threats in order to bolster their claim. She could not bring back war treasure to improve the household and tribe's financial standing. As such, she was not entitled to share in the family's riches. For similar reasons, boys who were too young were not allowed to inherit anything. Only physically fit young men (worthy of a war) who could defeat their enemies in the field were entitled to their share of inheritance; the property belonged to the distant male family members. It mentions an occurrence that happened back then: the famous Arab poet Hasan ibn Thabit had a brother who died and left behind a wife and several daughters. The children of his family stole everything he owned, and they had no pity on his wife and daughters. In answer to the widow of the deceased's complaint, the Prophet called them. To defend their acts, they claimed that they were the only ones battling the enemy to save those women and the territory. The holy commandment, which states that men should receive a share of what their parents and kinsmen leave, and women should receive a portion, no matter how big or small, of what their parents and kinsmen leave, was then recited to them by the Holy Prophet[31].

iii) Nature and Content of Koranic Laws Relating to Inheritance

a) Koranic laws relating to inheritance

Recognizing the importance of Islam and its foundations is crucial when assessing the Prophet's reforming role and the significant changes he brought about in Arab society. The ruins of the earlier civilizations provided the basis upon which Islam was built. Muslim jurists and divines in later eras seem to have disregarded the Prophet's eclectic approach and the sophisticated blending of the ancient and new. It incorporated elements of the past into itself, changing them somewhat and adding fresh elements of its own creation. The Prophet thought that inheritance laws were very important. He urged his disciples to learn inheritance rules and impart them to the general public, arguing that inheritance laws include half of all practical information. The Prophet's revelation of inheritance rules serves as clear evidence of the mission's reformative nature. There are multiple verses in the Koran that address inheritance laws. The asaba said, "Ye, who are believers, are not permitted to inherit women against their will," prohibiting widows from being forced into marriage. Some relevant verses are as follows: Men are entitled to a certain portion of what their parents and relatives leave behind, and women are entitled to a certain portion, regardless of how much or how little is left behind. This is stated in Sura 4, verses eight to eighteen, "after the battle of Uhud, when numerous Muslims had fallen." If any relatives (who are not qualified to inherit) or the poor and orphans happen to be at the division, give them some of it and show them some kindness. Allah provides you the following instructions regarding your children: if there are only girls and more than two, the boy inherits the entire estate; if there is only one girl, she inherits half of the land. His mother would have a sixth if the legator had no children and only his parents inherited from him. However, if the legator had children, each of his

[31] Leila Ahmed, *Women and Gender in Islam: Historical Roots of a Modern Debate*, (New Haven: Yale University Press, 1992)

parents would have a sixth. (All of this) after deducting any possible loans or bequests. You have no idea who will be more supportive of you, your parents or your children. This is a decree from the all-knowing, all-wise Allah. You will receive half of your wives' inheritance if they are childless; if not, you will receive a fourth of their estate with the deduction of any obligations or bequests. In the event that a legator, whether male or female, leaves behind siblings, each of them will receive a sixth share of the estate; however, if there are more than one, each will receive a third share, less any debts or bequests he may have made. An eighth of your inheritance belongs to your children if you have any, and a fourth goes to them if you don't. [32] This is an unbiased command from Allah. Allah is all-knowing and merciful. Sura 4, verse 175 discussed the heirs of the collateral as follows: "They ask thee for a decision." Allah provides you with the following ruling regarding distant relatives: if a man passes away without a mate, half of his belongings belong to his sister; if she passes away without a mate, he is her heir; if there are two sisters, two thirds of the estate belongs to them; if there are both brothers and sisters, the brother will receive the same amount as both sisters. Every person listed in the previously specified sections receives a certain amount. The residue, or most of the estate, is once again granted to the Asaba. "What is left over from fixed commitments belongs to a man's relatives in the male line," is an adage attributed to the Prophet that has typically determined their inheritance. The following are the main features of the succession principles that the Prophet revealed:

a) The spouse, female heirs, cognates, and the wife are all entitled to inherit.

b) Parents and ascendants are also entitled to inherit in addition to the male descendants.

b) Female heirs of the same degree often receive half of a male heir's share.

Islam has strictly restricted inheritance to the family and graded the rights of surviving family members according to their level of relationship to the deceased. The first and most significant stockholders are the heirs of the individual leaving property. Women's status consequently improved over time as Islam and the prophet's teachings spread. The prevailing notion that women were inferior to men had been abandoned. Some of the prevalent social and economic issues of the time were resolved by the Prophet, and the Koran maintained women's equality and the notion that men and women are complementary to one another. For instance, in pre-Islamic Arabia, women were not permitted to inherit. Thus, in Islam, a husband or wife became an heir. It was enabled for female cognates to inherit. Islam granted women the right to inherit, but this does not entail that their share is equitable or equal to that of men. Even in cases where there were male descendants, the right to inherit was granted to parents and ascendants. Generally speaking, women received half of a man's portion. Twice as much is taken by the brother as by the sister. People have said that this is prejudice against women.

b) Progressive elements in the Koranic Laws

[32] Leila Ahmed, *Women and Gender in Islam: Historical Roots of a Modern Debate*, (New Haven: Yale University Press, 1992)

The Koran, like Roman law, does not recognize primogeniture as imprudent and does not confer any rights upon the firstborn. The primary heirs under the laws of Koranic law are the sons, daughters, parents, and spouse, making up the twelve appointed sharers. These heirs are entitled to inherit, if they haven't already been disqualified due to factors like apostasy. There has been no delineation made as to how much of the deceased's estate the mother and father, as well as his children, will inherit. [33] These regulations are noteworthy in that, although a female heir's share is often half that of a male successor, she is entitled to all of the deceased's property, both immovable and mobile, and she is not subject to any limits based on the type of property. Hindu law stipulated that women could only descended through unbroken male lineages and could not inherit ancestral or joint family lands. When the deceased left behind just siblings and/or sisters rather than children, the mother's share is reduced from one-third to one-sixth. These passages were revealed following the Battle of Uhud, and since Arab tribes were fighting all the time, it's conceivable that this was done to keep women from owning too much property. When it comes to the wife's property, the husband is entitled to half when they are childless and one-fourth when they are raising children. He controls the windfalls that follow a spouse's death and makes sure that the right to track property back to its original source is sufficiently satisfied by keeping some of his childless wife's estate withheld. It is appropriate to bring up a pertinent statement made by a Muslim scholar regarding the distribution of shares of an uneven character under Koranic law, such as between children and parents and between male and female heirs. In terms of managing and controlling property, a woman is unaffected

3.4 THE NORTH WEST FRONTIER PROVINCE SHARIAT ACT, 1935

Prior attempts by a few religious leaders were successful; the first of a series was in the NWFP, and a law was presented and eventually accepted in the legislative assembly of the NWFP in 1933. On December 6, 1935, the NWFP Muslim Personal statute (Shariat) Application Act was passed. It specifically abolished section 27 of the NWFP statute and the Justice Regulation, 1901, which had previously given Muslims' personal law precedence over custom and usage. It therefore abolished the supremacy of custom over Sharia, addressed injustices against women, and established the following guidelines for Civil Courts (Ahmad, 2019): The Muslim Personal Law (Shariat) will govern questions regarding succession, special property of females, betrothal, marriage, divorce, dower, guardianship, minority, bastardy, family relations, wills, legacies, gifts, or any religious usage or institution, including waqf (trust and trust property), where parties are Muslims or where the decision conflicts with the provisions of the North West Frontier Province and Justice Regulation 1901. The Warren Hastings Plan of 1772 included the term "Laws of Koran" (Ahmad, 2019).

3.5 CENTRAL SHARIAT BILL, 1935

[33] Agnes, Flavia *Law and Gender Inequality Oxford Publications, 1999*, 79 (Eastern Book Company 1st ed,2013)

The application of Muslim LawTM was made. The NWFP Shariat Act of 1935 was the first piece of law to refer to "Shariat" and "Muslim Personal Law" interchangeably. While the local Muslims followed non-Islamic customary law, the major goal of the NWFP Shariat Act, 1935 was to apply Sharia law in the area of inheritance and succession. This Act stated that any lawsuits among[34] Muslims pertaining to this topic will be settled by the courts using Muslim personal law. Consequently, the Act addressed a wide range of topics that previous Acts and ordinances had not addressed. However, the assembly was granted the power to amend and update Muslim personal law under the NWFP Act (Ahmad, 2019). The NWFP Shariat Bill 1933 was introduced, which led Punjab's ulema to advocate for legislation that would comply with the new rules for their regions. Regardless, the Jamiat Ulema Hind held a wide stance on this matter, and under the direction of Mufti Kefayat Ullah, efforts were undertaken to codify British India in its entirety. Organizations representing Muslim women joined the movement (Ahmad, 2019). The Shariat Bill was written in 1933 by Abdullah Layal Puri, a well-known Muslim scholar from Punjab and student of Maulana Thanvi. The federal legislature was supposed to publish the measure. The administrative body of Jamiatulem-i-Hind also agreed on this. Despite having almost all of the provisions of the 1935 NWFP Act, it was unveiled to solicit public feedback following the 1935 Legislative Council deliberations led by Abdullah Layal Puri. The main provisions of the Bill were comprehensively stated in section 2 (Ahmad, 2019): Regardless of customs or usage to the contrary, the Muslim personal law (Shariat) shall be the rule of decision in all cases pertaining to adoption, wills, women's rights of inheritance, special property or females, including personal property inherited or obtained under contract or gift or any other provision of personal law, marriage, dissolution of marriage (including talaq, ila, zihar, lian, khula, and mubarat), maintenance, guardianship, gifts, trust, trust properties, and waqfs. The bill was endorsed by prominent women's clubs, religious leaders, and ulema. Due to their own self-interest, the Nawabs and the Taluqadars were the only ones who didn't like it. [35] The Bill's proclamation and explanation, which were published in 2019, made its purpose evident (Ahmad, 2019). The belief that Muslim personal law should always take precedence over traditional law has long been valued by Muslims in India. There has been ongoing agitation regarding the subject in the press and on the platform. The demand has received support from Jamiat Ulema Hind, the largest Muslim religious group, which has also drawn attention to the urgent necessity to establish laws to that effect. It is incorrect to refer to customary law as such because it is not well-founded, is always changing, and is not likely to ever reach the precision and definiteness that set all laws apart. The way Muslim women are treated by so-called customary law is just abhorrent. [36] Muslim women's organizations have criticized customary law for its adverse impact on women's rights and advocated for the implementation of Islamic personal law, or Shariat, to Muslim women. With the introduction of Muslim personal law, they will eventually ascend to the status to which they are inherently entitled. Additionally, the Present Bill would be advantageous to society if it were to become law because it would

[34] Ali, Ameer *Mahommedan Law Thacker*, 79 (New York, The Free Press 1989)
[35] Ibid
[36] Ahmed, Aqil *Mohammedan Law Central Law Agency, Allahabad, 2009*, 102 (Regal Publications, New Delhi 2nd edn 2017)

ensure the clarity and unambiguity of the reciprocal rights and obligations of the public Muslim Personal Law (Shariat), which is too well-known to necessitate research—the primary component of customary law—or allow for any duplication of effort. The leader of the Muslim League, Muhammad Ali Jinnah, proposed a significant modification during the Bill's final reading in the Central legislature in 1937. He proposed that each Muslim should be free to choose whether to adhere to Islamic or customary law, rather than forcing all Muslims to adopt Islamic law. Muhammad Ali Jinnah might not have approved of the bill meant to protect the interests of the Nawabs and Taluqdars, since their political support to the Muslim League was crucial. In a speech to the Central Legislature, he said (Ahmad, 2019) that the following is the current status of affairs regarding wills, legacies, and adoption. I think I can inform the House that, to the best of my knowledge, more than half of the CuchhiMenons have willingly embraced that declaration, thus Mohammedan law is relevant to them—as I indicated in response to a question on another amendment pertaining to CuchhiMenons. We will not give up; rather, we will keep trying to persuade Muslims who wish to adhere to Muslim law in all contexts—including adoption, wills, and legacies—by using voluntary and persuasive means. Once this bill is passed, a Muslim will automatically become subject to Muslim law, and his minor children will follow suit. All the Muslim has to do is come out and announce their wish to do so. So let's give this strategy a shot as it has shown to be very successful. But in the end, if we find that we have exhausted all voluntary and persuasive means, and if this House thinks that the Muslim Personal law ought to be implemented for both adoption and legacies, we shall take that into account. We don't commit in any way, and nothing is given up. Furthermore, Khan Bahadur Shaikh Fazl-i-Haq-Piracha emphasizes how Islamic law supersedes conventions and usages, with a preference for women. According to Ahmad (2019), if this bill is passed into law, the house will only be partially reversing the severe injustice that the Muslim community's female members are currently subjected to. These women are abused throughout the nation, including Punjab, where I represent. A number of other delegates have also put out compelling arguments, which are examined and summarized here. It is against our wishes that the Bill should become entirely optional if the house approves Mr. Jinnah's proposed changes. [37] The Government's opposition to the Bill and the conflicting views on certain matters forced Mr. Jinnah to intervene in order to ensure that it passed through without any opposition. Every Mussalman who so chooses will have the ability to follow Islamic law in matters of succession if the proposed amended version of the measure is accepted. This is now not possible because of the customary regulations that are in existence in several regions of the country. By addressing a long-standing complaint of Muslims who want to follow Islamic law in succession and other areas covered by the Bill, the Government will only be carrying out its obligation to support the Bill. After the bill is signed into law, it will be up to each Muslim to determine whether or not to follow Islamic law. Another delegate, Qazi Muhammad Ahmad Kazmi, who had always been adamant about Islamic law being applied legislatively, said that he probably would not have objected to the language or the law if he had only recently come across such laws (Ahmad, 2019). The

[37] Ali, Ameer *Mahommedan Law Thacker*, 79 (New York, The Free Press 1989)

proposed measure indicates the repeal of any laws that state that Muslim personal law is superseded by custom or practice, as it states: "Notwithstanding any custom, usage, or law to the contrary." The Muslim personal law will supersede all customs and usages; provided, that is, if any customs or usages are legally recognized and have a mandate that supersedes the Muslim personal law, this bill cannot invalidate them. Ahmad (2019) states that in the event of a disagreement between the Muslim personal law and use and custom, the latter will take precedence over the former under section 5(b) of the Punjab laws act. This is because removing the words "or law" from this clause would mean that the Muslim law will prevail "notwithstanding any custom, usage, to the contrary[38] the Indian government adopted the Punjab Laws Act (Act IV) in 1872. The law, which presently regulates the whole of Punjab, is passed and enacted by the legislature. The purpose of this legislation is to rectify the particular law that prioritizes usage and custom over Muslim personal law. The words or law will therefore have the effect of saying, when a case pertaining to it is heard in the Punjabi courts, that you are free to follow your own Muslim personal law, but that if an enactment of the Punjab has recognized the custom and usage, it will take precedence over your personal law, unless the Knight from Meerut had proposed an alternative solution to address this particular issue. According to what I gather, the purpose of this bill is to address the custom that has historically prevailed among some Islamic-following classes, governing them in questions of succession and inheritance. Since Mr. Jinnah set the example, he did not object to the corruption against women even though the legislation could not be made mandatory. As a result of the clause, he also valued the right canon and made the following statement (Ahmad, 2019). They have been performing these customs for a very long time. Due to their establishment in court, some customs have legal status. Certain customs are legally binding because courts have acknowledged them. While some customs are imposed because they seem right to the persons concerned, others are ambiguous. But as India has developed and progressed, attempts are made, frequently at great financial and legal expense, to establish the customs that have not yet been established. The basic goal of this bill, as I have stated, Sir, is to guarantee that the female heirs receive their just share in compliance with Muhammadan law. According to customs and traditions, the position of female heirs has always been crucial. A deceased man's widow is the only one eligible for support. Whenever a son or male heir inherits a huge estate, he often informs the widow that rupees 100 is good enough for her, even though the estate may be worth 10, 20, or 30 lakh. This makes it extremely difficult to determine what maintenance she is entitled to. Litigation is inevitably the result of this. Daughters and female heirs have similar status. To avoid confusion and costly litigation when any of these conventions are defined or decided, we should protect the female heirs' rightful shares in line with Muslim law. The following is stated by Maulana Shaukat Ali (Ahmad, 2019), who commends the Islamic law of inheritance for its reasoning I truly believe in the magnificent teachings of the Koran, which have helped us become better sons, husbands, and dads in every way. They also make our lives healthier and purer, but I don't have the authority to make other people agree with me. You know, sir, the law

[38] Baksh, Khuda*Contributions to the History of Islamic Civilisation*, 99 (Calcutta University Press, 1920)

we have is really simple. According to Mr. M. S.S. Aney's comments (Ahmad, 2019), these conventions that do not include female heirs are unfair. I completely agree with this. Not only are they unfair, but they are also eroding women's economic standing, which is the cornerstone of their advancement and growth as well as their rightful and equal participation alongside men in all spheres of society. A share must be given to each son and half a part to each girl. The wife gets one-eighth of her husband's property before the son or daughter gets their portion. We Muslims desire to live by the full letter of the law, and we will not give up until we achieve our goals for guiding our lives. So, the main idea here, sir, is that personal Muslim law should control the intestate succession rule. Different people adhere to different legal systems; succession rules in Europe and India, for instance, differ from one another. But what I actually meant to say, sir, is that the Islamic code is the most reasonable and equitable system of succession law. I'm not really ambitious. Dreams don't seem genuine to me. [39] A single territorial law for the entirety of India will take a very long time to develop. I can't wait for that moment. In my opinion, when it comes to succession, the Islamic legal system is the most advanced, fair, just, and innovative. I make no excuses for saying this. I contend that the Muslim ought to be subject to it at the very least. Another legislator, Syed Ghulam BhikNairang, backed the bill to reduce women's uncertainty regarding inheritance. Examining this bill's contents will reveal that it covers a wide range of topics, but the main issue that has been raised is the suppression of the rights of female heirs, including the sister in some situations, the daughter, the widow, and some other female heirs. He proposed the following language: "This bill expresses that desire which has been expressed on so many occasions and in so many forms. Islamic law was actually the first legal framework to provide women the status of both an heir and a legitimate property owner, as noted by one of the eminent speakers who spoke before me. In her multiple roles as a widow, daughter, and so on, she was given a certain amount. Khan Bahadur Shaikh Fazi-i-Haq Piracha, another representative, also offered his full tower of strength to end corruption against female inheritors. He expressed his viewpoint as follows (Ahmad, 2019): "Sir, I fully support the motion moved by my honorable friend, the bill's mover." The hare that had fallen into her possession was to be her own property; Muslim law fully recognized qualified ownership.[40] I am convinced that the rising disengagement of Indian Muslims from the Islamic social code is the primary cause of their current social and spiritual degradation. I believe that we still have time to win them over because of the country's general desire to go back to the personal law and their realization of how customs have split them off into various groupings. That is why, sir, I wholeheartedly support the legislation. It allows my people to return to the pure and straight path of Allah's law, in accordance with the teachings of the Koran, and feel secure in their decision to do so. This enables my people to stroll side by side with India's other Muhammadans. Additionally, I agree with it since the bills allow Muhammadans to base their social, religious, and spiritual behavior on equality and humanity. I argue that Islamic law is a powerful and all-encompassing legal framework that can direct and lead a person

[39] Banu, Afsar *Status of Women in Islamic Society*, 99 (Anmol Publications Pvt. Ltd, 2003)
[40] Ibid

in all areas of life. Its precepts remain constant in this ever-changing world and offer man enduring, enlightened guidance on how to avoid becoming entangled in a web of self-serving small interests

3.6 SHARIAT ACT 1937 AND ITS INFLUENCE

The Shariat Bill was finally approved on December 16, 1937, and was renamed the Muslim Personal Law (Shariat) Application Act, 1937. It is clear that this Act was not intended to be as expansive as it was by Maulana Thanvi and his associates. He declined to accept, as Mr. Jinnah had argued, the insertion of sections on customary law to several subjects. He expressed dissatisfaction with the Act's tight margins by drawing comparisons to the NWFP Shariat Act 1935. In an effort to revoke Jinnah's amended Act, a delegate by the name of Muhammad Ahmad Kazmi filed a revised bill on January 10, 1942. The Muslim League had not yet taken over the legislative council at that point. The task finished by Mohd. Ahmad Kazmi contains legal history. Mr. Jinnah framed the choice about adoption, wills, and legacies because the Act of 1920 defined them to be customary for Cuchhi Memons. This is the reason the measurement was important. In any event, some memos led to its withdrawal; hence, the Jinnahi modifications ought to be reversed as well, and the Shariat Act ought to take precedence in these situations.

The Muslim League was against the change. However, Jinnah's negative reaction to Later Mohd signaled the chapter's definitive conclusion. Ahmad Kazmi kept reminding people to accept his modifications, which he began in 1942 but which Mohd and the league ultimately rejected. In fact, Kazmi undid his modifications in 1945. Thus, despite the efforts of Jamiat and other ulema, such as Maulana Thanvi, the Act as previously adopted remained in existence without yielding any beneficial outcomes. Thus, the Shariat Act clearly declared all local civil law regulations in Punjab, CP, Oudh, Ajmer, Mewar, Madras, NWFP, Bengal, Bihar, Orissa, Agra, and Assam to be invalid. As a result, contradictory practices took precedence over Muslim personal law (Ahmad, 2019) [41]

3.7 SUCCESSION RIGHTS OF FEMALES UNDER MUSLIM LAW

According to Islamic law, men and women are entitled to inherit equally. If a Muslim has both male and female heirs, then all of them get their inheritance at the same moment of their death. Inheritance is not gender-based, despite the custom that a man's portion is twice as great as a woman's. This allocation of shares is supported by the fact that, under Islamic law, a male successor does not receive Mehr or maintenance from his father, but a female heir receives (or expects to receive) additional funds or property as her Mehr and maintenance from her spouse. In addition, the male heir is primarily responsible for supporting his progeny, with the female heir only being able to do so under extremely particular circumstances

3.7.1 Widow's right to succession

[41] Baveja, Malik Ram *Women in Islam Renaissance Publishers*, 100 (Kamal Law House, New Delhi.3rd edn 2012)

Islamic law states that no widow is unable to inherit. After her husband's burial and all related debts and responsibilities have been paid, a Muslim widow without children is entitled to one-fourth of his property. However, if a widow is a mother or grandmother, she is entitled to one-eighth of her late husband's estate. A Muslim woman loses her inheritance rights if her husband marries while unwell and passes away from the same sickness before fully recovering or having children. Until she remarries, the widow is entitled to her portion of the inheritance, even if the husband divorces her while he is unwell.

3.8 MUSLIM SUCCESSION ACT

The following general principles, which apply to all schools of thought, govern inheritance within Islam. The Mulla legislation's Section 51 declares the estate of the deceased to be equal to its immovable assets.

• Wealth obtained via one's own efforts is not recognized in the same way as wealth inherited.

• It is only when someone goes away that the issue of who gets what property becomes relevant.

• A Muslim child does not have the right to inherit his family's fortune.

Birthright is not recognized by Section 52. An heir-apparent or heir presumptive entitlement to the property does not take effect until after the death of the ancestor. He would have inherited it as an heir if the ancestor had lived. Islamic law mandates that a person leave his family with a legacy of wealth. In some circumstances, someone may leave non-blood relatives with only one-third of his wealth, with the remaining two-thirds going to family members.

3.8.1 Types of Succession

Assets may be dispersed after death in accordance with the laws of succession (intestate) or in accordance with the terms of the deceased person's will (a procedure known as testamentary distribution). Testamental and non-testamental succession are the two main categories into which property succession falls. For non-testamental succession, the Muslim Personal Law (Shariah) Application Act of 1937 applies" xvi. The relevant Shariah Law of the Sunnis and Shias governs the inheritance of a testate, however, who made a will prior to passing away. Muslims are obligated under the Indian Succession Act of 1925 if the property is immovable and located in West Bengal, Chennai, or Bombay. Only inheritances made by wills are free from this requirement. [42] According to Shari'ah law, a Muslim who passes away has lawful successors who, assuming there are no impediments to succession, are entitled to inherit the deceased's property. Tenants in common, or each inheritor receiving a certain share of the estate. As shared ownership is not recognized, inheritance in Muslim law is akin to tenants-in-common. Heir Alignment: Divided into two primary types, the

[42] Baveja, Malik Ram *Women in Islam Renaissance Publishers*, 100 (Kamal Law House, New Delhi.3rdedn 2012)

heirs can be classified as either Sharers or Residuaries. Within the family, the following are considered sharers: the husband, wife, mother, father, daughter, full sister, consanguine sister, and uterine brother. Since they are both Sharers and Residuaries, four of these Sharers receive inheritances. Relationships exist between the father, daughter, consanguineous sister, and full sister. Any remaining assets once they are distributed among the Sharees will be donated to the Residuaries in the event that the immediate Sharer passes away. Third-class kin groups are those who share a common ancestor but are not Residuaries or Sharers. That being said, there is no inheritance between stepparents and stepchildren. In the event that there are no living Natural Heirs, the government will "escheat" the estate of the deceased. If an individual leaves no heirs alive, the state will take over their estate.

3.8.2 Distribution of Property

According to Islamic law, the estate may be divided either by population or by strip. The primary weapon employed by the Hanafi Act is the per capita distribution.

