ANGLICIZATION OF SHARĪ'AH BY ANGLO-INDIAN COURTS AND ITS IMPACT ON PAKISTANI LAW: A CASE STUDY WITH SPECIAL REFERENCE TO WAQF, INHERITANCE AND EQUITY

A THESIS PRESENTED FOR Ph. D SHARĪ'AH (Islamic Law & Jurisprudence)

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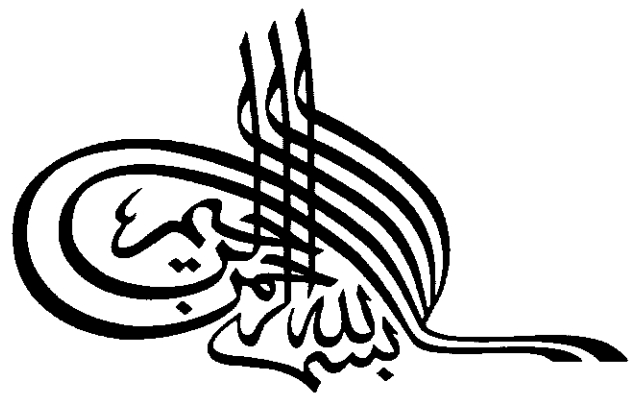

In the name of Allah,
the Most Beneficent,
the Most Merciful

ACCEPTANCE BY THE VIVA VOCE COMMITTEE

TITLE OF THESIS:

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This is to certify that Ms. Usmat Batool D/O Muhammad Hussain Shah, student of Ph.D *Sharī'ah* has completed her thesis titled, **'Anglicization of Sharī'ah in Anglo-Indian Courts and its Impact on Pakistani Law: A Case Study with Special Reference to Waqf, Inheritance and Equity'** under my guidance and supervision. I am satisfied with work of the student and approve it for submission.

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TO MY MENTORS

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Table of Contents

Abstract

This thesis argues the treatment of Islamic law under the English legal system by looking into the developments in law of family waqf, inheritance and equity in British India. It has the dual objective of analysing the impact of the English legal system upon Islamic law, and its impact on Pakistani law. It not only examines the evolution of codification of Islamic laws in sub-continent during colonial rule but also that how this codification partially influences the Islamic Law. It argues that the laws of waqf and inheritance were transformed in order to fit into new legal system. The colonial state also used the methods of translation, adjudication, and legislation in order to transform Islamic law into Anglo-Muhammadan Law. They amalgamated law of inheritance and customary law, made "*rivāj e 'aām*" through settlement officer and later they recognised this "*rivāj e 'aām*" as testimony and enforced it through courts. In 18th century British in their regulations merged equity, justice and good-conscience with customary law, though equity fills the gap of law on the discretion of their judges.

The study begins with the brief introduction of Anglicization of *Sharī'ah* during British sway in India. Then the essentials of the Islamic Law of *waqf* are described in a good detail, in the light of the opinions of Islamic jurists. The third part of the study not only briefs about the legal contribution of the Privy Council to the law of *waqf* but also the cases about family law of *waqf* in Pakistan. The law of Inheritance in Islam is specially focusing on the shares of females in Islamic Law to ensure that no local custom can override the law of inheritance in Islam is examined in fourth part of the study. In fifth part the attempts have been made to examine the law of Inheritance in sub-continent during British rule and its impact on the current Law of Inheritance in Pakistan. For better

understanding case law on Inheritance rights of women in Pakistan is discussed in detail. The last part of the research examines the role of the doctrine of justice, equity and good conscience in British rule in sub-continent and its impact on Pakistani law. Case law in Pakistan regarding this notion is also discussed.

Acknowledgement

Praise be to Allah, The Most Beneficent, The Most Merciful, without whose consent and consecration anything would ever be imaginable. I am beholden by my Lord's generosity in this effort. I owe my deep respect to our beloved Holy Prophet Muḥammad SAW who is forever the torch of guidance and light of knowledge for mankind.