3.8.3 Hanafi Law of Inheritance

According to Hanafi law, only male offspring of the deceased are deemed heirs. Each of the heirs holds a certain amount of the bequest in their own names. According to Sunni law, inheritors fall into one of three categories [43] Quota Heirs" are accorded priority in the line of succession and receive a specific share of the state's resources. From the viewpoint of a daughter, family members can include any individual, such as parents, grandparents, spouses, siblings, etc. The heirs that remain (referred to as "residuaries") will inherit the remaining property after the Quota-heirs have collected their inheritance. Included are male and female relatives from what is thought of as a second branch of the family tree. An individual's estate will be transferred to the government if they have no surviving relatives.

3.8.4 Shia Law of Inheritance

Shia law divides heirs into two primary categories (affinities): consanguinity (a blood kinship between two people) and marriage. While affinity heirs are referred to be Sabab heirs, consanguineous heirs are also known as Nasab heirs. Based on blood relationships, a further division into three groups is formed. In this case, the first individual will not pass on any inheritance to the second, and the second will prevent the third from inheriting. Those who are directly linked to you through your parents, siblings, or other relatives are in the first class. The second set consists of siblings, grandparents, and their children. The third category consists of uncles, aunts, and their children from both parents.

3.9 MUSLIM LEGAL CONCEPTION OF INHERITANCE

The idea of inheritance is based on the Prophet's compilation of Islamic or Quranic teachings. Co-tenancy is not recognized by Islamic law, and the heirs are tenants-with-common, which limits their inheritance rights to

[43] Coulson, Noel J. *A History of Islamic Law* (Universal Law Publishing Co. Pvt Ltd, 1997)

the shared shares of the land. In Abdul Raheem v. Land Acquisition Officer (1989), the court observed that Muslims do not adhere to or recognize the joint family arrangement when it comes to inheritance and that a Muslim's title, interest, and privileges in his estate pass away upon his death and become the property of others.[44] However, in Islamic law, inheritance is not a birthright and not every child born into a household is guaranteed to inherit. To inherit, an apparent heir must survive the deceased. The unborn kid can inherit while still in its mother's womb, provided that it is born alive. In the event of a stillbirth, the child's vested portion of property is forfeited, as the infant will be considered as having never been. Islamic law grants property rights to successors who are male or female. Cognites or close female heirs are recognized within the heir class. But in the Islamic system, women will have more financial security because of mehr and the support of their husbands, while males only have inheritance, which enables them to fulfill their duty to provide for their wives and children. Because of this, women only receive half of the shares that their male counterparts received. In contrast, each spouse in a married relationship is equally entitled to inherit from the other. Additionally covered by the inheritance plan is a widow A widow gets 1/4 of her deceased husband's estate if she is childless; if she is a grandmother or has children, she gets 1/8 of his fortune. On the other hand, if a widow married a Muslim man while he was unwell and the marriage was not consummated due to the conditions of the marriage, she would not be eligible to inherit. But if her spouse divorced her before she died of illness, her inheritance is still unlimited till she gets married again. Islamic regulations also give the deceased's descendants less weight in the inheritance arrangement by naming them as the immediate inheritors or first-in-line heirs. The Islamic inheritance system recognizes two types of successors: the Sharers, or Quranic heirs, and the Residuaries, or conventional heirs. The Quran changed the customary tribal rules of inheritance to fit Islamic beliefs. The primary modification to customary law was the establishment of the class of "sharers," or "Quranic heirs," which led to the recognition of heirs that the traditional succession laws had previously forbade. That is to say, if Muslim man "M" dies and leaves behind his wife "W" and his sons "S1" and "S2," W, being the sharer, will take 1/8 (one-eighth) of the land, and the remaining 7/8 (seven-eighths) will go to the S1 and S2 children. But because Sunni and Shia Muslim sects interpret the Quran in various ways, Shia and Sunni inheritance laws differ slightly from one another.

3.10 THE MUSLIM LEGAL PRINCIPLE OF SPES SUCCESSIONIS

One important law governing property transfers is the spessuccession is theory. "Spes succession is," a Latin adage meaning "expectation of succession," refers to the belief that a person who poses as the heir of another would inherit that person's estate upon their death. The rule states that simply because someone is expected to inherit property when someone else passes away, it does not mean that they immediately become the rightful

[44] Desai S.T. *Mulla's Principles of Hindu Law Bombay*, 60 (LexisNexis, publication Gurgaon 2018)

owner of that property. Consequently, a person does not acquire any legal ownership rights simply by virtue of their "expectation" or "chance" to inherit a property.[45] According to Indian law, Section 6(a) of the Transfer of Property Act, 1882 prohibits the transfer of a Spes Successions. However, the spessuccession is norm is not recognized by Muslim inheritance law. Therefore, it is believed that when spes successions are transferred, the chance of succession is lost. The subject of a formal release or transfer cannot be the potential existence of an apparent Muslim heir who inherits property. In Shehammal v. Hasan Khani Rawther and Ors, a decision was made. (2011) that the doctrine of spes successions need not always be considered in a family arrangement. The respondent was one of the supposed heirs in this case to inherit a part of the plaintiff's estate. But before the respondent received his share, he and his father executed a document giving up the respondent's ownership rights over the land in exchange for money. The question of whether a Mohammedan might forfeit his inheritance rights through a familial arrangement even before acquiring the land needed to be decided by the Apex Court. It was determined that the doctrine of spessuccession is might be ignored in circumstances when inherited rights are forfeited over consideration or in family arrangements

3.11 THE INDIAN LAW OF ISLAMIC INHERITANCE

Although not in its totality, Islamic canon—which covered crimes, enslavement, proof, etc.—was applied in India during the Muslim administration's rule. When the British took over India, they completely disregarded Islamic law and created a huge problem. Only the religious matters and sacred rites were left to the qadis, muftis, sadramin, and sadr al-sudur; all other major concerns were decided by British judges and magistrates in accordance with English law or local customary canon. Furthermore, because there was irregularity in the application of both personal and customary canon, that was the most uncomfortable experience.

However, in 1937, these irregularities were eliminated to some extent following the approval of the Muslim Personal law (Shariat) Application Act. This law regulates Sunnis and Shias in specific areas, such as inheritance, but it does not apply to charities, charitable institutions, charitable and religious endowments, or any agricultural land that is still subject to customary law. The exceptions to this law are three states: Andhra Pradesh, Kerala, and Tamil Nadu, where agricultural land was brought under the Act's jurisdiction through later legislation (Ali, 1984). The Cutchi Memos from Gujarat, which adhere to the Hanafi school of thought, were governed by Hindu customary canon regarding succession. However, in 1938, they were given the option to sign an Act of 1920 stating that they were required to be administered by Islamic canon. This was similar to the Mapillas of Tamil Nadu, who also followed customary canon regarding succession until the Islamic personal canon was implemented for them through the Mapalli Succession Act of 1918 and the Mapilla Wills Act of 1928. The Cutchi Memos Act, 1938 led them in accordance with the scope of the Islamic personal canon by stating in section 2 that: All Cutchi Memons shall in matters of succession and inheritance be governed by Muslim law. The Muslim Personal law (Shariat) Application Act currently governs inheritance and succession concerns for all Indian Muslims, with the exception of those who marry under the

[45] Engineer, Asghar Ali *The Rights of Women in Islam*, 100 (C. Hurst & Co. Publishers Ltd, 1992)

special Marriage Act of 1954 and to whom the Indian Succession Act of 1925 implies

3.12 WOMEN"S RIGHT TO MEHR

Islam bestows holy orders on a ―gift spontaneous‖, commonly known as ―mehr‖, which is given to the wife by her husband upon the occurrence of their marriage. It has a solid foundation in the Quran and has also been endorsed by the Prophet's Sunnah. However, there are a lot of differences and ambiguities in other works about Mehr, which don't seem to be able to provide a rational explanation of its theory, significance in general, and justification for its legal applicability. In these situations, a thorough examination of the phrase mehr's sources is very necessary. Without this evaluation, it is inconceivable to see a rationale for defining the importance and boundaries of this Islamic institution. Since its introduction, the term "mehr" has had several uses and meanings. The Arabic term "mehr"' refers to what is actually paid as a gift by the husband to the wife on their wedding day. Mahur (plural of mahr) is also used to refer to the marriage-portion or a gift given to the woman just by virtue of their union (Wani, 1996)

3.13 SOME PRE-ISLAMIC AND OTHER CONCEPTS MUDDLED WITH MEHR

3.13.1 Dower v. Mehr

Dower, according to Common law, is a widow's lifetime income equal to one-third of the legitimate estate assets her deceased husband owned at any time during their marriage. There were initially different types of dower, such as dower of Ad Ostium Ecclesiae (at the church door) and dower ex assensupatris (through the inheritor with his father's approval), where the wife received specific lands immediately before the wedding. Additionally, land held in the Knight facility was occasionally released from dower de la pelvis beale (of the most fair) of her husband's socage land. These types of dower, however, lost significance in the sixteenth century when compared to common law dower or local customs that increased dower to a quarter, a half, or occasionally the entire land.[46] A wife was entitled to have her land allotted "by metes and bounds" by the successor, with the exception of cases where she had been endowed with specific properties. This refers to the 40 days that Magna Carta (1215) allowed her to stay in her husband's home upon his death (Wani, 1996). In lieu of dower, the wife may restrict her claim to dower before to marriage by accepting a jointure, which is a property bestowed upon her for the term of her husband's life, or by using a sophisticated strategy that dates back to the 18th century. According to the 1933 Dower Act in Great Britain, a husband might avoid dower by making a statement in his bequest or other action, but in reality, dower was limited and retained by him at his death rather than established by his legacy. Consequently, dower turned out to be a hassle for attorneys. The Act extended dower to equitable interests as a meager form of recompense to widows (Wani, 1996). Under the Estates Act of 1925, dower was outlawed. The current trend in common law governments is to either abolish or replace dower with other, less irrational means of providing for widows, wherever it already exists.

[46] Ibid

Some states in the US did not enact a canon to address their inconsistent laws, therefore dower is still governed by common law. However, the majority of states have made significant changes to the dower laws or have modified a right or tradition related to it. These changes have included the husband's share of his estate, his share of the societal estate, or his share of the husband's life estate, which is his ownership of the land during his lifetime. Therefore, rather than being more, the problem in common law has a greater source: upkeep. The foreseeable explanation for the word "dower" being used for mehr can be found in the fact that the majority of Muslim husbands have historically refused to provide their wives mehr at the time of marriage and have abandoned their claims by not making payments during the duration of their marriage. Therefore, after the marriage was ended by divorce or death, the unfulfilled requests were typically made by women or their representatives. Because of this foundation, cases involving mehr have been brought before courts for the past 200 years, including those involving widows' rights to mehr. Consequently, because western writers and courts are not well-versed in the genuine idea of mehr, they have accepted the term "dowry" for mehr, treating it as a widow's claim to her late husband's possessions.

3.13.2 Dowry vs Dower (Mehr)

Another topic that is being misunderstood with mehr is dower.[47] The phrase "dowry" has been used for mehr even in the Encyclopaedia of Seerat (Wani, 1996). The term "dowry" refers to the material or personal belongings that a bride brings to her husband's home upon marriage. Prior to the Married Women's Property Act of 1870, English law dictated that a wife's estate would always belong entirely to her husband. By applying the laws of equity to the compromise clauses, the strictness of this canon was modified. As a result, estate was added through the husband, the wife, or both, or through others (such as the gurdians of either party) who were worried about their well-being in the marriage agreement. The beneficial gains of the estate included in the compromise were given to the keepers of the marriage agreement in accordance with the terms of the agreement, making the legitimate property theirs. Therefore, a married woman would have no estate under canon, but under the canon of equitableness, the situation was completely different. Marriage settlements were no longer required to protect the wife's claim to her own property once the Married Women's Property Act of 1870 was passed (Wani, 1996). Furthermore, the French dot, which has its roots in Roman canon, and the term "dowry" do not have well defined scientific definitions. Naturally, the woman delivered the dowry to the Athenians and Romans, and the Code Napoleon (Article 1540) gave the French dot the same status (Wani, 1996). But in nations like France, where the Roman canon was retained as the foundational law of the land and subsequently restored, the husband's rights were curtailed. As a result, the wife was able to use legal means to reclaim the estate she had carried with her, along with other belongings. The French dot is comparable to India's Jahez, which is currently seen as improper culture.

Mehr is very different from this theory. Prior to being granted legal protection under Hindu law, the woman lacked any legal individuality. Furthermore, her personality was fused with her husband's upon their marriage.

[47] Iyer, Krishna V.R *The Muslim Women (Protection of Rights on Divorce) Act, 1986,* (Eastern Book Company, 198)

As a result, the husband practically owned the wife and her possessions, if any. Now, despite the fact that the law grants the woman some autonomy, the husband, with his "past temper," continues to demand the wife's inheritance be paid in the form of a dowry. The growing frequency of dowry deaths serves as evidence for this custom. Legislators in India are working to stop such dowry operations. In any case, by classifying the dowry as a unique phenomena within Islamic canon, these anti-dowry codifications released mehr from their application. It makes sense when one considers what is meant by "dowry" in Section 2 of the Dowry Prohibition Act of 1961.

3.13.3 Stridhan vis a vis Mehr [48]

The Hindu scripture states that Stridhan is not comparable to Mehr in Islam. Stridhan literally means "the estate of the female." No alternative accurate interpretation is available in Hindu canonical sources. According to Gooroodas Banerjee, the theory is as follows (Wani, 1996): Most scholars and sages do not provide a precise description of stridhan or a comprehensive list of its uses. An attempt has been made to illustrate stridhan in Yajnavalkya, however it is not conclusive. It says that women's property is defined as "what was given to a woman by her father, mother, husband, or brother, or received by her at nuptial-free or presented on her supersession and the like" (Wani, 1996). By using the phrases and the like in the aforementioned example, Vijnaneshwara has broadened the meaning of stridhan. As a result, it fails to make the complete notion of strychnan comprehensible, and no clearer example of it is available. Mehr, however, is a legitimate phenomena in Islam that maintains its distinct purpose and legal position in both society and the legal system despite being a diverging idea. Examining how the term "stridhan" is used in Hindu law to signify the following can help clarify the distinction between "stridhan" and "mahr" (Wani, 1996)

i) The presents that a lady received from her parents and their relations, or from her husband and his relatives, while she was a virgin, a coverture, or a widow. These could be bequests or inter vivos contributions.

ii) Under all schools of Hindu law, with the exception of Mithila and Dayabhaga, presents inter vivos or by will given by strangers to a lady during her maidenhood, widowhood, before nuptial-fire or at bridal procession; during covertures by strangers

iii) Property acquired via self-exertion as a virgin or widow; during covertures under all Hindu law schools, excluding Mithila and Bombay School

iv)All schools see property acquired by adverse occupation as unlawful.

Prior to 1956, gifts accepted from strangers at the time of marriage (when a husband and wife become one legal entity) were regarded as stridhan; however, during the woman's lifetime, the husband would have power

[48] Ibid

over these presents. The wife would only be able to completely enjoy it as stridhan after the husband's passing. According to a Kerala High Court ruling, the phrase "dowry" will continue to safeguard stridhan (Wani, 1996).

3.13.4 Bride-price and Mehr

The terms "bride-price" have been used by some writers to refer to mehr. This is a wholly un-Islamic theory. This is an offensive use of the word and an unneeded display of independence on sensitive matters. Regretfully, several renowned writers have also been known to use words incorrectly. The most notable part of the widely read book is found in the following sentence: "To avoid confusion, the term "dowry" has not been used. The term "bride-price" has been used instead because it is closer to the original meaning of mahr" (Wani, 1996). The writer has created a greater misinterpretation by ignoring one misinterpretation. The author has not chosen to use the word mehr in order to disregard any potential misunderstandings. These kinds of texts indicate incomprehension and a lack of academic brilliance. The phrase "bride-price" refers to the husband paying the bride's father or guardian, meaning that the wife is actually bought from her father. One example of a ritual like this is the Asura marriage, which is still practiced among the Sudras in Hinduism. In this custom, the man marries an unmarried lady after giving her family a substantial amount of money or wealth that he can afford. Such a tradition is incomparable to others.

3.13.5 Roman Donatio Propter Nuptias and Mehr

According to some, the legal circumstances of the Islamic mahr are comparable to those of the Roman donation propter nuptias, which is a settlement made in the wife's favor before the marriage contract is completed in consideration of marriage (Wani, 1996). In any case, the two theories are entirely different from one another. Mehr, in contrast to contribution propter nuptias, is certain but not necessarily established before to marriage. In exchange for the wedding, Mehr is not given anything. According to Islamic doctrine, a condition placed on the female before the wedding to relinquish her claim for mehr is both unacceptable and ineffective. Still, the wife would have authority over her actual mehr if such conditions were set. Hazrat Umar states that the husband must give the wife her mahr even if she has already given it to him in full or in part and then claims it (Wani, 1996). Donation propter nuptias must also be viewed in the context of Islam, which grants women the freedom to challenge their husbands' choice of conjugal domicile in various situations. In Roman custom, wives were obligated to obey their husbands' domicile without inquiry (Wani, 1996). The women of the Romans and Athenians were also in charge of bringing in dowries

3.13.6 Hebrew-Mohar vis a vis Mehr

Jewish law required the specification of mohar prior to the marriage contract and deemed any marriage without consideration to be invalid. However, among the Hebrews, the mohar that was settled on a wife was

never given to her for her sole use and enjoyment; rather, she did not acquire any rights over it until the marriage was dissolved by the husband's death or divorce, at which point the mohar was given to her to enjoy or dispose of as she pleased (Wani, 1996). According to Jewish law, a woman who refused to follow her husband's instructions on where he wanted her to go forfeited all of her legal rights as well as her right to mohar and whatever possessions she had brought from her parents' house.

3.13.7 Pre-Islamic Arab Customs of Mehr [49]

In pre-Islamic Arabia, in addition to the custom of marriage, there were a lot of unmarried casual partnerships. Men referred to women's marital reimbursements under other titles. A comparable tradition was known as mehr. Before the advent of Islam, the mehr was a significant occasion in the context of traditional marriages; only when the mehr was given could a true bond be formed. Mahr was considered a sign of humiliation and concubinage in marriages without it (Wani, 1996). However, Mehr would be given to the girl's guardian prior to the arrival of Islam. The bride was left without more.[50] Through a ritual known as shigar, in which a male (first party) would offer his sister or daughter in marriage to the other party in exchange for the latter party granting the first party's sister or daughter in marriage, males were able to frequently evade the duty to reimburse. In relation to such cases, no further information will be provided. Some authors, such as Robertson Smith, have divided pre-Islamic weddings into several categories based on the amount of money exchanged at the nuptials (Wani, 1996). First, the event was recognized as a baal wedding since the girl's parents or guardians received the compensation. This served as the model for the typical pre-Islamic Arabian wedding. Second, it was referred to be a "wedding" when the "wife," who was a female acquaintance, received gifts (sadaq) but did not bring them home. This is undoubtedly related to the various unofficial wedding traditions that were practically prostitute-like in pre-Islamic Arab societies. It should be highlighted that the mehr of pre-Islamic Arabia differed from that of the Islamic era in terms of origin and character. Pre-Islamic practices are characterized by cohabitation, sexual desire, and "bride-purchase," whereas Islamic norms emphasize peaceful matrimony and devotion. Whereas the latter are holy ordered and affected by religion, the former were framed by men and shaped by sexual desire and kleptomania. The fact that this phenomenon must have once existed in its true form under the guidance of an earlier follower and then declined, leaving just the name for usage, may be the sole reason the word mehr was in use in pre-Islamic Arab culture. It is concluded from the preceding study of several words that are mistaken for mehr and their true meanings that the word mehr must be used as such in all languages and that the pointless search for or interpretation of substitutes for it should end. Its true meaning and ideology must be understood in light of its precise description, specific examples, and the Quranic phrases that are used to express it

3.14 APPLICATION OF MUSLIM LAW IN INDIA

[49] Anderson, James N. D., *Islamic Law in the Modern World*, 70 (Greenwood Press, Connecticut 1959).
[50] Ibid

According to the ruling in Bhagwan Baksh Singh v. Drigbijai Singh, a person is considered a Muslim if they were born into Islam and have never been shown to have converted to another faith. Shias are Muslims because they adhere to the core principles of Islam, even though they reject the legitimacy of the first three caliphs and refer to them as usurpers, as was noted in the case of Jiwan Khan v. Habib, [51]. Section 2 of the Shariat Act, 1937 is said to have as its scope, intent, and purpose the abrogation of Muslim customs and usages that are incompatible with Islamic principles.15 The Supreme Court in C. Examining the Act, Mohammed Yunus v. Syed Unissa established that it was specifically enacted to provide that Muslim law shall be the rule of judgment in all situations pertaining to the topics stated in the Act when the parties are Muslims. However, the Muslims are equally bound by the other secular rules in other areas. Regarding Fazlun Bi v. K. According to Khader Vali, Justice Krishan Iyer, the Muslim law of maintenance is superseded by the rules of section 125–127 of the Code of Criminal Procedure, 1973, which are of a secular nature. [52]He made a distinction between the regulations mentioned above and the customary law of Islam regarding the maintenance rights of divorced Muslim wives. The ruling regarding the Muslim Women (Protection of Rights on Divorce) Act, 1986 had an impact on the verdict, which has opened the door for numerous subsequent rulings regarding the right of divorced Muslim women to receive maintenance following their divorce. In the case of Abeda Bano Shaikh Jalaudin v. Jamshid Amir Ali Khan, the Bombay High Court dismissed an appeal and declared that Muslims are subject to Muslim law and are not covered by the Hindu notion of coparcenary. In Bafatun v. Bilaiti Khanum, the Calcutta High Court assumed that the Muslim parties were Sunnis if there was no documentation indicating which sector school they belonged to. Furthermore, it has been held that unless the opposite is claimed and proven, courts should assume that Muslims in India adhere to Hanafi law, given the preponderance of Sunni population in the country. He who contends that the parties to any dispute are Shias bears the burden of proof. Justice Tyabji in Akbarally v. Mahomedally, 21 stated that as the vast majority of Muslims in India are Sunni Muslims, the presumption shall be in their favor unless the reverse is proven. [53]This ruling was similar to that made in the case of Rashid Ahmed v. Mt. Anisa Khatun. Likewise, with regard to Shias, who mostly belong to the IthnaAsharis group, their legal system is upheld unless the parties can demonstrate that a different norm applies to them. He based his observations on the idea that the normal course of events should be allowed for, as stated in eaquaefraenquentius accident praevaniunt jura or ad ea jura adaptanturAhmadiyyas, one of the Muslim sects, who are not considered members of the community in some of the nations where India has decided to form members of the community.23 When two parties from the same school or sect approach the court to settle their succession disputes, there is rarely any concern raised about it and the mutual school or sect's laws will be applied. Every Muslim must be controlled by his own school, as was emphasized in the Raja Deedar Hussain v. Ranee Zahoorunissa case. The Privy Council's Lordships ruled that the accurate interpretation of Regulation No. IV of 1793, the Muslim rule of

[51] ILR (1903) 30 Cal 683
[52] AIR 1932 PC 25
[53]AIR 1932 PC 25

succession that is applicable to each sect should have precedence over plaintiffs belonging to that religion in the absence of any court ruling or established practice. But what happens if the parties seeking justice don't adhere to the same schools or sects? Indian courts have made several decisions regarding which school or subsect's laws will be applied for resolving legal disputes.[54] It has been agreed upon that the party that is the defendant in the lawsuit will be bound by the laws of their school or sect. Once more, it can be interpreted to suggest that the law of propositus or proposita will apply.[55] The law that would apply in that situation would be of propositus, even if the dispute is between two co-heirs of the same propositus and either or both of them attend a different school. Similar to this, the Privy Council has maintained that the parties are to be treated as Sunni Muslims subject to standard Hanafi law if there is uncertainty regarding the application of any sect or school and there is nothing to indicate on record as to what sect the parties belong to. This ruling was made in the case of Rashid Ahmad v. Mount Anisa Khatun. In the case of K., where the parties are requesting the application of the Shafi school of Muslim law. Haji Marakkar v. T. According to Kandan Kutty, unless proven otherwise through argument or proof, Indian Muslims are presumed to be members of the Hanafi sect of the Sunni school. The appellant's argument was rejected by the honorable court when it negated the Gazette notification designating the parties as belonging to the Shafi sub-sect.28 Nevertheless, it is argued that in the event of such a notification, the presumption should be automatically overturned and Shafis law would apply. In MohemdbhaiRasulbhai Malek v. AmirbhaiRahimbhai Malek, Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937 was up for adjudication. The court determined that the Act did not apply to agricultural lands because the language of the section preserved the agricultural land. The court further noted that in cases where the suit property includes both agricultural land and other types of property, any disputes regarding their succession must be resolved jointly. For the former, the decision-making guidelines will be governed by customary law, while for the latter, they will be considered in conjunction with other relevant laws, including the general law of inheritance. A Muslim may make a will in conformity with customary law that has been preserved under section 3 of the Muslim Personal Law (Application) Act, 1937, the Punjab and Haryana High Court noted in Dharma v. Tarsem, commenting on the will laws that apply to Indian Muslims. It is important to remember that section 2 does not reference testamentary succession; rather, section 3—which in the event of wills refers to an exceptional and voluntary rule—does. According to the collective interpretation of these two sections, Muslims in India are generally subject to Shariat; however, if a custom is prevalent, whether in derogation of the law or not, and it is proven to exist, the applicable law will be the one based on the customary law

3.15 MUSLIM LAW AND CONCEPT OF JOINT FAMILY

In contrast with other legal systems, Muslims do not recognize the existence of coparcenary, ancestral property, or joint families as those terms are understood under Hindu law. The Patna High Court affirmed this

[54]AIR 1932 PC 78
[55]AIR 1932 PC 37

when it disagreed with the lower court's conclusion that two brothers living together in the same home grants them the status of a joint family. In the case of ***Imambandi v. Haji Mutsaddi*** he Privy Council determined that in cases where de facto guardians who held major positions sold minors' property, the sale of minors' shares of the property was deemed invalid because the majors, even though they held the property jointly, lacked authority over the minors' shares. As soon as a Muslim passes away, his estate passes to his heirs, who inherit it as tenants-in-common in their respective shares. It has also been decided in Aminaddin v. Tajaddin, [56]41 that in cases where Muslim family members cohabitated and owned properties together, any property acquired by one of them would be assumed to be for the benefit of the whole group and not based on any presumptions similar to the Hindu joint family concept. In ***Maimoon Bivi v. KhajeeMoiudeen, the Madras High Court***[57] examined whether Muslim law recognized the idea of joint family property. Rejecting the argument, it was decided that Muslim law does not recognize the Hindu presumption of a joint family and that many family members are not acquired for the benefit of the family collectively. In this instance, the widow of the deceased husband and their two children moved in with her father. He began overseeing their land and used the money for their upkeep and education. The children asserted that the father used their joint estate funds to purchase certain real estate in the widow's name. They could not claim any ownership interest in the property that was bought in the widow's name because the court rejected their argument and determined that the widow was not in possession of any joint property and that there was no presumption that the property was obtained using common finances. In Mohd Ibrahim v. Syed Mohd Abbubakker, a Division Bench of the Madras High Court noted that, aside from a fiduciary situation in which one person holds property on behalf of all other family members, Muslims do not recognize any theory of representation, nor is there a presumption that any acquisition made by one of them would be presumed to be for the benefit of the family unless proven otherwise. Shukrulla v. Mst. and Krishnajiban Sanyal v. Mohammad Masiuddin Mandal both included similar findings. Though it is customary for Muslim families in India to consist of grandparents, parents, children, grandchildren, and so on, Zuhra Bibi asserts that "the position of total strangers combining their courts have likewise recognized this formulation as lawful.46 In doing so, they have taken into consideration the issues surrounding the shared structure of these families. One such question was decided in the Mohd Pilla v. Chainadu Amal case, where the court noted that the law applicable in that situation would be the law of trusts and partnerships rather than the Hindu joint family law, if the heirs of a deceased Muslim continued his business after his death. The controlling adult, therefore, is still liable for the gains he made in this situation. In Rukaiya Begum v. Fazalur Rahman, the Patna High Court considered [58]the presumption of jointness and joint family business among Muslims. The court held that the presumptions could not be raised simply by the fact that members of a Muslim family live together and hold their properties jointly. In the absence of supporting evidence, it was similarly denied in Shaik Mohd Ali Ansari v. Shaik Abdul Samad.

[56](1966) BLJR 761 (DB)

[57] AIR1970MAD200

[58] AIR 1976 Mad 84; See also: Mohd. Mahboob Ali v. I.A.C of the Income Tax, (1978) 113 ITR 167

3.15.1 Separate Property

Additionally, Muslim law does not recognize ancestral property. No matter where it came from, every piece of property that a person owns is seen as their independent or self-acquired property. Until the former passes away, no one else has any claim to it as an heir, and he will always be entitled to it. [59] In the case of Meera Bibi v. Vellayanna, it was noted that Muslim law was unaware of the distinction between separate and ancestral property that Hindu law acknowledged.

3.16 DOCTRINE OF REPRESENTATION

It is a well-known fact that Muslim law does not recognize the notion of representation. This implies that the offspring of the departed parent have no claim to any inheritance from their grandparents. This was the case in Jamila Bibi v. Hasmuddin Ansari, where the court determined that if a grandchild's father died before their grandfather, the grandchild would not be eligible to inherit rights from their grandfather's property under the established portion of Islamic law. These grandchildren will not inherit their father's portion because there is no doctrine of representation. Rather, they will only be eligible to inherit if they are entitled in their own right and not through their father. Because they are the grandfather's direct heirs, their independent right to inherit is the only thing that grants them the right to do so; their representational right is therefore untenable. In Abdul Huq v. Seetharam Sethi Jaya Rao, the Privy Council reaffirmed that the no representation rule does not apply to Muslims because it is made relevant by Hindu law. 53 According to the case's facts, [60]a paternal uncle of a dead Muslim's children purchased some real estate on their behalf, but only in the name of one child. The other children asserted that they should be considered co-owners of the property, arguing that what one person bought was also done so for the benefit of another. He owned the property as the father's representative, having bought it in the name of one of the children. The court dismissed the argument, stating that since co-ownership is illegal under Muslim law, there is absolutely no need to discuss representation. In a similar vein, in cases where it cannot be demonstrated that a Muslim father and his sons entered into a partnership agreement, the sons do not automatically become partners with their father, the father retains sole ownership of the partnership assets, and the son is not subject to legal action regarding transactions for which the father alone is accountable. In the case of Mohd Amirullah Khan v. Mohd, the Supreme Court confirmed the non-observance of the doctrine under Muslim law as applicable in India. Haku Mullah It has been noted that children do not have a recognized right to enter their grandfather's land if their father has

3.17 PRE-ISLAMIC ARAB CUSTOMS VIS A VIS SUCCESSION AND INHERITANCE

Of all the laws of Islam, the law of inheritance is one of the most important. Because it encompasses so many distant relations, its property division is somewhat complicated. As a result of its combination of traditional

[59] AIR 1955 NUC 5093
[60] (1885) ILR 8 Mad 464

and Quranic law, it is divided according to the opinions of different traditional schools, which determine the shares of various heirs and describe and classify the shares in different ways.[61] For instance, there are significant differences between the Hanafi and Ithna Ashari laws of inheritance. Thus, the many types of heirs mentioned in the Quran and the relevant jurists from diverse legal systems have been explored in this chapter. We also discussed how some institutions have listed the shares that are attributed to a specific heir differently. The Qur'an is the source of Islamic succession law (Rahman, 1988). Since the Quran's instructions are not entirely clear and comprehensive, it is permissible to examine the injunctions from several angles. The Quran contains references to the fundamentals of succession law. Quite reasonably, the Quran's admonitions might be seen of as guidelines for implementing succession within Muslim households. It cannot be claimed that the Quran, in its whole, created a new government based on the law of succession, even though it is the evidence of divine communications. In this course, an effort has been made to investigate the pre-Islamic practices that are ultimately and directly accountable for the succession among Muslims. This research will help us comprehend the pre-Islamic practices that seem to have influenced the current succession laws

3.18 SUCCESSION LAW AMONG PRE-ISLAMIC ARABS

In pre-Islamic Arab families, succession was managed as follows (Rahman, 1988):

(i) Agitate males acquired

(ii) Females and cognates were not able to inherit

(iii) Ascendants were favored over descendants, and collaterals were favored over ascendants.

(iv) The estate was split per capita in cases where the agnates were equally distant. Islam authorized succession to be managed by a set of principles that, without specifically endorsing or disapproving of the authority of the pre-Islamic customs, stipulated (Rahman, 1988)

(v) The spouse was declared an heir to the other [62]

(vi) Although cognates and agnates were both made capable of inheriting, agnates were given preference

(vii) Both ascendants and descendants acquired the right to inherit at the same time.

(viii) Generally speaking, a female received half of a male's portion.

Following the revelation of the Quran, there was typically no sense of having been educated about the pre-Islamic traditions pertaining to inheritance. Even while attempts are made to consider the practical aspects of Quranic injunctions, it is important to note that the injunctions in some cases cannot only be applicable. In

[61] Sen, A. (2015). "The Historical Evolution of Hindu Inheritance Laws: An Analytical Perspective". *Indian Journal of Law and Justice*, 6(1), 45-62.

[62] (1999) 3 SCC 753

order to carry out the directives, it is necessary to take into account the pre-Islamic traditions surrounding inheritance among the surviving heirs. Various examples suggest that using instances to guide efforts would be preferable. The following specific examples explain such attempts.

1. Spouse Relict:

There was no right for spouses to inherit from one another in pre-Islamic Arabia. Islam secured allotments for spouses, thereby presenting a new generation. The benefit of inheritance that spouses enjoy is mostly a result of the Quranic share's injunctions. According to Quran 4:12, you will receive half of your wives' estate if they are childless; if they are, you will receive the remaining 40% of their estate, less any debts (that they may have incurred and paid) that they may have left behind. And after any legacy or obligation (that you may have incurred and paid) that comes to you, the fourth of what you leave will belong if you are childless. If you have children, however, the eighth of what you leave will belong to them. The rights of the husband and wife are clearly defined. Although there are rights mentioned in the Quran, it cannot be argued that there is no need to take into account materials from pre-Islamic traditions. According to popular belief, the Quran says nothing concerning the spouses' circumstances throughout the demised person's parent's existence. Whatever the case, it is undeniable that wives are entitled to inherit their husbands' legacy. However, in pre-Islamic Arab customs, in cases where a son existed, the father was not allowed to demand inheritance, and collaterals were also not allowed to demand it. It means that as long as there are parents and collaterals, the rights for the spouse relic as prescribed by the Quran remain unaltered. Therefore, there is no doubt that the influence of pre-Islamic Arab traditions on succession events involving spouses is significant.

2. Descendants:[63]

The agnatic male descendants were the most influential heirs in pre-Islamic Arab society. It is accurate to state that no other heir to the inheritance could oppose the son. However, the pre-Islamic Arabs did not provide daughters the right to inherit their parents' property, hence the Quran includes both sons and daughters among the descendants who are eligible to do so. The whole estate of the deceased would pass to their sons. However, the daughter's rights to demand the inheritance of half of her son have been prescribed by the Quran. The point to be made here is that, although the daughter in the line of succession has been provided property by the Quran in addition to her son, she has not been given permission to remove her son from the line of succession. Their rights are connected to the ta'sib doctrine, which holds that a male inherits twice as much as a woman. Allah gives you the following instructions regarding (the provision for) your offspring: if there are more than two women, their share of the inheritance is two thirds; if there is just one woman, it is half. This sentence presents a complicated picture of what "children" are. However, son and daughter must be included in order to understand the true meaning of children. Including other descendants, such as grandkids, is justified. Nonetheless, the Quran has taken the ―son‖ into consideration while allocating

[63] Asaf A. A. Fyzee, *Outlines of Muhammadan Law* 317 (2010).

parents' portions of the ancestral estate, which will be covered later. Regarding the daughter, nothing is specified (Rahman, 1988). Apart from the boy, the daughter has always been regarded as a child. Since the daughter was not allowed to inherit in pre-Islamic Arab society, the goal of the Quran regarding her was not to give the son preference in the line of succession. In the line of succession, the rights of women, who make up half of men, seem to have virtually entirely survived, with the son receiving more weight than the daughter. Thus, it is important to note that the influence of pre-Islamic Arab traditions on the inherited succession among descendants is recognized here.

3. Progenitors:

When there was no agnatic male descendent, the agnatic male ascendants were permitted to inherit in pre-Islamic Arab societies. The Qur'an has established rules that allow an ascendant to inherit both while the descendant is present and when they are not (Rahman, 1988).

3.19 SUNNI LAW OF INTESTATE SUCCESSION

When the propositus passes away, the law of intestate succession takes effect either instead of or in addition to the testamentary succession method, depending on the circumstances. Generally, it is determined whether he left a will during his lifetime after he passes away. If it is, the named individuals receive the estate according to the will and testamentary law rules that apply to the deceased. When a will is not present, intestate succession is used to designate a new owner of the property. The method of instate succession will be used if there is no will. Likewise, property that remains after the terms of the Will have been fulfilled will be dispersed according to the rules of intestate succession. When succession opens under Muslim law, both forms may be in effect simultaneously for an individual's estate. It will pass to the heirs at the time of his death and is not suspended just because obligations owed from the deceased exist. The owner does not have any say in how his estate is distributed because he was dead when intestate succession opened. Instead, the applicable and established law acts as the ultimate authority to determine how property is distributed, determining who will inherit the deceased's assets and how much of them they will receive. The legal system therefore begins searching for the person's heirs right away, in the event that they pass away without leaving a will or if their estate does not exhaust under it. Generally, the tracing is predicated on the essential concepts of proximity and kinship. Those who are the closest blood relations are deemed eligible for a preferential inheritance and are commonly referred to as heirs. In the event that an individual passes away without leaving a will or having an heir, their property will pass to the State through escheat. The same holds true under Muslim intestate succession law, which, like other concepts of legal character, is a combination of pre-Islamic traditions and Prophet Mohammed's reforms. It outlines how heirs' portions are allocated, distributed, and quantified from a Muslim's estate following his passing. Courts in India are specifically instructed to apply the Muslim law of inheritance to all Indian Muslims by the Muslims Personal Law (Shariat) Application Act, 1937. The primary distinction between the recognition of testamentary and intestate modes of succession

under Muslim law is that, in the former, the testator has the discretion to determine the number of shares for the beneficiaries, whereas, in the latter, the heirs and the number of their prospective shares are determined by divinely ordained principles based on revelations from Allah to His Prophet; these principles are known as the compulsory rules of constituting the doctrine of Faraid.[64] Far too much weight is placed on those principles, according to which they comprise the infallible knowledge of Allah10, as opposed to the previously fallible knowledge of man. As a result, the verses on inheritance that grant the beneficiaries their claim are founded directly on God's will. It is important to remember that the rule of inheritance has been rationalized by shifting the responsibility for share fixing from man to Allah. While the testator may determine the exact amount, Allah has made clear the mandatory boundaries to which some relatives are entitled in the form of fixed portions. But it's also important to remember that even a testator's ability to form a will is founded on the authority granted by Allah's instructions, and while using it, the testator is not permitted to go beyond established boundaries. All around the world, Sunni and Shia Islam are the two main branches of the Islamic religion. According to these denominations, there are two groups of Muslims: Sunni and Shia, the former of which make up roughly 80–85% of the Muslim population and the latter of which make up roughly 15%–20%. The Quran and Hadith, which are the cornerstones of Islam, are accepted by the many sects, although their philosophies diverge beyond that. Their diverse sets of laws and regulations are occasionally in conflict with one another because to differing interpretations and understandings. This is the case with respect to their intestate succession. Their approaches to the intestate succession are expressed differently in their respective regulations and philosophies It is believed that Sunni and Shia Muslims only differ on small issues in every other area of Muslim law, but it is regrettable that there is a divergence in such a significant area—inheritance—despite sharing the Quran and a Prophet whose deeds and teachings are adhered to by both. This is the reason why the current work is divided into distinct chapters. The current chapter, "Sunni law of intestate succession," discusses the rules governing the allocation of a deceased Sunni Muslim's property

3.19.1 Concept of Intestate Succession [65]

Upon his death, a Muslim's intestate succession takes effect. Regarding property for which he did not prepare a will, for which a will exists but does not cover the entirety of the property, or for which a will exists but cannot be implemented because it was created illegally, he is considered to have passed away intestate. First, intestate succession applies to the entire property; second, it applies to the remainder that is not the subject of a will; and third, it applies to the portion of the property that has been released from the purview of an unlawful will. The law of intestacy makes sure that a deceased Muslim's potential heirs are located and given their shares as soon as it is decided that a succession to his property must be arranged. Even in cases when there is only one heir to make claims regarding their part in an intestate succession, the universal bequest is

[64] Ibid

[65] B. A. Garner (ed.), *Black's Law Dictionary* 827 (1999)

not permissible in Muslim law.[66] The one-third limit for a Will allows the remaining two-thirds to be divided among the heirs, which is how the modus occurs in the majority of cases where the deceased left any property. Thus, intestate succession is inevitable unless the estate is completely depleted to cover burial costs, salary, obligations, wills, etc. In India, the idea of intestate succession is acknowledged, implemented, and carried out in accordance with Muslim law. The Latin word "intestaus," which consists of the terms "in," which means not, and "testate," which means having left a valid will, is where the word "intestate" originates. It refers simply to the distribution of a deceased person's property in the event that they pass away without leaving a legally binding Will. The word was used in French to refer to something that was not confessional, or "de-confess." Failure to leave a bequest to the Church from one's estate before to death was considered a criminal offense. Such neglect carried the penalty of being denied burial in hallowed ground. "Ampliative testaments," in which his representatives made a Will in his name in the Church's favor, provided a remedy for these omissions. The fear for the intestate's soul if he passed away without putting a suitable portion of his estate to religious purposes is said to have equaled or exceeded the Roman horror of intestacy among early Englishmen.

The terms "intestate," "intestate succession," and "intestacy" all refer to the same thing. In terms of terminology, "intestacy" refers to the circumstance or state of passing away without a will. "Intestate" merely means that there is no will. a deceased person who either left no will or a will with formal flaws. If that is the case, he is considered to have died intestate, and his estate passes to his next of kin or heirs at law. Conversely, "intestate succession" refers to the manner of succession that occurs when a deceased person leaves no will or when their will has been revoked or invalidated due to irregularities. According to Black's Law Dictionary, "a person is said to die intestate when he dies without making a will, or dies without leaving anything to testify what his wishes were with respect to the disposal of his property after his death." As a result, the heirs to whom a succession has fallen by the effect of the law alone are called "heirs ab intestate." The term is also frequently used to refer to the individual. [67]As a result, "the intestate's property," or the property of the person passing away in an intestate condition, is frequently used when discussing the assets of a person who died intestate. The state of being intestate is referred to as "intestacy," which can occasionally be divided into two categories: total and partial intestacy. The former is defined as "the state in which a person dies without having made a Will disposing of all his property" by the Oxford Dictionary of Law. A partial intestacy comes when a will deals with only a portion of the testator's inheritance. A whole intestacy happens when the deceased leaves no will at all or a will that merely names executors and does not dispose of any property. The phrase "intestacy" has a more detailed definition, which is "the state of dying, leaving property indisposed of by Will." This could be the result of the testator failing to create a will at all, having a will that effectively disposes of none of his property (total intestacy), or having a will that effectively disposes of some of his property but not all of it (partial intestacy). Intestacy" is defined as "the state of a person dying without

[66] E. A. Martin (ed.), *Oxford Dictionary of Law* 263 (2006)
[67] Ibid

leaving a valid Will to regulate the disposal of his whole estate after his death" by the Oxford Companion to Law. As a result, it could be whole or partial. Under such circumstances, the surviving relatives' entitlement to the intestate's estate are outlined in legislation, and the court chooses the personal representative to handle the deceased's estate. The definition of "intestate" in both senses is provided below by the Dictionary of Law: a. Complete Intestacy:[68] This happens when a deceased person leaves no Will, which only names executors and makes no other property dispositions. b. When a testator's estate is only partially addressed by a will, it is known as partial intestacy. The persons entitled to inherit, the manner in which their estate is to be administered, and the amount and proportions that they receive are all governed by the Administration of Estates Act, 1925, as amended, and orders made under it in the United Kingdom. The importance of family ties is reflected in the intestacy laws, which provide the surviving spouse a bigger share of the estate. "A person is deemed to die intestate with respect to property of which he or she has not made a testamentary disposition capable of taking effect," according to the definition of "intestate" given by the Hindu Succession Act, 1956. The following is how the word is defined in Stroud's Judicial Dictionary of Words and Phrases:

a. It refers to either making no will at all or making a will but having an unwilling executor.

b. A person passed away intestate not only if he left no Will but also if every beneficiary under his Will passed away while he was still alive.

C. The court is thought to be biased against an intestacy. I'm not sure what the expression implies beyond this at this point in time. It is possible for the court to determine, in circumstances of ambiguity, that the testator did not intend to die intestate in some Wills; nonetheless, this cannot mean that the court should interpret plain language differently just to prevent intestacy. Even if a testator may have intended to pass away intestate, he only wishes to pass away testate inasmuch as he has stated in his Will

d. When a person's Will states that "the residue to be disposed of as the executor shall think fit," there is an intestacy regarding that person's remaining estate.

e. "Everyone deceased who has left the entirety or any portion of the moveable estates on which he might (if not subject to incapacity) have testate" was included in the definition of "intestate"; similarly, "succession in cases of partial, as well as total, intestacy" was included in the definition of "intestate succession

The term "intestate" is defined as "a person who has left no will" in Wharton's Law Lexicon. This means that intestate succession occurs when a person passes away without leaving a will, in the event that a will exists but does not specify how the deceased's estate will be distributed, or if the will was made for unlawful purposes. Most people agree that one component of the rules of descent and distribution is intestate

[68] J. M. Lely (ed.), *Wharton's Law-Lexicon* 394 (1892)

succession. The Essential Law Dictionary restates this as follows: "the rules of descent and distribution shall apply to the disposition of the property of someone who dies intestate." Consequently, "intestate" refers to the individual whose property is being distributed, but "intestacy" refers to the procedure involved in that distribution. "In the law of inheritance, transmission of property or property interests of a decedent as provided by statute, as distinguished from transfer according to the decedent's Will," is how the Britannica Concise Encyclopedia defines "intestate succession." Though they differ greatly, modern intestacy laws all follow the general idea that those having some familial connection to the deceased should inherit the estate; in reality, this favors the rights of the surviving spouse. The aforementioned definitions make it evident that the law of intestate succession covers a wider range of issues related to the transfer of a deceased person's property. The includes locating the people who have the right to inherit the property, calculating the value of their shares, deciding which of those people will inherit and who won't due to obstacles, disqualifications, etc., as well as paying debts and fulfilling any bequests that may have been made. Although these are handled under the testamentary mode of succession, the issues surrounding them are undoubtedly settled at the time of the intestacy, etc. The intestate succession may be based on a patrilineal, matrilineal, or egalitarian basis, depending on the legal system in place. Some societies still operate under the outdated system in which only male relatives were eligible to inherit a deceased person's property since it was inherited through the male line In the matrilineal system, women inherit property through their mothers and pass it on to their daughters. This is known as the female line mode of property transmission. Although the number of shares may vary in some circumstances, Islamic law of succession is essentially based on an egalitarian process that allows the devolution to the property regardless of the heir's and propositus's gender

3.20 SURAH AN-NISA 4:7

The verse's transliteration and translation from Arabic to English have previously been covered in Chapter II of this work. It is possible to comprehend that the verse includes five parts of Muslim succession law by analyzing its phrasing. First of all, it preserves men and women's equal inheritance rights. Regarding the acknowledgment of the right to inherit on the basis of gender, Islam does not discriminate. Second, it mandates the mandatory distribution of any estate that remains when the propositus or proposita passes away. It makes no difference how much or how little property is left behind after him. The guiding idea is the equitable distribution of property, regardless of its value. The remaining "taraka" will be divided among the heirs. If it is of a kind that prevents it from being shared, then anyone may buy it with their permission, and the money paid will then be divided in accordance with the percentage. The topic has been thoroughly covered in the second chapter. Thirdly, it states that upon opening, the property of all descriptions becomes the subject of succession. Fourthly, the succession begins when a Muslim passes away. Finally, the kin who are closer to the deceased are given preference and are kept out of the inheritance line

3.21 SURAH AN-NISA 4:8 [69]

The verse gives the heirs of a deceased Muslim instructions to consider giving some property to the needy and impoverished family members as well as any orphans who may be present at the time of inheritance distribution. If other relatives, orphans, and the needy are present, then provide for them (something) out of the estate and speak to them with appropriate kindness. Regarding how to interpret the text, Muslim jurists have differing opinions. There are those who believe it has been repealed, while others believe it still applies and should be followed because it is mandatory in nature. Although they are not required by the verse's wording to give them such a portion, it is advised that they do so with generosity. It is believed that the impoverished, orphans, and relatives who are not eligible to inherit will be very anxious to receive something from the estate in order to meet their basic requirements if they are present during the split. Through this scripture, Islam maintains a tolerant stance towards them and stipulates that giving them a part can be considered an act of kindness, charity, and compassion. They are also instructed to speak to them in a kind and caring manner. [70]

3.22 SURAH AN-NISA 4:12

And if your spouses don't have children, you get half of what they leave. However, if they produce a child, you will receive one-fourth of their estate after any debts or bequests they may have made. And if you don't leave a child, one-fourth goes to the women. However, after whatever debt or bequest you may have made, an eighth of your estate will go to your kid if you leave one. Furthermore, there is a sixth for every man or woman who has a brother or sister but no descendants or ascendants. However, if there are more than two, they split a third, following any debt or bequest, provided there is no harm (inflicted). This is a directive from the All-Knowing and All-Parent Allah. The verse details the deceased's uterine brothers and sisters' and spouse's portion amounts. The typical shares of the husband and wife, if applicable, are 1/2 and 1/4 in the event that no children from the previous marriage remain, and 1/4 and 1/8 in the event that they do. It also gives the number of siblings' shares; however, the siblings listed under 4:12 are the ones that are uterine. Under 4:176, the rights of consanguineal and biological siblings are mentioned. The term "kalaalatan" refers to the right of inheritance of siblings—i.e., brothers and sisters by birth—who are linked to one another through their mother. The emphasis of the verse shifts toward the end to the deceased's bequests and debts, if any, must be paid off before the inheritance is distributed under intestacy. It ends with a warning that informs Muslims of the divine order that is referenced in the verse

3.23 SURAH AN-NISA 4:33

We have all been designated as the heirs to the estates of our parents and relatives. Give their portion to those who have been pledged to you by your oaths. Indeed, Allah is a constant Witness over everything. This verse restates the right of Muslims who are the deceased's close relatives. It is believed that the Quran has

[69] Shaykh Safiur-Rehman Al-Muabarkpuri (ed.), Tafsir Ibn Kathir-Vol I 384 (2003).
[70] Ibid

unquestionably established the rights of surviving relatives to inherit from their parents and other relatives. Under 4:11 and 4:12, the list of inheritors and their specific number of shares are required. The poem also emphasizes how important it is that the deceased fulfill their contractual obligations. In addition to the heirs' preferential entitlement, the creditors under those arrangements ought to be granted the opportunity to settle any outstanding debts they owed the deceased when he was still alive.