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Translitration Table

ا	a	ذ	ḏ	غ	gh	ڭ	ng
ب	b	ث	dh	ف	f	ڱ	ph
پ	p	ر	r	ق	q	ڳ	th
ت	t	ڑ	ṛ	ک	k	ں	th
ٹ	ṭ	ز	z	گ	g	ھ	ṭh
ث	th	ژ	ẓ	ل	l	ہ	ch
ج	j	س	s	م	m	ۂ	ḍh
چ	ch	ش	sh	ن	n	ۃ	ḍh
ح	h	ص	ṣ	ں	n	ڑ	rh
خ	kh	ض	ḍ	و	h	ڑھ	kh
د	d	ط	ẓ	ی	y	ۓ	gh

Long Vowels

		ا
ـَ		a
ی	ـِـ	i
و	ـُـ	u
و	*(URDU)*	o
ـ	*(URDU)*	e

Short Vowels

ـَـ	a
ـِـ	i
ـُـ	u

Dipthongs

ـَـو	*(ARABIC)*	aw
	(PERSIAN/URDU)	au
	(TURKISH)	ev
ـَـی	*(ARABIC)*	ay
	(PERSIAN/URDU)	ai
	(TURKISH)	ey

Doubled

ـُّـ		uww/uvv
ـِّـ		ivv

Letter ء is transliterated as elevated comma (ʾ) and is not expressed when at the beginning.

Letter ع is transliterated as elevated inverted comma (ʿ)

ض as Arabic letter is transliterated as *d*, and as Persian Turkish Urdu letter as z

ز as Arabic letter is transliterated as *w*, and as Persian Turkish Urdu letter is transliterated as *v*

ۃ is transliterated as *ah* in pause form and as *at* in construct form.

Article ال is transliterated as *al-* (*l-* in construct form) whether followed by a moon or a sun letter

و as a Persian/Urdu conjunction is transliterated as *-o-*.

Short vowel ـِ in Persian/Urdu possessive or adjectival form is transliterated as *-e*

Note on Translation and Translitration

This work relies on the Marmaduk Pickthall's translation of the meaning of *al-Qur'ān*. This work relies on sources available primarily in English, Arabic, and Urdu. The transliteration system of the IRI Journal of Islamic Studies is followed.

In this work '*awqāf*' is used instead of '*waqfs*' for the plural of a *waqf*. Names of earlier Muslim jurists are transliterated. The names of books and their translations have been given as they appear in the original print.

Sharī'ah and *Fiqh* are translated under the terms of Muhammadan law or Islamic law. But specifically in the title of this thesis the term *Sharī'ah* must be understand as Islamic Law. It must be noted that various authors spelt the expression 'Muhammadan' differently such as 'Moohummudan', 'Mohammedans', 'Mohamedan', or 'Mussalman'. Gradually, uniform spellings 'Muhammadan' were adopted. Similarly instead of 'Mughul', 'Moghul', the expression 'Mughal' and instead of 'Kazi' and 'Cauzze' 'qāḍī' is adopted in the research.

List of Abbriviations

EIC	East India Company
MLD	Monthly Law Report
PLD	Pakistan Legal Decision
PLJ	Pakistan Law Journal
SCMR	Supreme Court Monthly Review
YLR	Yearly Law Reporter

Introduction of the Research

Introduction of the Research

1. Importance and Significance of Research

In Arab before Islam the nomadic Arabs lived in the *Hijāz*. This tribal society was patrilineal in its structure and patriarch in its ethos; individual tribes were formed of adult male links[1]. The *Qur'ān*[2] introduced novel inheritance rules that emphasised the tie existing between the husband and his wife and between parents and children; these rules also had the particular goal of raising the legal status of the woman within the nuclear family[3]. Thus the *Qur'ānic* legislation came to reform the tribal customary law of the pre-Islamic Arabia. In this system of inheritance Islamic law acknowledged and developed a lawful method called of *waqf*[4] which allowed its holder to settle his property to the use of beneficiaries in perpetuity[5].