3.24 SURAH AN-NISA 4:176[71]

They ask you to make a (legal) decision. Say, "Allah gives you a ruling concerning one having neither descendants nor ascendants (as heirs)." A woman will receive half of a man's estate if he passes away without leaving a child; other than that, his sister will get nothing. And if she passes away without leaving a kid, he inherits from her.

However, two thirds of everything he left will belong to the sisters if there are two or more. The guy will get the share of two females if there are brothers and sisters. Allah clarifies (His rule) for you so that you do not err. Additionally, Allah is all-knowing. This is regarded by some Muslim scholars as the final of Islam's heavenly revelations. The verse discusses the genuine and consanguineous siblings' part of the deceased's property. Following the occurrence, Jabir bin 'Abdullah described what happened as follows: "Once when he was sick, the Prophet visited him and found him unconscious." After making an ablution and dousing himself with the leftover water, he became conscious again. He asked the Prophet how his riches was being distributed among his nine sisters, but the Prophet did not respond. When this passage was eventually disclosed, Jabir said it was about him. The three passages of the Quran, 4:11, 12, and 176, as well as the traditions of the Prophet Muhammad and the interpretations of jurists through Ijma and Qiyas, form the foundation of Muslim intestate succession law. A Muslim's heirs can be found among the different groups of people who are connected to him by blood, marriage, escheat, contract, etc. Some people are given preference over others and some are not allowed to inherit in their presence when everyone is there. Relatives that live farther away are either completely or partially precluded from inheriting anything from the deceased when there are closer relatives present. These exclusions and preferences are founded on a few core ideas that are covered below and serve as the foundation for Muslim intestate succession law:

I. RULE OF PROPINQUITY

According to the rule of propinquity, the heir who is closer in degree is not allowed to inherit the one who is farther away. All Muslim legal schools agree that the issue of who will be a deceased person's heirs and, therefore, entitled to inherit his estate is resolved by identifying the people who are closest to him in accordance with the rule of proximity.59 This rule effectively excludes those who are farther away. For instance, the genuine grandfather will not be eligible to inherit if the father is present. The son's son is excluded from the relationship with the mother, the grandmother. The need applies differently to distant

[71] Lucy Carroll, "*The Hanafi Law of Intestate Succession: A Simplified Approach*" 17 (4) MAS 630 (1983).

relatives, residuaries, and sharers. This means that because of the distance of heirship, some people are excluded from the rule when it applies to sharers at one point, and the same thing occurs among distant kindred or residuaries when it applies to them. The application does not span between two classes' inheritance rights. For instance, if a son is present, both the deceased's father and he will inherit; the father will inherit as a sharer and the son as a residuary. Pre-Islamic times did not observe the rule in an inviolable way, and according to [72]Tyabji, only the customary law of those eras could account for the disparate treatment of equal relations and the exclusion of some people who might be considered equally entitled to similar rights. Sharers who are closest in degree are given preference over distant sharers. The most notable example of this is the exclusion of true grandparents and grandmothers from the presence of their parents. Similarly, residuaries are said to be preferred based on the proximity of their relationship status. Sharif al-Jurjani has reaffirmed this in his commentary on Al-Sirajiyyah, stating, "Really, preference is given to the nearest of all the residuaries based on the proximity of status, if such nearest is not present then to the nearest of the rest." The opinion of many distinguished Muslim jurists is the same. It is believed that everyone agrees that the agnates receive whatever is left over after the sharers' shares are satisfied, with the closest person being chosen over the next closest person. Furthermore, a distant agnate and a near agnate do not inherit. The right of a grandson to inherit from his grandfather in the absence of his father is justified by a commonly cited part of Muslim law, which states that the grandfather predeceased the grandson. It is believed that a father's son shouldn't be given the opportunity to inherit from grandfather if the father is removed from the line of succession himself because he passed away. If permitted, it would mean that the basic tenet that "the closest in degree excludes the remote" has been violated. The guideline is also adhered to while naming the list of distant relatives. The way this guideline is applied is determined by first classifying them into groups and then into sections. In their situation, it applies when determining the inheritance rights of the same group or sector, as applicable. Sunnis somewhat acknowledge the theory, whereas Shias totally accept it. [73]

II. RULE OF PROXIMITY

The distant heir will be disqualified by a closer blood relative. Despite their proximity, none of them has the right to make any claims against the deceased's belongings prior to their passing. Only at the time of his death would they all be taken into account and determined to inherit.65 The uterine collaterals would not be included among the sharers, but the collaterals of full blood

would be excluded. For instance, the consanguine sister, who would otherwise be entitled to receive 1/2 in the case of one or 2/3 in the case of multiple siblings, will receive nothing in the presence of a full brother or sister. However, if there is just one complete sister who has been successful as a sharer, then there is an exception to this norm, wherein the consanguine sister will receive 1/6. The consanguine sister will also not receive anything if the full sister has been banned from inheritance herself, in which case the rule will not

[72] Al-Zamakhshari, Al-Kashshaf Vol I 476-477 (1967).
[73] Ibid

apply. However, the rights of uterine collateral sharers will remain unaffected by the presence of complete collaterals. 66 Residuaries work in the same way. In the event where members belong to distinct classes, the rule is not apply. The arrangement of the classes and sections is such that individuals with closer blood ties are positioned earlier than those with farther ties. Importantly, when succession passes to them, the heirs that come after the deceased are excluded since those who are close to the deceased and fall within the previous class or section, whichever that may be, receive the entire remainder. For instance, the descendants of father will receive the succession if it goes past the first two sets of residuaries, which are, after son, son's son, father, true grandfather, and so on, and toward the third group. Rather than the consanguineous brother and sister, the full brother and his full sister should inherit. The third group is designed in a way that favors full siblings over consanguine ones; if any of them are present, the consanguine siblings do not inherit. The extent of the remainder will be entirely vested in the full sister and none will be granted to the consanguine brother, even in the event that there is a consanguine brother and sister. Distant relatives are similar in this regard. It is evident that Muslim law of succession recognizes the principle that full blood is preferred over half blood. [74]

CHATER 4
JUDICIAL APPROACH

4.1 INTRODUCTION

Thanks in great part to the judiciary's interpretation of inheritance laws, India has been able to strike a balance between its religious customs and the equitable and just ideals of the constitution. In both Muslim and Hindu law, courts have frequently intervened over the years to settle important disputes, frequently dispelling myths or injustices. The judiciary has played a pivotal role in the advancement of women's rights under Hindu law. Remarkably, the Supreme Court upheld daughters' equal coparcenary rights in landmark rulings such as Vineeta Sharma v. Rakesh Sharma (2020)[75] even in cases where the father had passed away prior to the 2005

[74] Under Muslim law females come under the category of agnates if there intervenes no female in the line of relationship to the deceased. Aziz Dar v. Mst Fazli, 1960 JK 53.

[75]

amendment. This ruling served to strengthen Hindu inheritance law's progressive position on gender equality The courts, however, typically take a more conservative stance when it comes to Muslim law as it is not codified and is based on Sharia principles. Muslim religious freedom has been respected by courts in inheritance cases, but they have also occasionally stepped in to make sure that personal laws do not infringe upon the fundamental rights guaranteed by the Indian Constitution, especially when it comes to gender justice. In order to reconcile the stronger constitutional requirement for equality with the respect for Islamic law, the judiciary has remained cautious when it comes to Muslim inheritance law. The current discussions surrounding the Uniform Civil Code highlight the significant influence of the judiciary on the Indian legal discourse surrounding inheritance rights. The Indian judiciary has played a significant role in shaping the interpretation and evolution of inheritance rules in both the Hindu and Muslim legal systems. Courts have frequently been faced with the task of balancing state laws with the fundamental rights of equality and non discrimination, as defined by Articles 14 (Right to Equality) and 15 (Prohibition of Discrimination) of the Indian Constitution. Significant advancements in inheritance law, particularly in the field of gender justice, have resulted from this judicial delicate balancing. safeguarding their privacy from nearby neighbours. A strong interpersonal bond is essential for any relationship, be it a husband and wife, a son and father, or a friend and friend. It may have taken thousands of years to move from the biblical garden to the legal desert.

Every civilisation has a term in its language for privacy. The word "privacy" now carries a wide range of connotations in contemporary culture. The largest definition of privacy includes, but is not limited to, not spying on others, maintaining the confidentiality of information, keeping his extramarital affairs under wraps, and safeguarding trade secrets. It is related to privacy, solitude, and independence. Therefore, the right to privacy extends to protection against both the public disclosure of personal information and intrusions of private, seclusion, or personal concerns.

4.2 JUDICIAL APPROACH TOWARDS MUSLIM LAW OF SUCCESSION

Every legal system contains three organs of the Government i.e. The third department, the judicial branch, is primarily responsible for ensuring that laws are understood and made clear. The legislative branch has the authority to create laws, the executive branch is in charge of enforcing them [76]Ubis jus ibiremedium" states that a right must exist before it can be repaired, and these three parts are responsible for carrying out the "functions of law." Humans have been given a wide range of rights and obligations towards one another from the dawn of human society. If either of them violates the rights of the other, the other may file a complaint with a body recognised as the judiciary. To make up for any injustice done to him and hold the offender accountable, the victim may turn to the legal system for retribution. It can be required to create responses to a range of questions and concerns about succession legislation. In order to carry out this function, the "Judiciary," an establishment of judicial courts, is tasked with interpreting and applying the rules and principles of a specific branch of law—in this case, succession.3 To do this, the courts adhere to the

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recognised rules of interpretation within the legal system. Indian law is composed of a system of courts that are relatively well-established and have wide authority over both civil and criminal matters. Their legal power includes matters concerning succession. Parties with full entitlement to have disputes arising from the Muslim law of succession resolved may bring such disputes before the courts concerning identity of heirs, number of shares, disqualifications, appointment of an executor or administrator, and all other related matters. Not a single other religious body is allowed to decide matters on behalf of Muslims in India other than these courts. It is also true that there exist situations where the idea of a fatwa is still in use but is not sanctioned by the law. Fatwas, save from their religious importance, have no legal bearing on how Muslim laws are applied in India. That is their personal law. when a case is brought before a court that deals with Muslim succession law. E. The Shariah serves as their guide. Parts IX and X of the Indian Succession Act, 1925 govern the procedural features of estate administration.5 Muslims in India are definitely subject to the application of their personal law in succession-related issues. Because of this, the principles governing Muslim law also govern how disputes will be resolved by Indian courts.[77] Most individuals agree that the law takes care of the majority of important concerns. When there are legal problems, higher courts in India have assessed the statute multiple times and have given it a variety of interpretations. The law of succession that has been granted to Muslims in India includes each of these situations. The courts set up during British administration and up to the present have given much thought to the Muslim law of succession and all of its problems and concerns. A noteworthy aspect of this chapter is its examination of the Indian judiciary's role in the interpretation, acceptance, and implementation of Muslim law of succession. This is in spite of a trend since independence towards a decrease in the quantity of Muslim law cases, including succession-related ones, that are published in respectable, widely read journals and law reports. On a number of issues pertaining to Muslim succession, Indian higher courts have from time to time rendered decisions. Any nation that wants to preserve the "rule of law" must have a robust judiciary. Additionally, the Indian legal system developed the judiciary at several levels. The highly esteemed Indian Supreme Court possesses both original and appellate jurisdiction. Original jurisdiction is limited to particular cases, while appellate jurisdiction is recognised for almost all civil and criminal cases where the court may receive an appeal in accordance with applicable Indian Constitutional provisions. Similar to the Supreme Court, which is the highest court in the nation, each state has a High Court, which is a state-level court with state-wide jurisdiction and is subordinate to the Apex Court. Under the respective jurisdiction of the district courts and police stations, subordinate civil judges and magistrates may make decisions on civil and criminal cases pertaining to the districts. Over every district court is a district judge. Without a judicial system to investigate and remedy violations of people' rights, no legal system could even contemplate guaranteeing the acknowledgement of those rights, be they fundamental, constitutional, legal, statutory, or otherwise.

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In India, Muslim law recognises that succession disputes within the community are settled in line with Shariah.7 The courts acknowledge the application of Shariah principles in all succession dispute cases and provide the necessary remedy to carry them out. Muslim succession disputes are resolved in India through a well-known legal procedure that was put in place during the British colonial era. The British government aimed to uphold the customary rules of the Indian religious communities.[78] In their private matters, the courts were instructed to apply their laws, customs, and assuages. The first record of the continuous existence of regional laws and customs was found in the Bombay Mayor's Court Charter from 1753. An Introduction to Geo C-21. III made guarantees on the protection of the laws, rights, and privileges of the people living in Bengal, Bihar, and Orissa. Under Section 17 of the Act, the Fort William, Bengal-based Supreme Court of Judicature was granted the authority to hear cases and issue rulings. The Mohammedan case would fall under Hindu law, and all activities and litigation involving Calcutta citizens—including their inheritance and succession to lands, rents, and belongings—would fall under Muslim law. Furthermore, the High Courts Act of 1861 permits the application of usages and customs in cases concerning succession and inheritance. The aforementioned was reaffirmed in the Government of India Act, 1915.9 The Government of India Act, 1935 further enforced this clause.10 The socio-legal structure of India benefited from the English law-compliant application of the principles of justice, equity, and good conscience.11 Following independence, the Indian Constitution established the Supreme Court as the highest court in the country, with District Courts and High Courts serving as its subordinate courts.12 State-level subordinate judiciaries were also established. Despite lacking the authority to resolve succession-related disputes, the Family Courts Act of 1984 represents a noteworthy advancement in the field of family law. Section 7 of the Act, as explained in Explanation (c), gives the married parties the authority to take actions or carry out procedures related to their property, or jointly owned property. The purpose of Article 50 of the Constitution is to prevent any violations of the inheritance rights of Indians, especially Muslims, by keeping the judiciary and the executive separate. If their share is not distributed in line with Muslim law, an heir under the Indian legal system may petition the courts to seek redress over the rights that have accrued to them.

In an attempt to make clear the application and implementation of the law, a number of judicial pronouncements have been released covering a variety of topics, starting with the application of Muslim law to Muslims. Among these are the wills' modes of succession, the heirs' consent to them, the limitations on the creation of wills, the renunciation of inheritance rights, and the inheritance rights of females, adopted, surrogate, foster, and other heirs. In terms of interpreting the Muslim succession law in India, the Indian judiciary has performed exceptionally well. It should be mentioned that, although they are rare, decisions that interpret the law differently than what Islam dictates are occasionally issued for a number of reasons. In succession situations, issues pertaining to property nature determination, partition, heirship determination,

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allotment, and a host of other topics may come up. Notwithstanding the challenges of the task, the Indian court has demonstrated remarkable success in rendering decisions regarding situations involving Muslims in India.

4.3 CASES

In the 1916 case of Abdul Majid Khan Sahib v. Krishnamachariar,[79] the court considered whether the co-heir's sale of property to pay debts was binding on the deceased's creditors as well as other co-heirs when the co-heir holds all or part of the property. The court rules that after obligations and burial costs are paid, a deceased person's inheritance is divided among their heirs. Drawing on previous rulings, the court made clear that, in line with Islamic law, one co-heir is not permitted to handle the shares of the other co-heirs. As such, without the other co-heir's permission, one co-heir is unable to act in any way regarding the other's shares. Under some circumstances, he may assign his interests to another co-heir of a third party. All other co-heirs will be bound by a decree issued against one co-heir, onto whom all of the deceased's effects are in possession, because a decision passed against a co-heir is considered a decree against the dead and the co-heirs function as the deceased's representatives in such a decree. Nonetheless, none of the co-heirs may impose any obligations on the other co-heirs. As so, none of the co-heirs could force the other co-heirs to sell against their wishes. Only property that he has a stake in and has inherited may be managed by him. Even when it comes to paying back debt, he is not permitted to act on behalf of the others.

Ismail Ali Khan, who died, left behind several widows and children in Imambandi[80] v. Sheikh Haji Mutsaddi (1918). The petitioner, Enayet-uz-Zhora, is one of his widows. She litigated to purchase a portion of his fortune with her two small children. Rejecting her assertions regarding the shares and her ability to sell them, the defendants questioned the validity of her marriage to Ismail and the children. As she is their legal guardian, the petitioner argued, her children should legitimately be entitled to their portion of the property. In this case, the issue was whether a mother's actions with her minor children's belongings bound them. The court noted that while though the mother is legally entitled to custody of her minor children under the Muslim legal system, this does not automatically make her the children's natural guardian. When the father is not around, the paternal grandfather steps in as the children's natural guardian and takes complete responsibility for their upbringing. Sunni law grants custody of the father's estate to his appointed executor following his death. In the event that the father passes away without designating an executor, the paternal grandfather assumes custody. It was decided that because the mother was not the children's natural or legal guardian, she lacked the right to alienate the property. Illyas and Ors. v. Badshah alias Kamala (1989): This case is about Munilal's[81] eunuch, which is his property. Munilal left a will endorsing the land's claims, Abdul Gafoor.

[79](1913)ILR 35ALL459
[80](1918)20BOMLR1022

[81]AIR1990MP334

Because they adhered to a community-wide property transfer standard, the defendants, the descendants of Munilal, contended that they created a distinct class of heirs via the Guru-Chela system. The respondent, who was a follower of Munilal, therefore claimed that Abdul had falsified his will and claimed the possession of the property. The trial court issued a decree to the respondent and ruled that the appellant's will was invalid. In the High Court, the appellant contested the trial judge's ruling, asking the bench to rule on whether Munilal's will—which was executed in favour of Abdul Gafoor—was legitimate in view of eunuch customs and Muslim law. The court determined that the eunuchs follow a generally recognised custom after reviewing the respondents' submission. The appellant contended that Munilal has the same right to inherit his property as any other Muslim. Because it forbids Muslims from executing wills in favour of those who are not members of their community, the respondent's claim about the customary property transfer should be disregarded. As a result, the custom defies governmental policy. The will remains lawful and in accordance with public policy, despite the tradition restricting the legatee's ability to carry it out. Additionally, as the will document did not follow Section 68 of The Indian Evidence Act, 1872, the appellant was unable to demonstrate its legitimacy. Furthermore, it was determined that the property could not be bequeathed to a non-community member through a will. Thus, the appeal was dismissed and the respondent's verdict was upheld. In the Rukmani Bai v. Bismillavai[82]case from 1992, the dead left behind provident fund payments and EDLI benefits. Before his death, he had converted to Islam from Hinduism. Per Section 372 of the Indian Succession Act, 1925, the respondent's daughter requested that a succession certificate be issued. Under Section 384 of the Act, the appellant—the niece of the deceased—filed a complaint challenging the succession court's decision to award the certificate to the respondent. Seeking to obtain the money for herself, the appellant opposed the respondent. According to the court, the respondent was qualified to get the succession certificate as she was the deceased's daughter and the dead had truly converted to Islam. The court determined that the succession of an Islamic convert is governed by Islamic laws, lacking a competing tradition, in accordance with Section 21 of the Principles of Mohammedan Law. The precedent set in the 1930 case of Mitar Sen v. Maqbul Rasan Khan was also mentioned. In that case, the privy council determined that a person's personal laws change upon conversion to a new faith, and the new law becomes applicable to both the convert and his offspring. Section 66 of the Mahomedan Code granted the daughter her half and her portion of the residuary, as the court determined that there was none. Due to the lack of merit in the appellant's case, the court decided that the respondent was entitled to the succession certificate and refused the appeal. Abdul RahimanRowther's property is at issue in Mohammed Gani v. Parthamuthu Sowra (2008). At the time of the creation of the partition deed, the plaintiff and the defendants were minors, with their mother serving as their legal guardian. Having their mother purchase the rice mill, the plaintiff and the defendants were guaranteed a quarter of the joint share. This is what the plaintiff is trying to divide. A share of the property had been awarded to the plaintiff, his daughter, his two children, himself, and his first wife. A claim made by the plaintiff was refuted

[82]AIR1993MP45

by the defendants. According to Muslim inheritance laws, the defendants were entitled to seven and a half shares, although the married plaintiff was only supposed to receive an eighth of a share. One-fourth of the share was awarded to the plaintiff by the trial court's decision. The Madras High Court heard an appeal of this ruling by the defendants. The plaintiff and the defendants were not to receive equal portions under the terms of the partition document, the High Court said, and the deceased's purpose was for the parties to enjoy the property together. The plaintiff will only receive one eighth of the shares, with the defendants obtaining the remaining seven eighths, as a result of Muslim inheritance laws coming into play due to the requested division. Kachem Abdul and allies versus Bibi Rijia and allies. (2013) At stake in this issue is whether Abdul Khalaque's (late) will was correctly carried out. The plaintiffs are the first wife and her sons, while the defendants are the second wife, her daughter, and her boys. 3.25 acres of land belonged to the dead. The defendants denied receiving any bequest from the plaintiffs in the will, thus the plaintiffs asked to divide the land. The plaintiffs were found by the trial court to be the beneficiaries of a forged will. The ruling eliminated the chance that the will was falsified, found flaws in the shares awarded to the claimants, and determined that the will was defective. In response to this ruling, the defendants filed their first appeal. The accused then filed a further appeal. In affirming the first appeal, the court determined that the will was invalid. The Court cited Section 118 of the principles of Mohammedean[83] law to establish that a Mohammedan will must be within a certain bound, have a competent legatee, and have the consent of the testator's heirs upon their death. Muslims are allowed to leave property to their heirs after their death, as long as the other heirs approve of it. The donation is considered consented to if the heirs do not contest it for a considerable period of time. The ability of the testator to leave a gift greater than one-third of the remaining amount is also limited by Mohammedan law after debt and burial costs are paid. Since the plaintiffs' portion exceeds the allowable maximum, the will in this case is invalid and robs them of their just share. The petitioner, the deceased person's spouse, asked that her husband be recognised as his rightful successor in Jannath Beevi v. Tahsildar (2022). After unintentionally excluding her father-in-law, a legitimate legal heir, the petitioner submitted a new application. However, she was not given the opportunity to speak, and an error in her application caused it to be denied. Therefore, the question at hand was whether the petitioner's request to include her father-in-law was appropriate to deny. Referencing Islamic inheritance laws, the court went on to state that the father is a legitimate heir to the deceased's wealth. It further maintained that the fundamental tenets of natural justice were broken by depriving the petitioner of a fair trial. The court granted the petitioner a fair hearing, overturned the previous decision that had denied the petition, and remanded the case for legal review. SK. Arman Ali & Associates. in opposition to Asraf Ali Sk. &Ors[84]on September 21, 2022, as demonstrated by the plaintiffs' evidence, Amin's desertion of Lokman Sk. along with Latif Sk. and his legitimate heirs, the unmarried offspring of his first wife, Rahima Bibi. is the legitimate heir to him, having been born outside of marriage to Meyatan Bibi, his second wife. the initial spouse of Amin Sk. perished while still alive. After

[83]AIR 2022 Mad 26.
[84] CAN 3 of 2017(Old CAN No. 6578 of 2017)

Amin Sk. passed away, his sons Lokman Sk. along with Latif Sk. each received joint ownership of 'A' schedule property, measuring two annas and sixteen gandas, and Rahima Bibi received ownership of 'A' schedule property, measuring one anna and eight gandas. Sk. Lokman. Defendants Nos. 1 and 2, his two surviving sons, were his legitimate heirs and successors, and as such, were entitled to a share of the suit property upon his death under the Muslim Law of Inheritance. After her death, Mehar Ali Sk, Rahima Bibi's son, was left behind. Mohpan Bibi and Kehatan Bibi, her two daughters, are her legitimate heirs and successors in accordance with the Islamic Law of Inheritance. After his demise, Mohpan Bibi left Mehar Ali Sk. together with defendants #4 and #5, his rightful heirs and successors. decedent passed away, designating defendants 6 through 9 as his legitimate heirs and successors, and they received a transfer of their rights in the suit's assets in line with Islamic inheritance law. Meyatan Bibi's lone son, Sk, passed away. Abdul Latif acquired ownership and possession of his mother's portion, which consisted of one skeleton and one anna. [85]As such, Abdul Latif was granted ownership of property valued at three annas sixteen gandas and included in the 'A' schedule. following Sk's demise. Lokman Sk., Abdul Latif Sk., Rahima Bibi, Meyatan Bibi, and the second wife. acquire ownership of the properties listed in Schedule 'B' in line with Islamic Inheritance Law. Abdul Latif, S. departed, leaving his partner Mst. Khadija Bibi's son, Arman Ali's kid, and Mst. Hashemi Bibi, Mst. Jarina Islam, the Miss. According to the Islamic Law of Inheritance, Marzina Bibi is his legitimate heir and successor. Sk Usman. died, naming defendants 10 through 14 as his rightful heirs and heir apparent. Amin Sk's legitimate heirs. after Usman Sk.'s death. Since they divided the suit properties fairly by an amicable settlement, the deceased are now the legitimate owners and possessors of those properties. Regarding the genealogy facts given on page 22 of the Learnt Trial Court ruling, it is clear from the evidence that DW 1 and DW 3 supported PW 1's testimony. According to PW 1's evidence, Amin Sk's belongings listed in the "A" schedule were passed down to his two sons, second wife, and daughter upon his death in accordance with the Muslim Law of Inheritance. This meant that his wife Meyatan Bibi received a part of one anna, or eight gondas, and his daughter Rahima Bibi received a share of one anna. In the 'A' schedule holdings, his sons Lokman Sk and Abdul Latif each received a portion of two annas, or sixteen gandas. Thus, following Rahima Bibi's death, her son Meher Ali Sk received a ½ share and her two daughters,[86]Kahutan Bibi and Mahupan Bibi, each received a ¼ piece of her 1 anna and 8 gondas in the 'A' schedule. Nandkishore Lalbhai Mehta vs. New Era Fabrics P.Ltd. &Ors was filed on July 8, 2015. This appeal was filed in response to the decision and verdict issued by the Bombay High Court of Judicature's Division Bench on May 6, 2008, in Suit No. 1414 of 1979's Appeal No. 245 of 2006. By submitting Suit No. 1414 of 1979, the appellant in this case sought specific fulfilment of the 19.10.1977 agreement. The defendants' appeal was accepted, however the court later reversed the ruling made by the High Court's lone judge on December 12, 2005. Summary: You will provide it to the opposite side as the payment window has closed. You will provide them the necessary amount and

[85]AIR 2015 SUPREME COURT 3796

[86]2006 AIR SCW 4323

extend the payment date if they accept the two stated terms of consent. However, you shall return the agreed upon amount to me and I won't be entitled to any interest or penalties if you settle the case in line with the agreement terms without accomplishing your aims, or if they reject and carry on with the action. This Agreement shall terminate automatically on October 24, 1977, at the latest, if I do not deliver to your solicitor the entire amount of Rs. 7,50,000/-upon its execution and Rs. 4,00,000/-(Rupees four lacs only). At that point, you will be entitled to collect the Rs. 7,50,000/-that I have paid you. I've enclosed my solicitor's cheque for Rs. 7,50,000/- (Rupees Seven Lacs Fifty Thousand Only) in your solicitor's name. You can cash it once you've confirmed the terms; if they're not confirmed, you'll send the cheque back to me. After receiving permission under Sections 22 and 27 of the Urban Land (Ceiling & Regulation) Act, permission for conversion to residential use, your settling with your labour and obtaining their permission as herein provided, and vacant possession of the said land being handed over to me, I will pay half of the remaining consideration money mentioned in paragraph 2 above. The remaining consideration money will be paid in equal quarterly installments within a year of the date the plot is turned over to me as provided. The Urban Land (Ceiling & Regulation) Act, 1976's Sections 22 and 27 require clearance before the transaction may proceed. The property needs to be converted from an industrial region into a residential community before the purchase is finalised. Furthermore, the sale is contingent upon their approval of the previously indicated transaction and your capacity to come to a labour agreement. The Agreement will only survive to the extent that my money is returned, which will be paid within six months of the expiration of the aforementioned nine months, with interest at the rate of 18% per annum from the date of refusal of any permission, consent, or agreement set out above. Until the money is repaid with interest, you will not be entitled to do any act, deed, matter, or thing whereby or by reason of the security created as herein provided in my favour will be affected or jeopardised in any way (emphasis supplied): You shall sign any application forms, etc., that may be required for the aforementioned permissions as well as forms pertaining to B.M.C. building department permissions and plan sanction, etc. ***Meenakshi, M., & Others. Metadin***[87]Agarwal (D). On August 29, 2006, the Division Bench rendered a decision in Lrs. &Ors, holding that the declarant's intention to retain the built-up area and divide it between male and female family members in accordance with Muslim law of inheritance and succession was not what the competent authority should have assumed. The Division Bench vehemently chastised the relevant authorities, raising concerns about how permission for the cooperative organisation had been given while permission for the Respondent had been denied and a comparable application for the Plaintiff had been denied. The Judges asserted that they had looked at the suitability, legality, and/or constitutionality of the direction given in compliance with Section 9 of the Act and came to the conclusion that even after alienating 26972 sq. Regardless of where buildings are located, the family kept 5261 square meters of surplus land, which they gave to the community. This is equivalent to 2253 square feet, or square meters, of land. It makes sense that Mr. Gupta brought up the sale deed the defendant finished on behalf of others. Each of the six co-

[87] LAWS (MAD)-1952-447

sharers has sold a portion of the residential homes and lands attached to them by the aforementioned deeds of sale. Less than 900 square feet of land were sold to the buyers by the six co-sharers combined. Once more, the Division Bench's assertion that the 1976 Act's competent authority disregarded the Muslim law of succession and inheritance is unimportant. Every claim petition that the appellants and co-sharers submitted was assessed in compliance with the 1976 Act.

Thus, the goal of the Muslim Personal Law (Shariat) Application Act was to replace any established anti-Islamic laws and traditions with the core principles of Islamic law. Therefore, it is baseless to contend that the Marumakathayam law of inheritance—which was only a custom—should be void due to Section 6 of the Muslim Personal Law (Shariat) Application Act. The Mappillas resided in regions of the nation where the tradition that gave rise to the Marumakathayam rule of inheritance was widespread and currently enforceable. Mapillas were covered by this custom, per Section 16(b) of the Civil Courts Act, III of 1873. Therefore, as far as Muslims were concerned, Islamic law had to take precedence over customary law, especially when it came to the laws governing inheritance and other matters. If not for the fact that this custom—also known as Marumakathayam law—had been enforceable, Mapilla families living in tarwad households would not have been subject to the custom of inheritance. The knowledgeable solicitors representing the respondents claimed an erroneous and unwarranted distinction between Aliyasanthana or Marumakathayam law and custom. "Custom" legal status has been awarded by legal authorities without the need for further proof. Therefore, the Muslims Personal Law (Shariat) Application Act seeks to abolish these duly established customs by applying under Section 6 of the aforementioned Act, 26 of 1937. Since custom is the basis of customary law, any custom that is in opposition with the Islamic Personal Law shall be deemed unlawful and unenforceable under the Muslim Personal Law (Shariat) Application Act. Between Talat Fatima Hasan and Mr. Hizbullah[88]Syed Murtaza Ali Khan... On July 31, 1996, the late defendant No. 1 filed a countersuit, and his attorney also raised this defence. The late Nawab did, in fact, sign an agreement with the Indian government on May 15, 1949, and on July 1, 1949, he handed his state to the Union of India, as stated in the written declaration of defence. The official declaration states that "Private Properties" have been mentioned in artistic performances. The Union of India's property, also known as property IV of the merger agreement: Prior to the merger, the governmental of Rampur did not distinguish between its governmental and private properties; everything belonged to the monarch. According to the merger agreement, Nawab's personal rights, privileges, immunities, etc. would be safeguarded by the dominion government in compliance with the State's Gaddi's laws and customs. On March 6, 1966, Nawab, a Shia Muslim, passed away. Unlike the Shariat Act or Muslim Personal Law, the primogeniture law of succession governed the Gaddi family's inheritance, including his personal goods. Following the demise of the late Nawab, defendant No. 1 was acknowledged by the Indian President as the legitimate ruler in accordance with Article 366(22) of the Constitution. Defendant No. 1 was the only person to receive the properties left by the late Nawab, acting as his sole heir and successor and

[88] A.S.No.1315 of 1989

having the right to accede to Gaddi in conformity with the law of male lineal primogeniture. The aforementioned right to succession was not provided by the Indian government's certificate, but rather in accordance with the succession standards that regulate private properties in the state of Rampur and the Gaddi, which are impartible by nature. Since neither the plaintiff nor any of the defendants Nos. 2 to 15 have inherited any claim or portion of the estates left by the late Nawab, the plaintiff is not entitled to an accounting of any mesne profits or partition. Furthermore, it is claimed that the late Nawab made sufficient provisions in compliance with Rampuran law by creating trusts like the Raza Trust and giving younger family members—including the plaintiff and other defendants—pensions and other benefits in accordance with Rampuran succession law, despite the fact that they lacked legal entitlements. In addition to the other assets that the late Nawab left them, the plaintiff's mother received allowances from the other defendants. Yaqoob Laway& Partners against Gulla and Anr. On November 29, 2004, they declared that while a sonless man is able to adopt a son, under Shariat law, he is not allowed to inherit the adopted son's belongings unless the adoptive father gives them to him as a gift or leaves them in a will. In Sunni and Shia families, boys are usually adopted when they are a year or two old, so that the adoptees can develop bonds to their new parents. One cannot inherit their adopted father through adoption, even if they can prove they are an adopted son in accordance with custom. Adoption does not make one the adoptive father's heir. The word "heirs" appears in the Holy Quran, however the adopted son is not mentioned in the text since he is not subject to Muslim inheritance law. The Code of Tribal Customs, or any other comparable source, contains no information regarding the custom of an adopted son. Unresolved is the question of how Muslim inheritance law would handle an adopted son's inheritance in the event of other recognised heirs. Adopted sons, or pisarparwardas, can only inherit from their adoptive father if they have legal documentation supporting them. Usually, this deed is in the form of a gift deed or will. By merely proving that they are an adopted son in accordance with tradition, one does not automatically receive the possessions left by their adoptive father. His adoptive status shouldn't impress or have any influence on the courts if he pursues his share of the property because he can only prevail if he can provide a document in his favour. This kind of deed shouldn't just be an adoption deed or a certificate verifying the adoptive father's status; it should also specifically include recitals conveying all or any portion of the property left by the adoptive father. Such a deed should be enforceable under the Transfer of Property Act and the Registration Act. The case of Mohammed Gani v. Parthamuthu Sowra concluded on January 21, 2008. The late N.M.'s descendants were the plaintiff and defendants 1 through 3. Abdul Rahiman Rowther and other properties; the plaint schedule provides details on these holdings. The aforementioned original owner divided his assets and granted his sons from his first marriage a stake in addition to himself by a recorded partition deed dated November 7, 1963. In a separate and equal manner, he likewise awarded the "D" Schedule component to the plaintiff and the defendants. Since the plaintiff and the defendants were minors at the time the aforementioned partition deed was created, their mother served as the children's guardian. The defendants admitted the plaintiff as a co-owner of the assets in question once she attained majority, and she was entitled to an equal share of those properties with them. The plaintiff chose to

maintain exclusive use and joint possession of the disputed properties. As a result, she received a notification from the attorney on October 29, 1980, asking the defendants for an amicable divorce and one-fourth of the suit properties. Positive reaction to the request was still absent. As a result, 25% of the properties at issue in the litigation are not eligible to be owned by the plaintiff. The complaint focusses on partition, rendition of accounts, and additional ancillary remedies. A boy is entitled to two halves, but a girl can only have one, according to Holy Kureon. The wife is entitled to one-eighth of her husband's property if there are children present. The defendants have not provided confirmation of the plaintiff's purported quarter participation in any court proceedings. One lakh rupees was spent on the plaintiff's marriage, while the defendants were required to spend two lakh rupees to safeguard the properties at issue in the legal dispute. Since the plaintiff's mother, Aayisa Beevi Ammal, acquired the rice mill in honour of the late N.M. Abdul RahimanRowther, the plaintiff is not entitled to a portion of it.

CHAPTER 5 EMERGING DIMENSIONS OF PROPERTY

5.1 INTRODUCTION

A traditional Indian woman may be taught from childhood that her husband‘s house is her own but, legally speaking, nothing could be further from the truth. We may have come a long way since women were forced to commit sati — so that the husband‘s family wouldn‘t have to share his property but the property rights of women are far from gender just even in the 21st century. Every marriage involves a co-operative effort of the spouses, whether overt or covert, in the accumulation of assets. These assets may stand in the name of the husband or the wife, or in their joint names[89] The impact of socio-cultural changes in the recent years has been felt also by an Indian family- the smallest unit in a society. With the advancement of women‘s education, a large number of women are now educated, who find a meaningful utility of their talents not inside the home but in the paid jobs outside. An Indian woman, who seldom crossed the barriers of her home and hearth, today seeks a fair share in education and employment. Moreover, the economic stresses in the family, especially a middle class family which is in majority, has necessitated fresh adjustments of the family budget and it is being gradually felt that unless husband and wife both earn money, they cannot operate, the household decently.2 Desire to improve the social status by acquiring new consumer goods, popularized profusely by frequent T.V advertisements, is another force propelling Indian women into paid jobs. But now women‘s engagement in works of gain for increasing the income of the family is becoming a necessity rather than a desire. But this has given rise to new legal problems, such as the separate earnings of both the spouses, their common contribution towards the expenses of the household, acquisition of properties intended to be used together and a more complex problem determination of the share of each spouse in the household assets There are situations where a housewife who, though educated and capable of earning, has been busy in maintaining and running the household carefully so that husband could go out for work and earn money for

[89] B. Sivaramayya, *Matrimonial Property Law in India*, 90 (Oxford University Press, 2002)

the family, finds on divorce that she has nothing to share in the household assets with which she had been associated for many years. It is unfortunate that absence of a settled and definite law for ascertaining the respective property rights of the spouses, when marriage terminates by divorce could not be a cause of concern either for the jurists or for the legislatures of this country.

The various personal laws in the country are uniform in recognising the obligation of husband to maintain his dependant wife, but the right of a wife to claim as part owner of a property acquired and owned jointly by the husband and wife during marriage is not recognized. The contribution of the female to the family‘s income is not recognized even today and a women‘s contribution in the acquisition of family property is still not evaluated in terms of the contribution[90] This fact is of great significance that most married women do not have any independent source of income and many women give up their employment after marriage or do not take it up for many years after marriage in order to devote their time to family obligations, particularly bringing up of children. They are, therefore, economically dependant on their husbands. In most cases of property acquired during marriage, both movable and immovable, it is paid for out of the husband‘s earnings. A matrimonial home is normally registered in the husband‘s name and so also things brought for the household. The principle of determining ownership on the basis of financial contribution is unjust and works inequitably against women. The demand for recognition of the wife‘s contribution in the way of work is growing in many countries. A legal recognition should be given to the economic value of the contribution made by the wife through housework, for purposes of determining ownership of immovable property instead of continuing the archaic test of actual financial contribution

This chapter confines itself to a study of economic rights of Indian women within the family structure especially after the breakdown of marriage. Post divorce maintenance and property division are of paramount importance because they signify the status of women within marriage and their contribution to the marriage. Two distinct rights which are implicit in the marriage contract are the right to reside in the matrimonial home and the right to a financial settlement at the termination of marriage. While maintenance is also an economic right, it is a conditional right contingent upon a person‘s need or ability to sustain one self. A person capable of supporting oneself is not entitled to maintenance. In this context the right to reside in the matrimonial home and a right to financial settlement, or division of assets at the termination of marriage are crucial economic rights.

While maintenance can be viewed as a sustenance dole for basic survival, which the prevailing social conditions necessitate, matrimonial home and property can be construed as _rights‘ which would economically empower a woman and redeem her from the situation of perpetual dependency[91] . As marriage

[90] R.K.Sinha, *Socio- economic Changes and the Absence of Matrimonial Property Regime in India in Law, Justice and Social Change* (ed. by D.R.Saxena), Deep & Deep Publications, 1996, p. 55.

[91] Ibid

is not viewed as an economic partnership, on marriage a woman does not acquire any rights in her husband's property and hence she is not entitled to claim division of assets at the time of divorce. The only relevant factors for determining property claims are title and financial contributions. Our matrimonial statutes do not award any recognition to a women's non-monetary contribution to the domestic household during the subsistence of the marriage. Hence the property acquired by the husband is treated as his exclusive property. The contribution of the wife in creating family assets, through her unpaid labour by performing her domestic duties, is not considered a relevant factor for determination of her share in these assets. In this respect, India lags far behind most other countries which award recognition of a woman's contribution to creating family assets and hence have evolved detailed guidelines for determining a woman's share in the matrimonial property. The emerging dimensions of property can be studied under the following headings:

(A) Matrimonial Property Law in India
(B) Right to matrimonial home/ Residence
(C) Recognition of Household Work: Evolving Jurisprudence

A) Matrimonial Property Law in India

I) Notion of Matrimonial property

In India, generally speaking, Hindu, Muslim, Christian and Parsi laws follow the separation of property. In Hindu Law the notion of joint ownership of husband and wife appears to have been prevalent in the Vedic times, as has been in medieval texts of Hindu law10. If this notion of jointness is carried to its logical extent, the widow of a deceased should have been entitled, at least, to a substantial portion of the estate of the deceased husband. But this conclusion does not find a place in the writings of Hindu jurists.

i) Women's Joint Ownership in Hindu Law

Altekar says that —the theory approved by the Hindu culture as early as the Vedic age was that the husband and the wife should be joint owners of the household and its property. The husband was required to take a solemn vow at the time of marriage that he would never transgress the rights and interests of his wife in economic matters But the actual position points out that the vow of the husband was merely a token without any significant content or meaning. Altekar also points out that joint ownership of husband and wife remained a legal fiction and that the husband remained the sole owner, without any remedy in favour of the wife. The wife had no right to incur any substantial expenditure during the subsistence of marriage without the husband's permission. The Hindu jurists failed to protect even her right of maintenance, when the husband

sold or mortgaged the wife's property. Such acts may have been regarded as morally reprehensible but no legal remedies envisaged[92]

ii) Joint Ownership and Negation of the Inheritance Rights of Woman

If the property was jointly owned by the spouses, the question naturally arises as to how, in Hindu Law, the wife was deprived of her rights of ownership and inheritance on the death of her husband. On this, Kane's statement succinctly summarizes the position Apasthamba postulated the identity of husband and wife in religious matters and Manu IX, 45 declares that the husband is one with his wife. But this identity of the husband and the wife was not accepted by the ancient sages for secular or legal purposes It was only in later times that there was a slow recognition by the Hindu law writers of her right of inheritance as a natural corollary of her joint ownership. Brihaspati asserted that a man could not be said to be dead as long as his wife was alive. The credit of articulating the widow's right of inheritance with irrefutable logic and force goes to Jimutvahana, the author of Dayabhaga There is no authority to hold that the ownership in the husband's property, which the wife acquires at the marriage, terminates with the husband's death. How then can it be argued that the wife's right is destroyed the moment she is widowed? Nor can it be maintained that she is to utilize just as much of the income as may be necessary for her maintenance

iii) Matrimonial Property Regime

By matrimonial property regime is meant the sum of rules governing the property rights between the spouses during marriage and includes rules for division of matrimonial assets in the event of divorce or legal separation.[93] A matrimonial property regime would be easily distinguishable from the law of inheritance which deals with the rights of surviving spouse in the properties of the deceased spouses when marriage terminates by death of the latter. In most of the countries of the world, especially in the western hemisphere, the law of matrimonial property is a well developed law and is considered to be a sensitive branch of civil law. Before the Hindu Marriage Act, 1955, divorce was not permitted16, only the customary divorce was known among Hindus hence questions involving the respective rights of spouses over matrimonial property never arose except where inheritance was involved. In the lower sections of the society where customary divorce was practiced, the wife who deserted her husband was bound to refund to him whatever she had received during the marriage or afterwards. In general, mutual gifts and presents were exceptions to the above rule in all other sections of the society. However, the rules in this respect were not fixed, and the husband had the lion's share in the matrimonial property. The Hindu Marriage Act provides both the husband and the wife the right to file a petition for a decree of divorce19. Aside from its social unacceptability, divorce is usually

[92] Raj Kumar, *Women and Law*, 13 (Anmol Publications Pvt. Ltd, 2000)

[93] Flavia Agnes, *Family Law Vol. 2, Marriage, Divorce and Matrimonial Litigation*, 207 (Oxford University Press,2011)

not a realistic option for most women who have little or no financial independence or education. Though Hindu Marriage Act 1955 (herein after called as HMA,1955), incorporated divorce provisions but the law was no longer worried about the disposal of matrimonial property, as it incorporated divorce as a remedy to terminate the married status of the spouses. To cope with the impending problem of determining proprietary rights, the Act provided that the property jointly presented to the spouses at or about the time of marriage may be disposed of by the court as it may think —just and proper

iv)Disposal of Property under Section 27 of the Hindu Marriage Act, 1955

For the application of Section 27 following three conditions are important:

a) The application should be filed before the disposal of the main matrimonial proceeding. When the main petition is dismissed no relief under this Section can be granted

b) The property should have been presented at or about the time of marriage

c) The property must belong jointly to husband and wife.

The scope of Section 27 of HMA 1955 on the face of it seems narrow. In spite of the narrow scope of the section the Allahabad High Court in ***Kanta Prasad v Omwati***[94] took the view that Section 27 does not exclude the inherent power of the Court to pass a decree with respect to the separate property of the husband and the wife. The court drew this power from Section 21 of the HMA, 1955, which stated that all powers of a civil court are available when deciding cases under it. The Delhi High Court took a contrary view in Shukla v Brij Bhushan and so did the Bombay High Court in two other cases. In Sangeeta Balkrishna Kadam v Balkrishna Ramchandra Kadam [95] wife claimed, among other things, jewellery, furniture and household gadgets purchased with her earnings and asked for their return under Section 27. The Bombay High Court exercising its inherent powers ordered the return of these items even though the articles were not strictly within the scope of the Section. But it would be far- fetched to interpret the inherent powers as conferring a power to adjust the properties belonging to the husband and the wife. The expression jointly in Section 27 of the HMA, 1955 is of significance; it demarcates the limits of matrimonial courts as well as their jurisdiction over the disposal of such property. This jurisdiction has been narrowed in two respects: First, by limiting it to property which has been given to the spouses either at or about the time of marriage; second, such property must have been given to them jointly. This construction is too thin and a majority of cases are left out of the purview of the Act. There are cases relating to various other kinds of property, which become the subject- matter of the dispute between the spouses; for example, the property given to them jointly in the form of gifts and presents from any source either —before‖ or —after‖ the marriage property jointly pooled by the spouses during their covertures for meeting the needs of the family and consisting of their individual earnings or separate property, furniture, utensils, apparel and other things of personal use which are clearly outside the purview of the Act.

[94] A.I.R. 1972 All 153

[95] A.I.R. 1994. Bom. 1.

Courts are often called upon to adjudicate with respect to these matters while determining the respective rights of the spouses in the wake of the dissolution of their marriage, and no doubt the courts often meet with difficult situations while so doing.

The distribution of chattels and other household articles between spouses after a break up presents still more difficult questions. The better principle seems to be that the specific articles such as clothes, ornaments and other personal belongings which by their nature are to be used by a particular spouse, may be given to him or her, but property other than this should be treated as belonging to both as co-owners and may be divided between them at the time of the dissolution of their marriage. The principles applicable in such matters are those of common sense. Application of formal and rigid rules of law will not be of much advantage, and on the contrary may perpetuate the trouble. The main reason for this is that spouses never pool their chattels or other similar articles of their daily use with a view towards determining their respective shares in them and their rights cannot be determined on principles of contract as none exist in this situation. As unsound as it may seem, it is nonetheless a fact that spouses never foresee the eventuality of divorce at a start of a marriage. It is also a matter of common experience that spouses do not intend to create any formal legal relationship when they use goods belonging to each other; it cannot be definitely held when one was acting as agent or bailee for the other[96]

These are some considerations which prevent matrimonial courts from deciding the respective claims of the spouses on more equitable grounds than the formal principles of law. The courts are rather handicapped in the absence of any fixed set of rules or a clear judicial practice in this area. Hence, any tendency towards general principles of law and a resort to justice, equity and good conscience encourages the play of a subjective element in the judiciary. A Civil Code, perfect in itself would avoid such mischief to a major extent and it seems imperative that laws applicable to Hindus should be thoroughly revised and any lacunas or loopholes plugged through the legislative process. The judiciary, of course, might be helpful in doing this but it inherently suffers from the same weakness for which the process of judicial law making has often been decried; that it moves too slowly in comparison to the legislative process. In disposing of property cases the civil courts of India generally make good use of general principle of law, particularly those of partnership, agency bailment and pledge. General principles of law relating to joint ownership are frequently resorted to while disposing of such property. It cannot be said that this is a happy state of affairs.

For a nation which has developed elaborate statutes for governing property relations with respect to its acquisition, enjoyment and disposal, it seems to be a matter of mere apathy preventing the legislative machinery from establishing rules for disposal of matrimonial property either during the subsistence or after the dissolution of marriage. The Court under the Hindu Marriage Act, 1955 is required to act in conformity

[96] A.S. Altekar, The Position of Women in Hindu Civilization, 251 (Motilal Banarsidass, 1959)

with what it thinks ―just and proper‖. These words indicate their indefinite ambit and place on the courts the burden of applying principles which may appear to be equitable and just. Hence, the legal system is inherently unfair to women seeking a divorce. As has been discussed in the preceding chapter, a woman is the legal owner of her Stridhan only and under Section 27 of HMA, 1955, in a divorce court may only adjudicate rights regarding property presented at or about the time of the marriage, which may belong jointly to the couple. Because Stridhan is not joint property, a woman must endure two law suits. She must first participate in the divorce proceedings. The woman must then bring another suit in a civil court against her ex husband to recover the Stridhan. The additional legal expenses and stress from prolonged litigation deter women from trying to recover their property.