The principles of *Sharī'ah*[6] were enforced by the Muslim rule in sub-continent for centuries. During Muslim rule in India the *qāḍīs* were used to implement *Sharī'ah* rulings in their decisions. These laws were enforced in the sub-continent in the beginning of the colonial rule. British Colonialism, represented by the East India Company, started its

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[1] Neol James Coulson, *Conflicts and Tentions in Islamic Jurisprudence* (London: Chicago, 1969), 10.

[2]The *Qur'ān* is the Book revealed to the Messenger of Allāh, Muḥammad (SAW) as written in the *maṣāḥif* and transmitted to us from him through an authentic continuous narration (*tawātur*) without doubt. Bazdawī Fakhr al-Islām, 'Alī ibn Muḥammad ibn al-Ḥusayn, *Kanz al-Wuṣūl ilā Ma'rifat al Uṣūl* in 'Abd al-'Azīz al-Bukhārī, *Kashf al-Asrār*, vol 2 (Cairo: Maktba al-Ṣanā'ī', 1307), 23.

[3]See Al-*Qur'ān*, (4: 7,11,12).

[4] See, Shams al-A'immah Abū Bakr Muḥammad ibn Abī Sahl Aḥmad Sarakhsī, *Kitāb al-Mabsūt*, Vol. 12 (Karachi: Idāra Al-*Qur'an* wa 'ulūm al- Islāmīyah, 1987), 26; Marghinānī al-Rushdānī Burhān al-Dīn, 'Alī ibn Abū Bakr ibn 'Abd al-Jalīl al-Farghānī, *Kitābal-Hidāyah*, Vol. 2 (Karachi:, n.d), 637.

[5] See Muḥammad Amīn ibn 'Uthmān ibn 'Abd al-'Azīz Ibn 'Ābidīn, *Radd al-Muḥtār 'alā al-Durr al-Mukhtār: Sharḥ Tanwīr al-Absār*, Vol. 3 (Cairo:1386/1966), 328; Ibn Nujaym, *Baḥr al-Rāiq* (Cairo: Vol. 5, 1311 A. H), 212.

[6]The word *Sharī'ah* literally means "a way". In legal terminology *Sharī'ah is the law itself.* The term *Sharī'ah includes* both law and tenets of faith that is *'aqā' id.* Ṣadr al-Sharī'ah al-Thānī al-Maḥbūbī, 'Ubayd Allāh ibn Mas'ud, *Sharḥ al Tawḍīḥ 'alā al-Tanqīḥ*, 1st. ed. (Cairo: al-Maṭba'ah al-Khayrīyah, 1324), 34.

penetration of India as early as 1601[7] and continued under different charters. Earlier in seventeenth century these charters were implemented to the British subjects in particular areas of sub-continent which were well-known as the company's factories. Later[8], the English Common Law not only influenced the statutes and regulations but also the order of legal administration of a whole Indian sub-continent with its judicial modifications and the principles of the English Court of equity.[9] English took into sub-continent not only the number of legal rules in the form of Common Law but also their outlook, tradition and approach in constituting, maintaining and evolving the judicial system[10].

In the beginning, English colonial power granted the existing legal system to prevail as an administrative affair for three reasons. Firstly, they wanted to stay connected with the past. Secondly, their main objective was to assert a social environment that could promote and facilitate trade activity. Thirdly, they did not want to intervene by the religious allegiances of their subjects[11]. These policies were reflected in the charter of George II approved in 1753; the judicial plan of 1772; the Regulations of 1780; the Act of Settlement 1781; and the Regulation XII of 1793. The British slowly abandoned this policy with the general consolidation of their power in India[12].

As the establishment of the colonial state turned more refined and the officials became more adequate of administrating different modes of resistance, enormous part of

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[7] Archbold William Arthur Jobson, *Outlines of Indian Constitutional History* (London: Curzon Press, 1973), 9.

[8]Even after the British rule Islamic Law prevailed right from 1601 to 1772 in sub-continent. George Claus Rankin, *Background to Indian Law* (Cambridge: The University Press, 1946), 1-2.

[9] Motilal Chimanlal Setalvad, *The Common Law In India* (London: Stevens and Sons Limited, 1960), 1.

[10] Ibid., 5.

[11] Ali Asghar Asaf Fyzee, *Outlines of Muhammadan Law in India* (Bombay: Oxford University Press, 1964), 53-54.