Another unpleasant alternative is that the wife can initiate an action against her husband for a criminal breach of trust if she can prove that the disputed property is part of a dowry which is illegal. Section 27 of the HMA, 1955, therefore, operates against a woman‘s economic interests. Hemant Kumar Agrahari v Lakshmi Devi[97] is a significant judgment which seeks to enlarge the court‘s jurisdiction to adjudicate upon the disposal of even that property which is not joint of the spouses. Section 27 provides for the disposal of property presented at or about the time of marriage ―which may belong jointly to both husband and wife‖. Hitherto, courts, under Section 27 have been dealing only with properties which belonged jointly to the spouses. In ***B.R. Kadam v S.B. Kadam*** [98] while the apex court construed the expression _at or about the time of marriage‘ more liberally to include even property given before or after the marriage provided it is relatable to the marriage, it reiterated that such property should belong jointly to both the spouses. The wife who had claimed certain jewellery stating that she had received the same ―at or about the time of marriage‖ was refused the relief as the court found no evidence to establish that the jewellery belonged jointly to both the spouses. A different view, however, was taken by the Delhi High Court in ***Sangeeta v Sanjay Bansal***[99] where the wife‘s application for return of her stridhana was granted. In Hemant Kumar the court held that matrimonial courts do have jurisdiction to dispose of exclusive properties of the spouses as well provided the same was presented at or about the time of marriage; what is significant is that the property must be connected with the marriage. As to the issue of the property being jointly owned, the section nowhere uses mandatory words must the word used in Section 27 is ―may belong jointly‖. In view of the use of the word may‖ and not must, the court held that property which may not belong jointly to the parties may also be disposed of by the court. Section 27 does not confine or restrict the jurisdiction of the matrimonial courts to deal only with joint properties of parties presented at or about the time of marriage but also permits disposal of exclusive properties of parties as well provided, these were presented at or about the time of marriage. Where, however, the properties acquired by

[97] A.I.R.2004,All.126
[98] A.I.R. 1997 SC 3562
[99] A.I.R. 2001, Del. 267.

the couple by their own efforts and not given to them at or about the time of marriage to be held jointly, the court has no jurisdiction to adjudicate upon them under section 27.

A suit for recovery by the wife of her ornaments and property which is her own is not maintainable under section 27 of the Act since it covers only properties which belong jointly to both the husband and the wife; however, such suit is maintainable under the provision of section 7(1)(c) of the Family Courts Act,1984 since under this section the court has jurisdiction to decide a suit or proceeding between the parties to a marriage with respect to the property of the parties or either of them. The dissolution of a marriage takes place either by the death of a spouse or by divorce between the spouses. If the dissolution of marriage takes place by death, the law provides three broad approaches: a) the right of succession of a widow, in law; or b) the division of assets of the community under the legal systems that recognize the community of property; or c) the provisions related to maintenance of the wife or the husband, according to the provision of law. The last may be in addition to succession where it is inadequate or a substitute for it. The law regarding the division of assets on divorce is unsatisfactory and inadequate in India. The legal systems traditionally follow one of the two systems to govern the property of the spouses: a). the separation of property; or b) the community of property.

Under the former the wife is the owner of her property, distinct from her husband, as she had been before her marriage as the husband is the owner of his own property. Each spouse has independent powers of disposition over his or her property without the need for consent of the other spouse. While the separation system confers the freedom of management and disposition, it eliminates the prospects of sharing the assets of the other spouse as of right. In the community of property the husband and wife are regarded as partners with respect to a contract entered into between the spouses before the marriage. Practically, the joint management of property is not possible; the husband has the control and manages the community of property belonging to the spouses. In an attempt to achieve the advantages of both the systems – freedom to manage one‘s assets and sharing of assets on dissolution- a third system, deferred community has been adopted by legal systems in recent times. Under deferred community, the spouses are separate with respect to their properties during marriage and the sharing of assets comes into being on dissolution of marriage

English law Developments

The old common law doctrine of spouse being one entity, which worked much to the detriment of women, was altered by the courts of equity when they propounded the doctrine of equitable separate estates. Further, legislative measures also changed the scenario and today, a woman is feme sole when it comes to their property. The Morton Commission, however, pointed out (as early as 1969) that, the contribution of wives made towards acquisition of family assets by performing domestic chores for gainful employment was not accounted for at all!‖ Later, in the same year, the English Law Commission in its report of Financial Provision in matrimonial Proceedings recommended that, ―the courts while ordering financial settlements must not

only look at contribution made by wife in money or money‘s worth, but also her contribution made normally looking after house and family‖. This view was given effect to in a landmark decision of Porter v Porter[100] . However the court also lamented in Pettit v Pettit45 when Hudson L.J. observed: I do not see as to how one can correct the imbalance which may be found to exist in property rights as between the spouses without legislation. The judicial view was given effect to by The Matrimonial Proceedings and Property Act, 1970 where s.5 (1)(h) clearly mentioned , that, the contribution made by each of the parties to the welfare of the family including any contributions made as looking after the home or earning for the family must be given regard to‖. Applying the Act came Lord Denning‘s landmark judgment of Wachtel v Wachtel[101] in which he clearly stated that the contributions made by a working wife were equal to those made by a housewife

The American Law Developments

The felt need to change the fault based theory of divorce reflected itself in the Uniform Marriage and Divorce Act (UMDA) which was ratified by the National Conference of Commissioners on Uniform State laws in 1970, though the idea had emanated in 1884. The court recognized that a spouse who made material contribution towards the acquisition of property which is titled in the name of other may claim an equitable interest in such jointly accumulated property incident to divorce proceedings‖ 47.States following the community of property approach have enacted and adopted laws based on the basic model of UMDA which distinguishes separate property from marital property and lists out various factors that the courts must take into account while awarding maintenance of the claiming spouse equitably The Act provides for an inclusive definition of marital property and at the same time, excludes separate property from it. The Act states48 -For the purposes of the Act, ―marital property means all property acquired by either spouse subsequent to the marriage and during its subsistence‖, except:

a) Property acquired by gift, bequest, devise or descent; b) Property acquired in exchange for property acquired before the marriage or in exchange for property acquired by gift, bequest, devise or descent

c) Property acquired by a spouse after a decree of legal separation

d) Property excluded by valid agreement of parties

e) The increase in value of property acquired before marriage. It further states that all property acquired by either spouse after marriage and before a decree of legal separation is presumed to be marital property regardless of whether the title is held individually or by the spouses in some form of co-ownership such as joint tenancy, etc. The presumption of marital property can only be overcome by showing that the property falls under the categories listed as above. The Act lays down that, ―the court shall divide the marital property without regard to marital misconduct in just proportions considering all relevant factors including:

[100] (1969) 1 W.L.R.115
[101] (1973) 1.All. 829 (C.A.)

a) Contribution of each spouse to the acquisition of the marital property, including contribution of a spouse as home-maker

b) Value of the property set apart to each spouse

c) Duration of marriage

d) Economic circumstances of each spouse when the division is to become effective, including desirability of awarding the family home or the right to live therein for reasonable periods to the spouse having custody of any children‖.

Unfortunately, a matrimonial property regime could not develop in India because of reasons more than one.[102] Firstly, the marital rights in India are governed by diversified personal law systems which, for the most part, rest on religion and traditional practices. And, these personal laws still continue to maintain that family is the domain only of the husband, ignoring totally the socio-economic realities of life today. Secondly, under the separation of property principle, being followed by the courts in India, on the English pattern, the property may either belong to husband or to wife. But, above, all prime reason why matrimonial regime could not be developed in this country has been the lack of sense of claim to matrimonial assets in the divorced women.
Legal equality apart, in Indian women, irrespective of the denomination to which she belongs, still considers, divorce as such a curse that finding that she has now no right to share the company of her husband, has hardly any heart for the claim of her share in the matrimonial home. In India, Ms. Veena Verma, a member of the Rajya Sabha, made a valiant attempt by introducing a private member‘s Bill in the Rajya Sabha in 1992, namely The Married Women (Protection of Rights) Bill, 1988. Besides, other rights proposed to be given to a married woman (of any denomination) the Bill provide that; She shall be entitled to have an equal share in the property of her husband from the date of her marriage and shall also be entitled to dispose of her share in the property by way of sale, gift, mortgage, will or in any other manner whatsoever. Unfortunately she lacked the benefit of research and knowledge of the subject.

It was a solo effort and while her intentions in bringing out the Bill were lauded, the then Government persuaded her to withdraw the Bill stating that it would withdraw the matter.

v) Uniform Civil Code in Goa

Closer home in the context of matrimonial property, the Portuguese Civil Code, the living legacy left in Goa by the Portuguese is of paramount significance. For almost 500 years, a working model of Uniform Civil Code has existed in Goa. This regime provides the baseline for fairness and security in marriage[103]. Giving her a share in the marital property recognizes her contribution to the union, even if the contribution is not financial. According to the Uniform Civil Code in Goa, marriage is a contract. Parties who want to get

[102] Ibid

[103] The Hindu Marriage Act, 1955, Section 13 (1).

married must register their intent to marry and later, they must register the marriage itself. When there is a conflict between religious laws and the Uniform Civil Code, the Code supersedes the religious laws51. Thus, if two Goans marry under their religious rites and do not register their marriage, it will not be legally recognized in Goa. Family laws not only require that the parties register their marriage, but also that they stipulate the system under which their property will be governed. Goan law allows parties who are marrying to design the allocation, administration and distribution of their property under one of three systems. The system that will govern the properties of the two parties is to be decided in an ante-nuptial agreement before the marriage is solemnized; once the marriage is solemnized, there can be no revocation of ante-nuptial contract by way of a new contract. In the absence of an ante-nuptial contract regarding the distribution of property, the custom of the country governs by default. This custom presumes that the spouses are married under the simple communion of acquired properties. Under this system, the spouses register their separate properties at the time of marriage. These separate properties include the property that each spouse holds at the time of marriage, or that which is acquired by succession, gift or under a previous exclusive right. If separate property is not registered at the time of marriage, it is considered to be community property Debts incurred prior to marriage are charged to the property of the debtor spouse. All property acquired during the marriage is considered to be jointly owned by both spouses and is to be equally divided if the parties divorce.

The spouses can choose to marry under separation of properties, but they must expressly reject the regime of communion of acquired properties. Under the separation of properties system, each spouse will have ownership strictly according to title. Spouses who choose to marry and divide their property under the third system, dotal regime, must specify the property included in the endowment. The parties have considerable freedom in designing distribution of their property, as long as they do it in the ante-nuptial contract. For example, they can identify the property that will remain separate, and agree to be governed by the separate property regime. In the same ante-nuptial contract, they can stipulate that they will switch over to the community property regime if and when they have children. A systematic study of the Goan family laws is required. In the light of the current issue the Goan laws could serve as a model for the entire nation. Many countries54 have already enacted law relating to matrimonial property[104]

vi) Classification of Assets/ Matrimonial Property

Departing from the conservative doctrines of English common law, the Indian legal system regards the husband and the wife as separate entities for the purposes of the law of property and for other purposes. As a general rule, the property of one spouse is regarded as separate from the property of the other, whether the question arises during or after the marriage relationship. The wife has no rights as such in the husband‘s property. The husband, in turn, has no right as such in his wife‘s property. It is suggested that in Indian law a three-fold classification of matrimonial property should be followed:

[104] Report on Financial Provisions in Matrimonial Proceedings, L.C. No. 25, para 69

i) Matrimonial home

ii) Household goods

iii) Other assets. Under Indian law a matrimonial home should be recognized as belonging to both the spouses holding it as joint tenants. The co-ownership should automatically vest in the non-owner spouse on

a) The birth of a surviving child

b) The completion of seven years of marriage (or such other period as may be fixed by the legislature.

For the purpose of co-ownership it should be immaterial whether the matrimonial home is in the name of the husband, or wife, or both, whether or not there has been contribution from the other spouse. Neither the husband nor the wife should be entitled to sell; mortgage or otherwise alienate his or her interest, except with the consent of the Court. Such permission should be granted only in exceptional circumstances. In case the dissolution of marriage occurs by divorce, the survivorship principle should be rendered inoperative on the death of the co-owner who had the entire interest originally.[105] Furthermore, the co-ownership rights should extend only to one matrimonial home and that to the portion or part that is actually being used as the matrimonial home In other words, if the building consists of two floors and one floor has been rented out, the floor under the actual occupation of the couple should be treated as the _matrimonial home‘. The household goods and jewellery should be regarded as the wife‘s Stridhana or her exclusive property. The general principle of exclusion of articles of gift or inheritance should be followed. With respect to other assets, the equalization principle followed in Germany and later in Ontario (A Common law system) should be adopted, that is a spouse having a lesser estate should receive half the net value of the difference between the estates of the two spouses The demand for recognition of wife‘s contribution in the way of house work is growing in many countries. England has passed the Matrimonial Proceedings Act in 1970 and the judicial decisions following have emphasized the right of wife to a share in the capital assets of the family. Lord Denning said that ―the wife who looks after the home and family contributes as much to the family assets as the wife who goes out to work He emphasized the importance of the home having been maintained by the joint efforts of both husband and wife and therefore, when the marriage breaks down it should be regarded as the joint property of both of them, no matter in whose name it stands. The demand for recognition of the wife‘s contribution in the way of work is growing in many countries. A legal recognition should be given to the economic value of the contribution made by the wife through housework, for purposes of determining ownership of immovable property instead of continuing the archaic test of actual financial contribution. The Marriage Laws Amendment Bill 2010 provides that Courts would decide the extent‖60 of the wife‘s share in her husband‘s self acquired property both movable and immovable, in case of a divorce.

While the wife will have no share in the inherited property, its value will be taken into account by court while fixing the amount of compensation or alimony to her. The judge will decide as per the facts and circumstances

[105] Ibid

of each case. Rajya Sabha passed the Bill on 26th august 2013 and it awaits the nod from Lok Sabha. But still the terms are not clear and it is left at the discretion of the Court. It is necessary to recognize marriage as an equal economic partnership between husband and wife, and to give weight to the wife‘s contribution to the acquisition of assets by the husband by suitable legal mechanisms. Although the adage is, behind every successful man there is a woman‖, this is hardly recognized in the context of married couples. Since, matrimonial property exists independently of the separate properties of the spouses and does not rest on their religion based personal laws, the Indian Parliament now must enact an independent Act providing a statutory regime of matrimonial property for every couple in India irrespective of their religion, caste or creed a step towards achieving the Constitutional directive of the Uniform Civil Code under Article 44.[106]

vii) Application of matrimonial property provisions and Muslim Law

Any proposal for the introduction of a matrimonial property law is bound to give rise to some controversy and doubts. The important question that needs consideration is whether any such law can be construed as an interference with the Muslim religious sentiments. Muslim marriage, as is well known, is a contract and such sharing can be regarded as incorporated in the marriage contract. In contemporary India, the greatest stumbling block in introducing any reforms in the law applicable to Muslims is the attitude of the government, combined with male Muslim opinion. The government‘s position is that no reforms in Islamic law will be introduced unless the initiative comes from the community‘. From the past experiences it is clear that community among Muslims means orthodox fundamentalist males and those who are opposed to reforms. But this is also a fact that males in all communities are likely to oppose any proposal relating to matrimonial property as it will affect their interests The resistance to reforms is understood to be due to the fear that the identity of the community will be effaced. Marie-Aimee Helie-Lucas observes: In all Muslim societies today .fundamentalists stress the quest for identity.

There is similarity in the arguments they put forward, despite their totally different historical and political situations. The arguments can be seen in Pakistan, for example, where the State is Muslim and was specifically created as such to protect the Muslims who today form more than 90% of the population. But the very same arguments are also encountered in India, Srilanka or Nigeria, where Muslims enjoy separate laws on the basis of their minority status[107] The same issue arise in socialist Algeria capitalist and cosmopolitan Tunisia and in Saudi Arabia, whose royal capital swamps the international activities of fundamentalist groups with its resources. They appear in Morocco under its monarchial regime but also in theocratic Iran and the comparatively democratic Senegal, where the Muslim majority is demanding the repeal of the Civil Code and the adoption of Shariat law Under all these different political regimes and irrespective of majority or minority status, Muslim identity is described and perceived under threat Under Islamic law a wife is entitled to an

[106] The Married Women (Protection of Rights) Bill, 1994(Bill No. XXV OF 1994), Section 3(3)
[107] Ibid

eighth share of her husband‘s property but it would be available to her only on his death. As long as the husband is alive, he is the sole owner of the property. ―A divorced lady has no share in the marital property. Under Muslim law a divorced wife is entitled to maintenance only during the compulsory period of waiting or iddat that lasts three months after the dissolution of marriage. After iddat, the woman is free to remarry and hence she has no further share in her former husband‘s property,‖ says Jahurul Islam, advocate, Calcutta High Court63. A definitive and controversial case on maintenance for Muslim women was the Shah Bano case in 1986. As she had no means to support herself and her children after her divorce, Shah Bano had approached the court to secure maintenance from her husband. The apex court passed a landmark judgement wherein it invoked Section 125 of the Code of Criminal Procedure, which applies to everyone, regardless of caste, creed, or religion. It ruled that Shah Bano be given maintenance money, similar to alimony. However, following outrage by certain sections, the Congress-led Parliament nullified the Supreme Court‘s ruling in the Shah Bano case on divorced women‘s right to maintenance So forget a share in property, the Indian government has been unable to even ensure maintenance for all divorced women.

The scenario is quite different in western countries where women have it better than their Indian counterparts. In nine states in the US (Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington and Wisconsin) there exists the concept of joint marital property or community property. In these states, the formation of a marriage creates a new category of property called community property.[108] The wife and husband have equal rights to manage their property jointly. In all the other states, each spouse does not automatically acquire an equal interest in property obtained during marriage. Property interests depend upon each state‘s constitution and statutory provisions, or an express agreement between the spouses. ―It is a more common practice in the US to enter into pre-nuptial agreements in order to avoid division of assets according to the principles of community property says Banerji. In the UK, Section 25 of the Matrimonial Causes Act, 1973, governs the equitable distribution of property in the event of divorce The question that must now be asked is Can such a regime be introduced only for Hindus? The new law seeks to change a sui generis change in the matrimonial property regime. Its prime justification is the recognition of the contribution made by a woman, which may be either monetary or non-monetary to the acquisition of material assets. It involves recognition of equal rights of women in marriage. Marriage is a recognized institution for women of all religions and the contribution that women make to the institution is common—regardless of the religion to which she belongs. How then can a benefit be conferred on a married woman of one religion and not on another? Such conferment of benefits would be blatantly discriminatory based on religion alone. The Constitution of India guarantees the right to freedom of religion but the conferring of a benefit on woman

[108] Naeem Vargo and Robin Goldfaden, The Goa Uniform Civil Code—Alive and Kicking , in Justice For Women (ed. Indira Jaising), The Other India Press, 1996, p20.

cannot be said to be an interference with religion. On the contrary, religion is a prohibited classification under the Constitution. Not conferring such a benefit would violate their right to freedom of religion. For a woman will be told, you are free to practice your religion, but if you do, you will not be eligible for this benefit. Must a woman then opt— either for her religion or for marital property She would be required either to renounce her religion or marry, not under her Personal Law, but under a special law a course which may deprive her of her rights under Personal Law. It is precisely to avoid such consequences that the Caste Disabilities Removal Act, 1860 was passed.

A common civil code is felt necessity to avoid disabilities which attach to a person by virtue of religion – something which the 1860 Act sought to do. So long as a system of laws applicable on the basis of religion continues, different laws will apply to different women. But when the State intervenes to regulate on the subject of marital property, it cannot single out women of one community for benefits. [109]A colonial State, with limited legislative powers and with no obligation to guarantee fundamental rights could afford to continue to divide communities on religious lines. But a sovereign democratic state can have no such justification. A state acquires its power to bind citizens by its laws by virtue of the fact that they are citizens or nationals of the state—not because they belong to a particular religion. Thus the demand voiced by some feminist groups and activists that matrimonial property law should be enacted for all or none is unrealistic. The interests of Hindu, Christian and Parsi women cannot be sacrificed at the altar of (male) Muslim opposition to any change B) Right to Matrimonial Home/ Residence The institution of marriage is of vital importance to man and society at large. However, the concept of indissolubility of marriage no longer holds true. With the change in socio-economic conditions, marriages are becoming more and more vulnerable. With more girls going in higher education and jobs, they are becoming aware and enlightened. Financially they are less dependent. Problems of adjustment arise due to clash of egos, or interference of in-laws and the like. Quite often, the families are emotionally wrecked. In order to alleviate the sufferings of such spouses who find it impossible to continue together, the law makes provisions for divorce. Divorce, however, is not a panacea and brings in its wake various problems for the husband, wife, the children and for the society too A very practical and a serious problem that a wife is faced with after divorce is that she is rendered homeless and shelter less. There is no provision enabling her to continue to stay in the matrimonial home. All girls do not have parents, or parents willing to accommodate or support them after divorce. There are practically no State shelter homes for such women and children. In such circumstances, a very vital issue is where does a woman go after divorce Can she legally continue to stay in the matrimonial home or in other words, can the husband be stopped from turning her out of the house The law is silent and nothing is said either way.

[109] Sukanya Nihal Singh, *Prospectus for Women Empowerment,*225 (Common Wealth Publishers, 2001)

The issue became a subject for judicial adjudication in Bombay High Court. A wife was driven out of the matrimonial home in 1984, after five years of marriage. There was a short span of reconciliation which ended in a break again.[110] She tried to re-enter her matrimonial home but was not allowed. She spent a night outside the house. Next day, she entered the home and also secured ad interim orders restraining her husband and in-laws from turning her out or interfering with her free access to the house. The husband went in an appeal to the High Court against this order. The Judge vacated the lower court's order on the ground that the wife's re-entry to the house amounted to forcibly capturing the premises. On behalf of the wife it was argued that the house being the matrimonial home wherein she had lived for many years, she had a right to reside there and that, her being kept away from that house for sometime should not defeat her right to come back and stay there. The Court did not accept these contentions and held that, If this argument was accepted in all its implications, it would be impossible to prevent public disorder on a very wide scale. Today it is a case of a wife entering her alleged matrimonial home. Next it will be others, including persons with all sorts of claims, existent, bonafide, dubious and dishonest. A State subject to the rule of law cannot permit this to happen – may, not even in the name of feminism or for protection of deserving‖ This judgment is not a happy one. There is no logic whatsoever in equating the claim of a wife to reside in her matrimonial home to the claim of others The concept of matrimonial home includes only the spousal relationship and others‖ whose claims may be dubious and dishonest.‖ In this context, a mention may be made to the provision under the English Law which gives protection to a spouse to live in the matrimonial home. These protections are granted by the Matrimonial Homes Act, 1967 and by the Domestic Violence and Matrimonial Proceedings Act, 1976. The former Act protects a spouse who has no contractual or statutory right to remain in occupation of the home. Such a spouse has a right not to be evicted or excluded from the dwelling house or any part thereof by the other spouse except with the leave of the Court, and if not in possession, a right with the leave of the Court to enter into and occupy the dwelling house. Thus, the Act protects the wife who has no property of her own. In case of a wife who is a joint owner with her husband, she has a legal right to live in the house.

In an interesting English case, Gurasz v Gurasz[111], fifteen years after marriage, the wife left the house owned jointly by the spouses. The wife alleged that the husband had been persistently cruel to her and her children and she had left because of his treatment. After leaving, the wife was unable to find a suitable accommodation for herself so she applied under Section 1 of the Matrimonial Homes Act, 1967 for an order that she be given leave to enter and occupy the matrimonial home and that the husband's right to remain there should be terminated. It was contended for the husband that as the wife was a joint owner of the house with him, the Court had no jurisdiction to make the order sought. The county court judge ordered the husband to vacate the matrimonial home and that the wife should re-enter the home with the children. On appeal, this order was affirmed. Under the Domestic Violence Act, 1976, a county court can grant injunction, inter alia, excluding

[110] Ibid
[111] (1970) p.11

the other party from the matrimonial home or requiring the other party to permit the applicant to enter and remain in the matrimonial home. Thus, if a wife is harassed or battered by the husband, he can be asked to leave the house or, if he turns out his wife, he can be asked to permit her to enter and live in the matrimonial home. Indian laws are inadequate in this regard and a woman whose marriage has broken, whether dejure or defect to, has nowhere to go. Two judgments, one of the Supreme Court and the other of the Delhi High Court may be referred here since they have a bearing on the issue of matrimonial home. In B.R. Mehta v Atma Ram[112] it was held that a house owned by or allotted to wife is not the matrimonial home over which the husband can have any right, domain or occupation. The issue arose in case of litigation under the rent law. Under proviso (h) of Section 14(1) of the Delhi Rent Control Act, 1958, one of the grounds on which a landlord can have his premises vacated is that ―the tenant has built, acquired vacant possession of, or has been allotted a residence The question before the Supreme Court was whether allotment of a house to a wife, a government employee, in all circumstances, disentitled her husband the tenant, to retain the rented premises. The additional rent controller, rent control tribunal and even the High Court held that on wife‘s getting accommodation, the husband acquired vacant possession of the residence under provision and hence he was not entitled to retain the disputed premises. The Supreme Court, however, reversed this judgment and held that the wife‘s house was not the matrimonial home over which the husband could have a right, domain or occupation.

Reference was made to Revti Dutt v Kishanlal[113] in which the Delhi High Court observed If he [husband] goes to stay in the house of his wife, legally speaking, he has no right as such to stay and can be turned out from the house at any time by its legal owner, namely, the wife. There was no law according to which the husband and the wife could be deemed to be one person‖. Would this mean that even a husband‘s house is not the matrimonial home for the wife Which home then can be a matrimonial home So long as the spouses pull on well, there is no problem but if with slightest tensions and misunderstandings, one threatens the other with eviction, serious problems are bound to arise in matrimonial relationships. Such interpretations, as given in B.R. Mehta and Revti Devi are liable to make matters worse for divorced or separated women who have no shelter of their own.

i) Wife's Right of Residence:

Right of residence is a part and parcel of wife‘s right to maintenance, which has been statutorily recognised by Section 18 coupled with Section 3(b) of the Hindu Adoptions and Maintenance Act. Rent control laws also provide for protection not only of the tenant‘s interest but also, of those who are entitled to reside therein. In two cases a very significant issue was decided by the apex court which involved the right of a wife to defend herself in eviction proceedings filed by the landlord against her husband. In B.P. Achala Anand, the appellant was the legally wedded wife of the respondent. The matrimonial home was a tenanted premise in the name of

[112] A.I.R. 1987 S.C. 2220
[113] 1970 Ren. C.J. 417 (Del)

the husband. When their relationship got estranged, he deserted his wife and children and walked out to reside in a lodge. In 1991 proceedings for dissolution of marriage were initiated and on 3.12.1998 a decree of divorce by mutual consent was passed. In November 1991 the landlord served an eviction notice on ground of bona fide self need and rent arrears under section 21(1)(a) of the Karnataka Rent Control Act,1961. The husband, however, was not serious in contesting since his relations with the wife were strained and in any case he was not residing in those premises. The wife, therefore, sought impalement in the eviction proceedings so as to defend the case. The trial court rejected her application but the High court allowed the same in appeal. The wife was permitted to be brought on record as a defendant subject to her depositing Rs. 10,000/ towards arrears, which she did. The eviction suit was disposed of by the trial court, which ordered partial eviction of the tenants. The aggrieved landlord filed a revision before the High Court. The High Court held that there was no relationship of landlord and tenant between the landlord and the wife that tenancy vested only in the husband who had given away the contest. Accordingly, the order of partial eviction was set aside and eviction order under section 21(1) (a) of the Karnatka Rent Control Act, passed. Hence the wife's appeal by special leaves. The main issue was as to a deserted wife's right to contest the eviction suit in view of the fact that her legal right to residence is a concomitant of her right to maintenance. The Court observed that members of the family of the tenant are entitled to seek relief to contest the proceedings and such leave may be granted by the court if the court is satisfied that the tenant was not defending by collusion, connivance or neglect – or was acting to the detriment of such persons.

On the issue of a wife's right to residence in the matrimonial home the Court referred to, inter alia, ***Dr. Abdur Rahim Undre v Smt. Padma Abdur Rahim Under***[114] and M /s Bharat Heavy Plates and Vessels Ltd78 Analyzing the case law, the court held that a deserted wife who has been or is entitled to be in occupation of the matrimonial home is entitled to contest the suit for eviction filed by a tenant against her husband provided (i) the tenant has given up contest or is not interested in contesting thereby prejudicing the interests of the wife who is residing therein; and (ii) the scope and ambit of the contest or defence taken by the wife would not be on a footing higher or lower than that of the tenant himself. This right, however, comes to an end with the wife losing her status as wife consequent upon divorce and the right to occupy the house as part of right to maintenance coming to an end. The court remarked Divorce is termination of matrimonial relationship and brings to an end the status of wife as such. Whether or not she has the right of residence in the matrimonial home would depend on the terms and conditions in which the decree of divorce has been granted and provision for maintenance (including residence) has been made. In the event of the provision for residence of a divorced wife having been made by the husband in the matrimonial home situated in the tenanted premises, such divorced wife too would be entitled to defend in the eviction proceedings, the tenancy rights and the rights of occupation there under in the same manner in which the husband tenant could have done and

[114] A.I.R. 1982 Bom 41

certainly not higher or larger than that‖. In the case under review, during the pendency of the eviction proceedings in the high court a decree of dissolution of marriage by mutual consent was passed on 3.12.1998. The terms and conditions of such settlement were not brought on record to indicate whether the wife was entitled to continue her residence in the tenanted premises by virtue of an obligation incurred for her as part of maintenance. Consequently, it was held that the wife cannot be allowed to prosecute the appeal against eviction and defend her right against the claim for eviction made by the landlord. The other significant apex court judgment in Ruma Chakraborty was also on almost similar facts. B.P. Achala Anand was relied upon in support of its finding that a divorced wife stands on a different footing than a deserted wife as divorce brings to an end the status of a wife as such. Whether or not she has the right of residence in the matrimonial home would depend on the terms and conditions on which the decree of divorce has been granted and provisions for maintenance- including residence- has been made. [115]In this case, in the divorce order made by mutual consent, the husband was ordered to pay a sum of Rs. 200 p.m. for maintenance of children only. The appellant / wife in the opinion of the court had expressly waived her right to maintenance. It was held We are of the opinion that the court has no jurisdictional power to add a person as a party who is neither a necessary party nor a proper party. The appellant in the status of a divorcee cannot claim interest in the suit premises either independently or through her erstwhile husband and as such she cannot be held to say that she is a party without whose presence the court cannot adjudicate and pass a decree The appellant is also not a person whose presence is necessary to enable the court to effectively and completely adjudicate all the questions involved in the suit.‖ These two judgments of the Apex court have made it explicit that the wife has no legal right to stay in the matrimonial home after divorce. There is thus an urgent need for adequate and effective law to protect a wife‘s need for shelter after divorce. Award of nominal amounts by way of maintenance do not meet such need. On divorce, women are entitled to only a meager amount of maintenance which is insufficient to procure separate residential premises for themselves and the children under their custody. Women who have secured a job are not even entitled to maintenance, even though during the subsistence of marriage they may have opted out of paid employment to support the family and to have and raise children. A decree of divorce will disentitle a woman of her right to a shelter or matrimonial residence. This becomes a compelling reason for women not to opt for divorce even in situations of extreme domestic violence.

The fear of being rendered shelter less is overwhelming, particularly for women in the urban settings, where housing is expensive and beyond the access of ordinary middle and low income groups. In an important case dealing with the matrimonial home, the Delhi High Court has reiterated that merely because the husband moves out of the place where the couple last resided, the matrimonial home did not necessarily shift to where the husband currently resides. The case arose from a suit by the parents of the husband for possession of their house occupied by the estranged daughter-in-law, though the son had vacated the premises. While the High

[115] Ibid

Court set aside the decree of the lower court on the ground of non-joinder of the husband to the suit, the case has implications for determining the locus of the matrimonial home in the event that the husband alone moves out of the house where the parties last resided jointly. The Delhi High Court has also clarified that this matrimonial home cannot be treated as the shared household for purpose of The Protection of Women From Domestic Violence Act, 2005 in all cases. Dealing with a case83 where the spouses lived together in a house where the husband did not have a right to live as the property belonged exclusively to the parents of the husband, the Court held that the daughter in-law could not claim a right to live in such a house and granted an injunction to the in-laws restraining the daughter-in-law from forcibly entering the house of her in laws.[116]

ii) Protection of Matrimonial Residence under the Protection of Women from Domestic Violence Act, 2005

The right of residence in the matrimonial home is a crucial right of survival for most married women and is implicit within the contract of marriage. But, since this right was not statutorily protected, a husband could, at his whim, drive the wife out of the domestic residence. Devoid of statutory protection, the right hinged upon astute layering, sympathetic and sensitive judges, and stray innovative judicial pronouncements. Women's groups in India had been campaigning for several decades for a specific law which would protect this right. Finally, under the Protection of Women from Domestic Violence Act, 2005, this right was awarded statutory recognition under the notion of a shared household. This Act which came into force on 26.10.2006 has been enacted by Parliament essentially to provide for a remedy under civil law, which is intended to protect women from being victims of domestic violence and to prevent the occurrence of such violence in society

As a part of this strategy, this Act seeks to provide, inter alia, for the right of a woman to reside in her matrimonial home or shared household, whether or not she has any title or rights in such home or household. Such a right is concretely secured through a residence order', which is passed by the magistrate. Lest the protective right of the women from domestic violence is lost in the realm of uncertainty, the Act provides a fairly comprehensive definition of the expression shared household which seems to be a replica for the concept of matrimonial home. Likewise, the concept of domestic violence has also been provided with the widest possible amplitude87.It includes within its ambit any act (omission or commission or conduct) that causes any physical abuse sexual abuse verbal and emotional abuse and economic abuse of the aggrieved person either directly or indirectly by any person in domestic relationship[117]

This Act reinforces the right of woman to the property and any act, which deprives her of any economic or financial resources, or household effects and facilities, shall constitute domestic violence. Respondent means any adult male person who, or has been, in a domestic relationship with the aggrieved person and against whom the aggrieved has sought any relief under the Act. The Act provides protection not only to married

[116] Devlina Ganguly Knotty Issue, The Telegraph, Calcutta, Aug 19,2009
[117] The Constitution of India, Articles 25-28

women but also to a sisters and daughters. The Act applies only to circumstances in which men subject a woman to domestic violence, except in the case of a married woman she can complain against the female relatives of her husband. A daughter can complain against her father and a sister can complain against her brother. The Act provides for the woman's right to reside in matrimonial or shared household, whether or not she has any title or rights in the household. This right is secured by a residence order, which is passed by a court and cannot be passed against a woman. In certain cases if she has to be provided alternate accommodation, her maintenance was to be paid by her husband. Thus in case of a married woman the Act secures her right to reside in the matrimonial home in the sense that she cannot be thrown out of it unless a statutorily recognized decree of divorce has been granted. However the right under PWDVA is of a limited nature and does not give the woman title or interest in the property. It also does not protect the woman against third parties (for instance, the landlord). It is also difficult to enforce after divorce since divorce severs the marital bond.

Two important decisions on the recent legislation, whereby Hindu women wanted to enforce their residential rights in the matrimonial home against the wishes of their husbands; infact highlighted the utter futility of this provision in the Indian patriarchal setup that bares the patrilocality. In a case from Delhi owing to matrimonial dispute the wife left the matrimonial home and started living with her parents.[118] The husband filed a petition claiming divorce and the wife as a counter to the divorce petition filed criminal cases under sections 406; 498-A ; 506 and 34 of the Indian Penal Code and got the family of her husband including him arrested, who were granted bail after three days. She shifted to her parent's residence from where she then tried to enter the house, which was of her mother-in-law failing which she along with her parents forcibly broke open the locks of the house. The appellants alleged that they were terrorized by their daughter-in-law. Meanwhile mandatory injunction had been filed by her to enable her to enter the house. Trial judge granted temporary injunction restraining appellants from interfering with possession of wife. The husband had meanwhile shifted to Ghaziabad. When the appeal was filed against the order of trial court, Senior Civil Judge dismissed the claim of the wife and held that as the husband was not living in this house it is not the matrimonial home and the wife had no right to any property that does not belong to her husband. The wife preferred an appeal to the High Court which reversed the judgment of the lower court and held that only because the husband changes his residence, it would not shift the matrimonial home and therefore, the wife was entitled to retain the premises, owned by her mother-in-law. The matter went to the apex court. The court held that as the premises in question belonged to the mother-in-law of the wife and not to her husband, the wife had no right whatsoever to claim any possession rights in such house. Even if this was the house where she and her husband had lived together after getting married, it would not make this house as their matrimonial home in the sense that she could claim legitimately a right of residence in it against the wishes of its owners. In another

[118] Ibid

parallel case that came from Bombay the husband filed a suit against the wife claiming divorce and the wife filed a corresponding petition claiming her right to continue to live in the matrimonial home and sought an injunction against her dispossession. The premises in question did not belong to the husband but in fact were in the name of his mother.

A little before the presentation of the suit claiming divorce, the husband and the wife had shifted to another premises near the house of the mother-in-law, but the wife staked her claim not on that premises but wanted to enforce her rights of residence on the premises owned by her mother-in-law[119]. Here again the court rejected her claim on the ground that merely because the wife stayed in the house of her mother-in-law along with her husband, she would not get a legal right of residence in the mother-in-law's house. It is not the property in which the husband had any right. The right is available only as against the husband and not against any member of his family. Both the cases point towards one curious feature. In Indian society, upon marriage it is the woman who leaves her parent's home and joins the husband's household. In several cases the wife goes and lives in a home owned by either of her parents-in-law and is expected to live with them. Her duties include not only looking after the husband but his entire family and their needs. If she wants the husband to maintain a separate residence and the husband refuses, she has no remedy. If she is kicked out of such homes, she again has no remedy as the house does not stand in the name of the husband. Her rights clearly are statutorily secured if she lives in her husband's house than when she lives in her in-laws house. In such a scenario, the court's verdict that Indian society expects a son to live with the parents so that he can look after them in their old age may be a little too harsh on the wife. It is a paradoxical situation for an Indian woman, that neither her rights to insist on a separate residence can be recognized by the courts as against the wishes of her husband, nor can she claim any rights of residence in the house of her in-laws. Thus the Act has in explicit terms given a right of residence in the shared household, that is, the household in which the parties were living during their marriage whether it belonged to either or both of the parties or not. But Supreme Court has, however, not allowed this right of residence to a wife even though the residence was a shared household in the above cases. Even though the effect of this judgment has been subsequently whittled down by another Supreme Court judgment where it ruled that an estranged wife has a right to stay in her husband's house and is entitled to maintenance from him under the PWDVA even if the estrangement had occurred prior to the enactment of the law; such judgments will keep on reappearing given the patriarchal nature of sections of our judiciary.

5.2 RIGHT TO RESIDENCE: AN ESSENTIAL ELEMENT OF MAINTENANCE

[119] Kusum, *Women's Shelter after Divorce or Separation, in Women, Law and Social Change* (ed. by Shamsuddin Shams) , Ashish Publishing House, p 55.

The term maintenance has not been defined under the Hindu Marriage Act but is understood to have a monetary connotation and its quantum, enough to prevent destitution and vagrancy of the grantee. It is never intended to financially or economically strengthen the indigent spouse, but should be sufficient to take care of his/her primary needs. The basic needs have been answered variedly by different courts in the light of the facts and circumstances of each case but in case of a spouse who is thrown out of the home, should it also include a residence is a question that becomes very important from the point of view of an estranged wife as the first problem is that she is confronted with situations like where to go The Supreme Court has declared right to residence as an essential element of maintenance.[120] The facts of case such that a suit was filed by the owner for declaration of title to the property that he had purchased out of his funds. The wife had taken exclusive possession of this house pursuant to a decree of maintenance. The High Court declared the husband to be the owner of the property; directed the wife to handover the possession to him and observing that in view of the factual setting in the case when the relations between husband and the wife are estranged, the wife cannot still claim a right of residence in the matrimonial home so as to resist a decree for possession, dismissed the second appeal preferred by the wife. The matter was taken to the Supreme Court, which endorsed the right of a woman to a residence' as included in the general term of maintenance and observed

Maintenance must necessarily encompass a provision for residence. Maintenance is given so that the lady can live in the manner more or less to which she was accustomed. The concept of maintenance must therefore include provision for food, clothing and the like and take into account the basic need of a roof over head. Provision for residence may be made either by giving a lump sum in money or property in lieu thereof. It may also be made by providing for the course of the lady's life, a residence and money for other necessary expenditure. The case was remanded back to the High Court with appropriate directions to consider it on merits keeping in mind that the wife's rights of maintenance include a right of residence in the matrimonial home as well.

C) Contribution of the Homemaker: Evolving Jurisprudence

i) Housewife's contribution in household work

Unpaid work can be understood to comprise all productive activities outside the official labour market done by individuals for their own households or for others.[121] These activities are productive in the sense that they use scarce resources to satisfy human wants. Housework, care for children and for sick and old people, do-it yourself jobs and voluntary community work or work in political or societal organizations, subsistence agriculture, help in family businesses, building the family house, maintenance work, transport services etc have one thing in common: they could, at least in theory, be replaced by market goods and paid services. This

[120] Ibid

[121] The Protection of Women From Domestic Violence Act, 2005

socalled third person criterion distinguishes unpaid work from consumption and from time and energy invested in one's own education99.For the same reason, personal activities like sleeping and leisure activities fall outside the definition of unpaid work. Unpaid work consists of time used as an input (often together with the use of purchased goods and/or consumer durables used as capital equipment) in nonmarket production processes; unpaid work is part of a particular 'mode of provision' for human needs The skewed distribution of work, paid and unpaid, between women and men, was made visible in the Human Development Report 1995. A sample of 31 countries studied indicated not only that of the total burden of work, women do more than men (53% in developing countries and 51% in industrial countries), but also that of women's total work time - both in developing and in industrial countries - roughly two-thirds is spent in unpaid work and one-third in paid work.

For men in industrial countries these shares are reversed. Men in developing countries spend even less of their total work time in unpaid work: roughly one-fourth. - The burden of unpaid work and paid work respectively are distributed unequally between men and women As a result, 'men receive the lion's share of income and recognition for their economic contribution - while most of women's work remains unpaid, unrecognized and undervalued Family is a concrete entity where production and reproduction of social life is carried out. Although, every member should have the right to family resources, yet family itself promotes gender subordination and sexual discrimination because of which women are more vulnerable in family relationships. The family- based work continues to increase. In sharing the economic responsibility in the family, men go to work outside home, whereas women contribute to domestic chores. Sometimes, women go out for work which creates equality for them. Therefore, family‘s economic responsibilities are not divided equitably among its members. In addition to domestic work, women also work at farm or outside to supplement family income According to Posner the household is not only a producing unit but is also a consuming unit. A family in essence promotes division of labour and at the same time gains from it. In most families, the husband specializes in market employment and earns income on which the wife devotes time and processes it into tangible and intangible outputs. The most important input is the time and processing it into tangible and intangible outputs. The most important input is the time devoted by the wife whether earning or not [122]The result is that the husband is freed from household chores. In other words, household work done by a housewife or even an earning wife maximizes real income of the family. By tradition and by law, the housewife is not taken to be a productive worker in the economic sense of the term. The reward she gets in exchange of the services she renders is not economic, rather, is not expected to be economic. She is supposed to find and seek her own reward in psychological and emotional terms, that is, satisfaction that the other members of the household are satisfied through her. In other words, her reward is vicarious. However, the economists would point out that she gets paid for her services in real terms, in terms of goods and services. And this payment through access to goods and services in return for housework is considered a determinant of

[122] Ibid

her status in her family. It also determines her sense of independence within the family and in the society at large, and finally, in her planning of the family budget.

On the other hand while she does not have to pay any tax to the government, she does not enjoy retirement benefits and is not entitled to superannuation, pension and so on. In other words, she does not have any old age support, in the economic sense, if she ceases to work. Her support in her old age, when she becomes incapable of work, is based on the emotional relationship she has developed with the members of her family. This is not the case with a housewife who holds a job outside the home. While she gets paid for the job she holds, her position as far as housework is concerned, remains the same.

The quantum of her work is barely reduced, though there is a slight improvement in her status because of her remunerative work outside the home. Perhaps, this is one of the major reasons responsible for the dwindling number of women who keep themselves confined to housework. They prefer to branch out into the market and find an economic identity for themselves. Housewives services are not included in computing the gross national product. But this does not signify that housework is an uneconomic area. There are certain common elements that define housework for housewives all over the world. These may be enumerated as follows:

i) Housework is essential to our socio-economic structure of which the family is the basic unit.

ii) Housework is petty, isolated and monotonous work, involving unending hours of hard and unrewarding labour[123]

iii) It is highly labour-intensive but is not paid for

iv)Housewives, therefore, have very little income left out of the housekeeping money allotted to them and that too, provided they are not asked to account for the housekeeping allowance to the major income-earner in the family.

v) Housework is geographically and occupationally immobile work, unlike the functioning of nurses or carpenters or economists

vi)Housework is full of risks and hazards. For the instance, it is estimated that about million American housewives are injured inside their homes every year apart from being injured in marital violence.

Besides these, it is ironical that the commercial economy has an analogy for every item of housework. For instance, restaurant meals provide the analogy for good preparation, cooking and serving of meals. Dryers and cleaners offer the analogy for washing and laundering services. Housecleaning can be done by commercial housekeepers. All these jobs, in the commercial set up, are obviously paid for services. Thus they are included

[123] S.R. Batra v Taruna Batra (2007) 3 SCC 169

in the computation of the Gross National Product. But ironically, domestic housework remains unpaid for when the housewife does it. The question of paying the housewife for housework is negated because it is said to commercialize the home-unit and fuse the concepts of market and home. A woman‘s work at home and her work in the market are, therefore, two ends of the same continuum Dr. Mahbub-ul-Haq very rightly says that —if you look after your child your work will not be counted in the national income account; if you cook it is not work but if you hire someone it is Women‘s contribution to household is classified as subsidiary. It is not taken into account for calculating gross national product. If such work was done outside home, it would attract wages at a higher rate[124] Therefore, house- based workers need certain amount of visibility which is lacking in this type of work. It calls for research, followed by suitable measures, whereby domestic work is recognized and women adequately compensated for their economic contribution at the family level and share family‘s economic responsibility equitably with men. In Assam, besides looking after home, women participate effectively in most of the agricultural operations and construction work. In Orissa, since land is registered in the name of men only, women are unable to get institutional credit. In Manipur, they run a bazaar. In market women are found marginally at retail points. The social constraints against women and their preoccupation in non remunerative jobs are the major factors for lower reward of their income The Indian patriarchal system strengthens control over material assets in favour of males and perpetuates stereotyping of roles firming financial dependency of women on men. An Indian women‘s assumption of household responsibilities take her no where if after spending substantial part of her life in domestic drudgery a broken marital cord forces her to fight for her survival. In absence of evaluation of homemaking as an economic contribution, this important though unremunerative work does not translate into a right to own material assets looked after by a wife as part of her house-keeping control and meager quantum of maintenance to be squeezed out from the pocket of an unwilling husband under the compulsions of a court‘s direction. The Indian Judiciary and the personal laws have also consistently failed to quantify the contribution of the homemaker. General Recommendation No. 17 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) dealt with measurement and quantification of the unremunerated domestic activities of women and their recognition in the Gross National Product.

It affirmed that the measurement and quantification of the unremunerated domestic activities of women which contribute to development in each country will help to reveal the de facto economic role of women and it recommended that State-Parties should inter alia encourage and support research to evaluate the unremunerated domestic activities of women to quantify and to include this in the Gross National Product. It recognized that most of the unpaid work around the world is performed by women. The House of Lords in

[124] M. Bruyn-Hundt, *The Economics of Unpaid Work. Amsterdam*: Thesis Published, 1996, p26..

Miller v. Miller[125] strongly articulated that there has to be some sort of rationale for redistribution of resources from one party to another. It held that there are at least three rationales—need (generously interpreted), compensation and sharing for redistribution, which individually or collectively look at factors which were linked to the parties relationship, either causally or temporally. The most common rationale is that the relationship has generated needs which the other party should meet. The court in such cases try to ensure that each party and their children have enough to supply their needs which is set at a level as close as possible to the standard of living previously enjoyed. A child is the major source of need. Another source of need is having had to look after children or other family members in the past which compromise the ability of many homemakers to attain self sufficiency as a result of family responsibilities. Yet another source of need may be the fact how the parties chose to run their life together. The House said that even dual career families are difficult to manage with complete equal opportunity for both as compromises often are made by one so that the other can get ahead. The needs generated by such choices are a perfectly sound rationale for adjusting the parties respective resources in compensation.' The second rationale closely related to need is compensation for relationship generated disadvantages. The economic disadvantage generated by the relationship may go beyond the need. The third rationale is the sharing of fruits of matrimonial partnership. Earlier, in White v. White[126] it was already settled that domestic and financial contribution should be treated equally. It clarified that Section 25 (2) (f) of the 1973 Act112 does not refer to contribution which each has made to the parties accumulated wealth but the contributions they have made and will continue to make to the welfare of the family.

ii) Position in India

In India, husband and wife is not one person and there is no community of interests in their respective properties. However, maintaining the separation of properties, it is possible to distinguishing the category of property in which both the spouses have common interests either because of its acquisition through joint efforts or because of an intention to treat a property as common property of both. Matrimonial property law seeks, among other matters, to quantify a spouse's contribution to the marriage in order to ascertain shares at the time of death or dissolution of marriage While a string of legislations on matrimonial property rights have been made in most countries which have taken into account the hitherto unexplored subject of quantifying the contribution of the homemaker and courts have from time and again dealt at length with this issue, Indian courts, very strangely and unfortunately have refrained from discussing this issue. No attempt has been made in passing any suitable legislation to address critical issues in division of matrimonial property. However,

[125] [2006] UKHL 24
[126] [2001] 1 A.C. 596

scattered efforts have been made to appraise the value of the homemaker in insurance suits. In an extremely slow pace a skeleton of jurisprudence pertaining to contribution of homemaker is shaping in cases related to insurance claims and the like. In Lata Wadhwa v. State of Bihar[127] the Supreme Court was dealing with the monetary value of services rendered by the housewives to the households in order to compute the compensation under the Motor Vehicles Act, 1988. the court was of the view that taking into consideration, the multifarious services rendered by the housewives for managing the entire family even on a modest estimation should be Rs. 3,000 per month and Rs. 36,000 per annum. This would apply to all housewives between the age group of 34- 59 and as such who were active in life…‖. As far as the elderly ladies were concerned in the age groups 62-72, the value of the services rendered by them to the household was modified by the court to be Rs. 20,000 per annum with the appropriate age specific multiplied as provided in the Act in addition to the conventional sum of Rs. 50,000 awarded in such cases. This quantification of the value of house work performed by woman has been followed in tort cases where there was medical negligence. Compensation amounting to Rs.12,000 was ordered to be recovered by the State from the negligent doctors in Sobhag Mal Jain v. State of Rajasthan[128] . In an earlier case where high intensity electricity lines snapped leading to death of a person, the rule of strict liability was held to apply. In Surjya Das v. Assam State Electricity Board[129], where such an accident happened and the petitioner‘s wife was electrocuted, the Gauhati High Court computed the quantum of compensation taking her earning‘s to be about Rs. 1500 per month, she being a daily wage earner. This was done without any reference to the minimum wages fixed in the State in 1999 when the accident took place. It is disappointing that the Court nowhere explains the basis on which it arrived at this figure. It must be pointed out that in cases where women are earning, their contribution to the household work should also be taken into consideration, as a separate factor apart from the loss of loss of earning while computing compensation. In Malay Kumar Ganguly v. Dr Sukumar Mukherjee and Ors[130] the Apex Court following Lata Wadhwa stated that: ―For compensating a husband for loss of wife, therefore courts consider the loss of income to the family. It may not be difficult when she had been earning. Even otherwise a wife‘s contribution to the family in terms of money can always be worked out. Every housewife makes contribution to his family. It is capable of being measured on monetary terms although emotional aspect of it cannot be. It depends upon her educational qualification, her own upbringing, status, husband‘s income.‖ Justice Prabha Sridevan in a recent case in the Madras High Court relied heavily on the decision of the Apex Court in Lata Wadhwa and noted that: The role of a housewife includes managing budgets, coordinating activities, balancing accounts, helping children with education, managing help at home, nursing care etc. One formula that has been arrived at determines the value of the housewife as, Value of housewife= husband‘s income+ wife‘s income+ value of husband‘s household services, which means the wife‘s value will increase inversely proportionate to the extent of participation by the husband in the household duties. The

[127] A.I.R. 2001, SC, 321
[128] A.I.R. 2006, Raj 66
[129] A.I.R. 2006, Gau.59
[130] 2009 (10) SCALE 675.