[12]Syed Rahsid Khalid, "Islamization of Muhammadan Law in India,"*American Journal of Islamic Social Sciences*, 5, no. 1, (1988), 146; William Hook Morley, *The Administration of Justice in British India; Its Past History and Ppresent State* (London: G. Norman, 1858), 44-66.

the Muslim law were anglicized by laws of British origin. The initial Anglicizing trends were existing in the 1772 regulation that in cases where native laws failed to provide any rule, the disputes should be determined in accordance with the Roman law doctrine of 'justice, equity, and good conscience'[13], which by 1887 was held "to mean the rules of English law if found applicable to society and circumstances"[14]. The next step towards the Anglicization[15] of Islamic laws in sub-continent was the replacement of *qāḍī*s by judicial experts of Common Law[16]. *Muftī*s continued to advice these experts, yet, usually the disputes were resolved by these experts without considering the *muftī's* point of veiw. According to Rankin, the judicial decisions of this period show contravention of the principle of the *Sharī'ah*[17]. The Common Law principle of '*staredecisis*' whereby lower courts are required to essentially follow the verdict of superior courts in parallel situation was something unknown to the *Sharī'ah*[18].

The significance of the institution of *waqf* of the context of the present research is twofold. Firstly, family *waqf* is a mean of *inter vivos* property dealing which allows the *wāqif* to determine who will benefit and to what extent, from the property after his death. Secondly, the institution of family *waqf* is, in South Asia has been seriously compromised as a viable method for controlling inter-generational devolution of the property according to the wishes of the *wāqif*[19]. In South Asia the family *waqf* came to

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[13] *Waghela Rajsanji v. Sheikh Masludin 1886/7, 14 LR IA 89.*
[14] Anderson. R. Michael, 'Islamic Law and the Colonial Encounter in British India', *Institutions and Ideologies: A SOAS South Asia Reader* (David Arnold And Peter Robb Eds., 1993), 7.
[15] This term derived from the word anglicize which means to make or become English in form of character. Anglicization, also known as Englishing, is the act of making or becoming English in form or character.
[16] Muhammad Khalid Masud, 'Anglo-Muhammadan Law', *The Encyclopedia of Islam*, ed., K. Gudrun, D. Matrinage, J.Nawas, E. Rowson, (Leiden: Brill, 2009), 86.
[17] George C. Rankin, *Background to Indian Law* (Cambridge: The University Press, 1946), 46.
[18] Ibid., 143.
[19] Carroll, Lucy, 'Life Interests and Inter-Generational Transfer of Property Avoiding the Law of Succession,' *Islamic Law and Society*, 8, no. 2 (2001): 255.

prominence as a mean of preserving land estates in the nineteenth century[20]. With the downfall of Muslim Empire the institution of *waqf* remained under sustained controversy. British power confiscated several *waqf* properties on the plea of anomalies in their administration. Subsequently the *waqf* properties were restored to the Muslims but their administration was regulated under the Religious Endowment Act 1863[21]. The supervisory power was however vested with judiciary for scrutiny of the corruption among the *mutawallīs*. Some of the wealthy Muslims with a view to save their properties took recourse to endow them to family *waqf*. But in 1894 the Privy Council negated their efforts on the plea that the move was "a concealed means for the aggrandizement of family". The Council also invalidated family *waqf* in 1894 in Abul Fata's case[22] and this issue became a part of Muslim politics in India[23]. On protest by the leadership of Muslim community, its decision was overruled by legislation promulgated in the form of the Mussalman Waqf Validating Act, 1913.[24] And the other was that during the period of European Colonial expansion, the scope of Islamic was progressively reduced to the domain of family law. These two inter-related phenomena may provide a partial explanation for the fact that contemporary legal historians recognise Islamic Inheritance Law, but are barely unaware of the Islamic Inheritance system. A decade later, G. H. Bousquet said that great practical importance of family endowments as a legal means of

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[20]Between the years 1798-1858, some twenty cases involving Muslim endowments appeared in the published reports of *Sadar Dewani* Courts. Kozlowski, C. Gregory, *Muslim Endowments and Society in British India* (Cambridge: Cambridge University Press), 131.