Australian Family Property Law provides that while distributing properties in matrimonial matters, for instance, one has to factor in the contribution made by a party to the marriage, to the welfare of the family constituted by the parties to the marriage and any children of the marriage, including any contribution made in the capacity of a homemaker or parent.' If we look at some of the rulings of the CEDAW with regard to complaints made to it, we find the high prevalence of the stereotypical attitudes with regard to the role of women that constitutes a serious impediment to the full implementation of the said Convention.

One cannot ignore or forget that the homemaker, by applying herself to the tasks at home, liberates her spouse to devote his energy and time and attention to tasks that augment his income and generate property for the family. In fact the National Organization for Women, USA has adopted the proposal for recommendation of economic rights for homemakers, which includes giving of a value to the goods and services produced and provided by the homemaker in the Gross National Product. Concluding, the Court held that the time has come to scientifically assess the value of unpaid homemaker both in accident claims and in division of matrimonial property. Yet another casewas for determination of compensation payable to the dependants of a woman who died in a road accident and who does not have regular source of income.[131] It was an appeal against the order of the Allahabad High Court, which declined to enhance the compensation awarded to the appellants. The deceased was 39 years old and due to her death the appellant being a government servant was unable to look after the minor child and is also deprived of the care, love and affection of the deceased and the comfort of her company. The appellants filed a petition claiming Rs 19,20,000 before the Claims Tribunal. But though it calculated the total dependency as Rs 6,00,000 it reduced the amount of compensation to Rs 2,50,000 by making the following observation:

The claimants are entitled to this amount of compensation but keeping in mind that the deceased was actually not an earning member and this is only based on notional income. The amount of compensation is too much and as such a lesser multiplier could be adopted in the present case. In the circumstances of this case, the claimants are entitled to Rs 2,50,000 as compensation from the insurance company‖. The High Court also dismissed the appeal preferred by the appellants, considering the compensation awarded to be just and fair. On appeal against the said order before the Supreme Court, it was pleased to declare certain facts about women in the judgment. The Supreme Court held that it is not possible to quantify any amount in lieu of the services rendered by the wife/mother to the family i.e. husband and children. However, for the purpose of award of compensation to the dependents, some pecuniary estimate has to be made of the services of housewife/mother. In that context, the term services is required to be given a broad meaning and must be construed by taking into account the loss of personal care and attention given by the deceased to her children as a mother and to her husband as a wife.

They are entitled to adequate compensation in lieu of the loss of gratuitous services rendered by the deceased. The amount payable to the dependants cannot be diminished on the ground that some close relation like a

[131] Ibid

grandmother may volunteer to render some of the services to the family which the deceased was giving earlier. It is highly unfair, unjust and inappropriate to compute the compensation payable to the dependents of a deceased wife/mother, who does not have regular income, by comparing her services with that of a housekeeper or a servant or an employee, who works for a fixed period. The gratuitous services rendered by wife/ mother to the husband and children cannot be equated with the services of an employee and no evidence or data can possibly be produced for estimating the value of such services. It is virtually impossible to measure in terms of money the loss of personal care and attention suffered by the husband and children on the demise of the house-wife. [Para 32] Women are generally engaged in home-making, bringing up children and also in production of goods and services which are not sold in the market but are consumed at the household level. Thus, the work of women mostly goes unrecognized and they are never valued. Therefore, in the categorization by the Census, what is ignored is the well known fact that women make significant contribution at various levels including agricultural production by sowing, harvesting, transplanting and also tending cattles and by cooking and delivering the food to those persons who are on the field during the agriculture season [132]The gender bias has also been reflected in the judgment of the High Court whereby the High Court has accepted the tribunal‘s reasoning of assessing the income of the victim at Rs.1,250/- per month. Concluding the Supreme Court reiterated that the time has come for the Parliament to have a rethinking for properly assessing the value of homemakers and householders work and suitably amending the provisions of Motor Vehicles Act and other related laws for giving compensation when the victim is a woman and a homemaker. Amendments in matrimonial laws may also be made in order to give effect to the mandate of Article 15(1) in the Constitution. The Supreme Court recognized the services rendered by the wife/mother to a family. It is indeed happy news to the Indian women who perform gratuitous services for the family. But the Court failed to add some value for the selfless services rendered by the deceased for her dependants.

Since the said observation of the Supreme Court remain confined to the realms of eulogy as no pecuniary advantage is seen bestowed on the dependants towards the services rendered by the deceased as a housewife, love and affection, care, pain and suffering, protection, loss of comfort, consortium, funeral expenses, etc. Women are responsible for the running and maintenance of the family home and are the primary caregivers. The nature of the contribution differs between classes; poor and working-class women engage in more labour intensive activities they cook, clean, rear children and care for the elderly, while wealthier women, who may have recourse to domestic help, are still ultimately responsible for the supervision and organization of the household. The contribution is also different in the urban/rural context. For the rural women, household chore will often include collecting water and firewood for the family, plastering walls, tending to livestock and other agricultural work. By working within the home women divest the opportunity to earn money, get promoted, and receive a pension, while facilitating their husband or partner to do so. Women who work outside the home

[132] UNDP (United Nations Development Programme), 1995, New York: Oxford University Press.

carry a double burden as they are still the ones responsible for caring for the family and household and the money they earn is often used for household expenses whereas the man‘s earnings are more likely to be invested into assets in his name[133] Many foreign jurisdictions recognize such ―contributions in kind‖ as having a commensurate monetary value and/or accruing a beneficial interest in the ownership of property. Ireland, for example, has in recent decades moved away from the doctrine that ownership is determined by legal title in favour of a fair division of property according to the contribution of both parties whether they be financial or domestic in nature. Another example can be seen in Section 4(7) of the Family Law Act (1990), which governs the division of matrimonial property in Ontario, Canada, and specifically provides: The purpose of this section is to recognise that child care, household management and financial provision are the joint responsibilities of the spouses and that inherent in the marital relationship there is equal contribution, whether financial or otherwise, by the spouses to the assumption of these responsibilities, entitling each spouse to the equalization of the net family properties Similarly, under Section 79(4) of the Australian Family Law Act (1975), courts must take into consideration the nonfinancial contributions made to the property and the welfare of the family through unpaid work at home care of the children.

While any new law governing the division of matrimonial property in India should take cognizance of what is being done in other countries. [134]It is important to draft a law that recognizes the historical discrimination and prevailing vulnerability of women in the Indian context. What is needed is a law that is gender specific to women, applicable to women from all religious communities on the basis of economic rights rather than personal laws, which automatically confers upon them an equal right to property and assets and where judicial discretion is limited in favour of women and children, especially in relation to rights over the family home. The new law would also need a special clause to protect against the malafide transfer of assets and property in an effort to deny a woman her rights. Women‘s economic position is adverse as neither Indian law nor government policy views their work within the home as productive work with economic value. The Supreme Court expressed outrage at the inclusion of housewives in the same category as prostitutes and prisoners in the Census, calling it a callous approach. The Supreme Court's reaction was in line with the concerns that have been expressed worldwide by researchers, feminists and even policy makers to give some recognition to unpaid care work, usually provided by women.

Though unpaid care work and its importance have been recognized, it still remains outside monetized mainstream economies. Reasons behind the exclusion of this non-productive work is found in the difficulties that are involved in valuing and measuring care services, like taking care of children and cooking. The Central Statistical Organization (CSO) undertook an effort in this direction in 1998. It conducted India's first Time Use Survey (TUS). It was a pilot survey and it covered only six states. The objective of the survey was to quantify the economic contribution of women to the national economy and to study the gender discrimination

[133] Ibid

[134] D. Paul Chowdhry, *Women Welfare and Development*, (Inter India Publications, 1992, p137)

in the household activities. This survey, the first of its kind was conducted fifty years after the birth of independent India in recognition of a recommendation forwarded by UNDP. More than a decade later it remains the only one. Time Use studies provide evidence of the enormous time spent by women in carrying out household activities. Yet, the non-recognition of household work and care work reinforces gender discrimination and inequality. Neetha N, researcher at the United Nations Research Institute for Social Development (UNRISD), examines the concept of care work within the context of TUS and concludes that TUS was designed with a very limited and simplistic understanding of care work. But this alone does not explain why in the last ten years, CSO, the technical wing of ministry of statistics did not conduct a more in depth TUS, one encompassing all Indian states. Perhaps the answer lies in Pronab Sen's response. Sen, principal adviser in the Planning Commission admits, utility of the TUS is not clear. TUS, Sen explains is extremely expensive and it requires round the clock monitoring of the respondents, which in the case of the 1998 survey included 18,591 households, for close to a year[135] In addition to being expensive, a certain level of superficiality in these surveys is hard to overlook. Neetha N urges that in order to understand care work one needs to go beyond strict activity-based understanding. Then there are other problems like distinguishing between care work and domestic work. Also, something like washing clothes, which is care work, when done by the housewife/mother and economic work when done by a paid hand, brings out the nuances that TUS failed to address A woman's contribution in kind gets ignored in India, but many countries have recognized its value. The Australian Family Law of 1975 provides for courts' assessment of the non-financial contribution made by wives to the welfare of the family through unpaid work at home and care of children. Elsewhere in Ireland, changes in law recognize a wife's domestic duties. A Canadian law governing division of matrimonial property also stipulates that child care, house management and providing finance is a joint responsibility that brings with it joint rights over property125 . A woman‘s worth in the society is likely to be recognized once their contribution to the economy in both paid and unpaid works is valued. Economic recognition of unpaid work including domestic chores is one of the ways to reduce violence against women. Women typically work 16 hours a day, most of them have no leisure, and bear most of the responsibility at home as well as engaging in some tasks related to income generation. The household work is taken for granted by men with patriarchal attitudes. Men think that it is woman‘s responsibility to help men, to do household work, even women with jobs outside the home typically must still do the household work. This is discriminatory. Contribution of women to economy remained unaccounted for due to the non- recognition of this work under the current system of national accounting Law should modify and mould itself to the needs of the society at a particular stage of evolution. In the domain of family law, this phenomenon can be well

[135] Ibid

CHAPTER 6 CONCLUSION AND SUGGESTION

Inheritance for Indian Muslims is governed by their respective personal laws, which are based on Islamic or Quranic principles. It contains the framework for how inheritance must pass on within a Muslim family by providing detailed rules on the scheme of inheritance, distribution, and administration of the estate. However, Muslim personal laws are quite rigid and not very open to criticism or amendment. There are standing concerns regarding issues such as, the inequality in property rights between male and female heirs, exclusion of step-children, and illegitimate children and non – recognition of adopted children etc. Further, there is an ongoing legal and judicial struggle to bring harmony between personal laws and the constitution, which calls for developing a more inclusive legal framework that could attempt to balance personal and constitutional laws. Succession rights in Hindu law have evolved through time. Things have altered slowly but steadily. The trend has been slow, but women now have the same inheritance rights as their male counterparts. The laws prohibiting gender equality are now relics of the past.

Succession rights in Hindu law have evolved through time. Things have altered slowly but steadily. The trend has been slow, but women now have the same inheritance rights as their male counterparts. The laws prohibiting gender equality are now relics of the past. Beginning with the Mitakshara legislation, which prohibited women from sharing property and so discriminated against them The Hindu Succession Act of 1956 was not gender-neutral and did not meet the standards of social law. As society progresses, concerns about gender parity increase, and laws are changed to address the issue. One of the best examples of this is the Hindu Succession Act. Since the law was changed in 2005, Hindu women can inherit property just as Hindu men can. The research did find that Muslim women were better off than Hindu women before the modification was made, but only when compared to Islamic inheritance law. Islam guarantees a woman's financial security from the time of her birth until the day she dies, and it is the responsibility of the capable males in her family and society to see to her needs. In other words, women in Muslim laws have had equal inheritance rights ever since the legislation was formed, but in Hindu laws women didn't have such rights until an amendment was passed. Hindu women are in a better situation than Muslim women when it comes to the proportion of property they get. Hindu women get an equal portion, but Muslim women receive half of the amount acquired by Muslim men. Although there is a rationale for the distinction, similar clauses continue to exist today. Things have altered slowly but steadily. The trend has been slow, but women now have the same inheritance rights as their male counterparts. The laws prohibiting gender equality are now relics of the past. Beginning with the Mitakshara legislation, which prohibited women from sharing property and so discriminated against them The Hindu Succession Act of 1956 was not gender-neutral and did not meet the standards of social law. With this, the article has covered the topic of succession laws and compared the same under Hindu and Muslim law. There are multiple differences between the law in their understanding of different topic as per their religion, and the same has been respected throughout the paper. The succession

laws are said to be simpler and fair now. Gender inequities throughout the world are among the most pervasive forms of inequality which concerns each and every member of the society and forms the very basis of a just society. The issue of _gender justice‘ is of enormous magnitude with multiple ramifications which engulf an all-embracing and limitless canvas. The unequal status of women being offensive to human dignity and human rights has emerged as a fundamental crisis in human development the world over. The full development of personality, freedom of thought & expression and equal participation of women in political, social, economic and cultural scenario are concomitants of national development, social and family stability. All forms of discrimination perpetrated on grounds of gender definitely breed unrest, hence, the issue of gender justice and women empowerment has been a major social concern felt by many nations over the years. Though there has been formal removal of institutionalized discrimination, yet the mindset and attitude ingrained in the subconscious often find its expression and not been completely erased. Women across the globe still face all kinds of indignity and prejudices. The malady sometimes pounces with ungenerous monstrosity giving a free play to the inferior endowments of nature in a man thereby making the whole concept ridicule, destabilizing the entire edifice. In India in the absence of uniform code regulating property rights of Indian women, such rights get determined depending on which religion and religious belief she follows , whether she is married or unmarried, which part of India she comes from, if she is a tribal or non-tribal and so on and so forth. Ironically, what unifies Indian women is the fact that across all these divisions, the property rights of Indian women are immune from protection of the Constitution; the various property rights may be, as they indeed are in various ways, discriminatory and arbitrary, notwithstanding the Constitutional guarantee of equality of all. The property rights of the Hindu women are highly fragmented on the basis of several factors apart from those like religion and the geographical region which have been already mentioned. Property rights of Hindu women also vary depending on the status of the woman in the family and her marital status: whether the woman is a daughter, married or unmarried or deserted, wife or widow or mother. It also depends on the kind of property one is looking at whether the property is hereditary/ancestral or self acquired, land or dwelling house or matrimonial property. Texts of Vedic era confirms that the Smritis and commentaries, with their roots in a feudal society of agrarian landholdings, prescribed a patriarchal family structure within which women's right to property was constrained. Under the Mitakshara law, the property of a Hindu male devolved through survivorship jointly upon four generations of male heirs. Ownership was by birth and not by succession. Upon his birth, the male member acquired the right to property. Since Hindu women did not form part of the traditional joint family property or coparcenary, they did not have joint ownership. But women had the right to be maintained from the joint property and this right included the right of residence. Women also had the right to claim marriage expenses from the joint property in their natal home. The husband was bound to maintain the wife despite all her faults, including 'quarrelsome nature', 'neglect of household', 'barrenness' and 'adultery'. He could marry again, but he was under a legal obligation to continue to maintain the first wife. In addition, the wife was entitled to 'supercession fee' or 'sulka'—an equal share of property which the husband gifted to the new wife. Since divorce was not commonly prevalent, after

marriage, women could not easily be deprived of their right of residence and maintenance. Further, under certain situations like cruelty or adultery, the woman had the right to claim separate residence and maintenance and this provision was given statutory recognition through the Hindu Woman's Separate Residence and Maintenance Act, 1946. The early Smritikars, Gautama and Manu, enumerated six categories of stridhan property (or stridhana—literal meaning—woman's property) Vishnu, a later smritikar, added four more categories to this enumeration. The later sages Yagnavalkya, Katyayana, Narada, Devala, etc., widened the scope further. Yagnavalkya (around AD second century) expanded the scope of stridhana by adding the word adhya (meaning 'and the rest') to the enumerations of Manu and Vishnu. The Katyayana Smriti lays great emphasis on stridhana and emphasised exclusive ownership, both in terms of sale and gift, and stipulated 'Neither the husband nor the son, nor the father, nor the brother have authority over stridhana to take it or to give it away.' This injunction is almost in the nature of a warning to male members to lay their hands off the woman's property.

If the husband borrowed the woman's stridhan money, he was under a legal obligation to repay it with interest. Mitakshara (Vijnaneshwara, AD eleventh century), the most widely recognized source of Anglo-Hindu law, expanded the scope of the term adhya mentioned by Yagnavalkya and laid that property obtained by a woman through inheritance, purchase, partition, seizure (adverse possession), and finding is her stridhana. Through this expansion, every category of property was brought under the scope of stridhana and the woman was granted exclusive ownership over it. As can be observed, a system of property ownership by women seems to have been an integral and significant part of the ancient moral, ethical, and legal social norms. It does appear that patriarchal collusions constantly undermined the scriptural dictates of the 'dharma of stridhana'. At each time, the Smritikars, with great effort, brought the emphasis back to women's ownership of property and in the process also expanded its scope. There seems to be a constant tussle between the Smriti dictates and patriarchal subversions within the family. During the colonial rule, several judicial decisions constrained the scope of stridhan property. As already mentioned, the Mitakshara had expanded the scope of stridhana to include property acquired by a woman through every source, including inheritance and partition. But the judicial decisions changed this concept and lay down that inherited property is not stridhana. A new legal principle was gradually introduced through court decisions that whether the property is inherited by a woman through her male relatives (father, son, husband) or through her female relatives (mother, mother's mother, daughter), it is not her stridhana and that it would devolve on the heirs of her husband or father. Women lost the right to will or gift away their stridhan and it acquired the character of a limited estate. Upon the widow's death, the property reverted back to the husband's male relatives named as 'reversioners'. With the subversion of the institution of stridhana which was meant to protect women's right to property during the colonial period and with the consolidation of property rights in the hands of individual men, through certain legislative women's condition had become deplorable.

Moreover daughters and widow could succeed to the property only in the absence of male heirs; hence, succession by women was merely in theory. Of late, the legislature in India has tried to improve the position

of women through a series of ameliorating legislations, however, most of these Acts have been within the confines of the larger framework of the Mitakshara coparcenary and preference for male attitude. The first legislation in this respect is The Hindu Law of Inheritance (Amendment) Act, 1929, which laid down the preference for certain cognates, like son‘s daughter, daughter‘s daughter, sister and sister‘s sons were held entitled to succeed after paternal grandfather and before paternal uncle. Following abolition of Sati, the number of widows increased appreciably in our country. To improve the status of widow, the legislative reform was brought out by the British to reform the law relating to women‘s right to property. In order to relieve them of their miseries the Hindu Women‘s Right to Property Act 1937 was enacted to confer property rights upon them; she could enjoy the property during the lifetime. Even when certain women were given right to inheritance, the property devolves only as life estate and does not pass to them on absolute basis. They never had the power to alienate the property or make a bequest of it as its owner but merely had the right to enjoy the property while they are alive, thus, properties were transferred to them for their maintenance. Only with regard to certain property, women could actually exercise ownership rights. Such property which she holds absolutely, with power to both enjoy and alienate has been termed ―stridhan‖. Such property comprised of gifts given to a woman by her husband or her husband‘s relations, Gifts or bequest of property given to a maiden or widow by non-relations, however such bequest excludes married women as in that case the property would be under the control of the husband. Again the property acquired by a maiden or widow through her exertion would be her stridhan. However, gifts and items that constitute stridhan have meagre economic value, as most of the times, these constituted personal items like clothes and jewellery and very rarely they were in the form of immoveable property. However, immoveable property, if any, was held by women in the nature of women‘s estate and not as absolute estate. The Hindu Women‘s Right to property Act, 1937 gave recognition to women‘s right to some extent, however, rights granted to women were by no means adequate. This Act also recognized the right to property of two more widows in addition to the deceased‘s widow being widow of the pre-deceased son and widow of the pre-deceased son of a pre-deceased son as heirs of the Hindu male intestate. As per the Act, the interests of male coparceners devolve on their death upon widows. They were entitled to get their share by partition. All said and done, the enactment of this Act, considerably enhanced women‘s legal status and she no longer had to depend on the husband‘s family for her maintenance. However, this right is not an absolute one but merely vests a limited right during her lifetime, after which, it again revert back to the reversioners. However, a serious lacuna of this Act was that it affected the rights of daughters to the property. The Hindu Law givers expressly laid down that the maiden daughter‘s maintenance till her marriage, and her marriage expenses were to be paid out of her father‘s estate. Thus, the Act of 1937 was inadequate to protect the interests of Hindu women. In order to strengthen the property rights of Hindu women, The Hindu Succession Act, 1956 was passed. Section 14 of The Hindu Succession Act, 1956 abolished women‘s estates and converted it into full estates. It provide that any property held by women at the commencement of the Act as women‘s estates shall be converted into full estate except those which were acquired by way of gift or will or under any decree of award prescribing such limited estate

Another important change has been brought out by the proviso to Section 6 of the 1956 Act, which provides that upon death of a coparcener, the property will devolve upon his mother, widow and daughter along with his son by testamentary or intestate succession and not by survivorship. This rule confers on the women an equal right along with the male members of the coparcenary. Section 6 retained the Mitakshara coparcenary by excluding women from survivorship. As a result father and sons held the joint family property to the total exclusion of the mother and daughter despite providing a uniform scheme of intestate succession. The stringent restrictions under the Shastric law on female inheritance were finally taken away by the Parliament to make it conform to the Constitutional mandate of equality. The disability of women in inheriting the father‘s property was undone under Section 6 of the 1956 Act. Before this Act, the property of women dying intestate was governed by customary Hindu law which provided for her limited interest and being usually terminated on her death. However, Section 15 of the HSA, 1956 is the first statutory enactment that deals with succession of Hindu female‘s property when she dies intestate. The Act provides two different laws based on the sex of the intestate. This double scheme is the traditional method intended to protect the family property. The property of a female Hindu dying intestate shall devolve according to the rules set out under Section 16. Firstly, upon sons and daughters (including the children of any predeceased son or daughter); secondly upon the heirs of the husband, thirdly upon the mother and father, fourthly upon the heirs of the father and lastly upon the heirs of the mother Again, any property inherited by a female Hindu from her father or mother, shall devolve in the absence of any son or daughter of the deceased (including the children of any pre deceased son or daughter) not upon the other heirs referred to in sub section (1) in the order specified there in, but upon the heirs of the father. Also any property inherited by a female Hindu from her husband or from her father –in –law shall devolve in the absence of any son or daughter of the deceased (including the children of any pre-deceased son or daughter)not upon the other heirs referred to in sub section(1) but upon the heirs of the husband. This separate scheme of succession reflects a strong patriarchal and orthodox outlook. Further, Section 15(2) provides that the property inherited from the father would revert to the heirs of the father when a Hindu female dies without issues. The section also provides that the property inherited from the mother would revert to the heirs of the father and not to the mother‘s heirs. Thus, the legislative intent of conservation of property becomes questionable because if the object was to conserve the family property, the property inherited from the mother should revert to the mother‘s heirs. Under Hindu Succession Act of 1956, property laws also continued to retain certain anomalies concerning agricultural land, widow's rights, and the dwelling house. Agricultural land was a state subject, hence beyond the scope of the Hindu Succession Act, and through state- made laws, women could be denied a share in ancestral as well as separate property which was marked as 'agricultural land. Land fragmentation continued to be the concern here and this became a whip to deny women their rights in parental property. Their status is confined to that of dependents. Under Section 23 of the Hindu Succession Act, women's right to claim partition of the dwelling house was restrained. Only when male heirs decided to partition the property could female heirs claim their share. Further, married women were not given the right even to reside in the parental home. There was a sustained campaign by

women's groups who were demanding an amendment in the above mentioned discriminatory aspects of the Hindu Succession Act

Further, it is also true that legal provisions, however beneficial they may be, are not enough to secure equal rights for women until and unless the society co-operates and complements these laws with an egalitarian attitude towards women. Equality cannot be achieved until and unless the mindset of society changes and acknowledges the rights of women to own property. Need of the hour is to realize that women are not just an object or commodity to be maintained and kept by the family for certain purposes but they also have the right to be independent. She must have the right to own house, landed property and any other property in her own name to do as she please with it. But the present set up and mindset of the our society is patriarchal which grossly favours man and all the institutions like family, marriage, right to property etc. are likewise built with its foundation based upon such patriarchal structure. As such, if we want to bring about the changes like recognizing this important right of property ownership of women, it will lead to changes in the status quo, hence the question arises should we continue to permeate the inequality in order to preserve this status quo so as not to disturb the equilibrium, an equilibrium based on equality Should the interest of women be always sacrificed for the convenience of the society Or should we be more bold and open minded and venture to build up a structure based on equality of sex and justice to women