[21]Upadhyay, R, Waqf (Charitable Islamic Trust) – Under sustained controversy in India?,*South Asia Analysis Group*, 2004, https://www.southasiaanalysis.org *(Last accessed: 12.06.12).*

[22]Kozlowski, C. Gregory, *Muslim Endowments and Society in British India*, 145; Fyzee, A.A. Asaf, *Cases in the Muhammadan Law of India and Pakistan*, 396.

[23]Upadhyay, R, Waqf (Charitable Islamic Trust) – Under sustained controversy in India?,*South Asia Analysis Group*, 2004, https://www.southasiaanalysis.org *(Last accessed: 12.06.12).*

[24] Tahir Mahmood, *The Muslim Law of India*, (New Delhi: Law Book Company, 1982), 274.

circumventing the law of Inheritance[25].

In Pakistan *waqf* is made subject to limitation of upper limits of land holdings. More important, in Pakistan changes were made in West Pakistan by the 1959 West Pakistan Land Reform Regulations. According to that regulation it has been impossible in Pakistan to make agricultural land the subject of *Waqf dhurrī*[26], The *Waqf khayrī* is now controlled by a central administration of *waqf*. These provisions were repealed in 1990. In contrast with Egypt the longest period of *waqf 'alal-awlād* has been fixed as sixty years after the death of the creator of the *waqf*; that it be limited to two generations only, following the creator of the *waqf*. The law has also conditioned the *waqf* to be not more than the third of the person's property unless it was permitted by its legal heirs[27]. The issues of family *waqf* are discussed in this research.

At that time, in sub-continent, matters relating to inheritance and succession were governed by partly Muhammadan Law and partly by, customary law[28]. The British Government at the commencement of its ascendancy assured the people by a solemn Act of Parliament the full enjoyment of their laws and customs. Section 17, 21 Geo, 111, sc. 70, enacted that in all suits and actions before the Supreme Court of Judicature at Fort William in Bengal, inheritance and succession to lands, rents and goods, and all matters of contract dealing between party and party shall be determined in the case of

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[25]Ibid.

[26] David Pearl, *A Text Book on Muslim Personal Law* (London: Croom Helm, 1979), 206.

[27]In 1952 the first law No. 180 has been issued to abolish family *waqf*. This was followed with another law No. 525 which has been issued in 1954 that gave the right to the Ministry of Awqāf to confiscate and revoke any family waqf and to exchange it with money and divided the shares accordingly to the family members. In 1958 another law No. 122 has been issued which gave the authority to the Ministry of Awqāf the right to manage and to administer all waqf properties. Esposito, L. John, *Women in Muslim Family Law*, (New York: Syracuse University Press, 1982), 67-72; Liebesny Herbert James Liebesny, "Stability and Change in Islamic Law", *Middle East Journal*, 21, no. 1, (1967): 3.

[28]In Coulson's words for non-Arab Muslims, however, the reception of Islamic Inheritance system "posed serious problems, for its basic concepts were alien to the traditional structures of their societies". See Coulson, J. Neol, *A History of Islamic Law* (London: Edinburgh, 1964), 137.

Mahommedans by the laws and usages of the Mahommedans[29]. In section 15 of Regulation 1V of 1793 provided that in all suits regarding inheritance and succession, the Mahommedan Laws with respect to Mahommedans are to be considered as general rules[30]. Then in Bombay Regulation 1V of 1827, the Punjab Laws Act (IV of 1872)[31] relating to the jurisdiction of the Punjab Civil Courts, the Madras Courts Act (III of 1873)[32], the Central Provinces Act (XX of 1875)[33], the Burmah Courts Act (IX of 1887), and the Oudh Act (XVIII of 1876), the Legislature has expressly provided that subject to certain conditions, customs should form the rule of decisions by the courts[34]. Section 2 of Regulation XI of 1825, says that the primary rule of decision in all questions relating to the matter specified shall be custom where a custom exists, and that the Hindu and Muhammadan Laws shall only be applied where no such customary rule prevails[35]. There were four customs prevailing at that time in Muslim community with reference to inheritance and succession:

1. The land of the deceased was devolved to sons even in the presence of widow and daughters.

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[29]Amir Ali Syed, *Mahemmodan Law*, vol. 2 (Lahore: Publishing Company, 1976), 15.
[30]Ibid.,16.
[31]David, Pearl., *A Text Book on Muslim Personal Law* (London: Croom Helm, 1979), 34.
[32] Ibid., 35.
[33]Section 5 of Act XX of 1875 provides that "in questions regarding inheritance, special property of females, betrothal, marriage, dower, adoption, guardianship, minority, basterdy, family relations, wills, legacies, gifts, partition, or any religious usage or intuitions, the rule of decision shall be the Muhammadans Law in cases where the parties are Muhammadans . . . . except in so far as it is opposed to the provisions of this code, provided that when among any class or body of persons or among the members of any family any custom prevails which is inconsistent with the law applicable between such persons under this section and, which, if not inconsistent with such law, would have been given effect to as legally binding such custom shall, notwithstanding anything therein contained to be given to". Amir Ali Syed, *Mahemmodan Law*, vol. 2, 18.
[34] Ibid.
[35]William Henry Rattigan, *A Digest of Customary Law*, ed. Omprakash Aggrawala (Allahbad: University Book Agency, 1989), 1.

2. The daughters of deceased were excluded from inheritance[36].
3. In the absence of sons only the widow of the deceased person inherited the property.
4. If the deceased has an unmarried daughter only in that case she inherited the property, if she got married the property of her father was to be divided equally to deceased male ascendants.

In all the above instances each heir had no right to alienate this property. One of the arguments to justify the above custom was that a woman is entitled to her proper dowry according to the rank or status of the family, and she has no other rights of inheritance to the property of her paternal relations[37]. In fact it was widely acknowledged that, given the nature of existing (exogamous) marriage patterns, any effort to *include* married women would lead to the *fragmentation* of local estates and, ultimately, a sharp decline in the productive capacity of the land[38].

In the year 1937, the customary law of the Muslims was abrogated by the Muslim *Sharī'at* Act[39]. The exception of the agricultural land contained in the Act of 1937. So, the exclusion of agricultural land takes away a very large part of the effect of the Act of

[36]Under Anglo Muhammadan Law, where there is proved and valid custom, excluding daughters from inheritance, the daughters should be treated as non-existent. (Roland Wilson, *Anglo Muhammadan Law*, ed. A. Yousuf Ali, 179).
[37]Fyzee.A.A. Asaf, *Cases In the Muhammadan Law of India and Pakistan* (Oxford: The Clarendon Press, 1965), 99.
[38]Nelson, J. Matthew, *In the Shadow of Sharī'ah: Islam, Islamic Law, and Democracy in Pakistan* (London: Hurst & Company, 2011), 11.
[39]Mahabir Prasad Jain, Outlines of Indian Legal and Constitutional History, 6th ed. (New Delhi: Wadhwa & Company, 2007), 563.

1937[40]. After that in 1937 The Muslim Personal Law (*Sharī'at*) Application Act, 1937 (Act XXVI of1937) was introduced[41].

This law was only applied to intestate succession and had no application to testate succession. After the independence West Punjab Muslim Personal Law (*Sharī'at*) Application Act (IX of 1948) enlarged the scope to cover the questions regarding succession (including succession to agricultural land). In 1951 the scope was further enlarged to all questions of succession (whether testate or intestate). In 1950[42] quite similar amendment was introduced in Sindh. In 1962, The West Pakistan Muslim Personal Law (*Sharī'at*) Application Act was enacted. An important result was that it seems to be that women became entitled to inherit the property. Section 2 of the West Pakistan Muslim Personal Law (*Sharī'at*) Application Act, 1962, was as amended further in 1983 when Article 2A was included in the above mentioned section[43].

Firstly, it seems from a plain study of section 2-A that the law does not abolish all type of customs and not fulfill all the purposes of making amendments in section 2-A.

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[40]George, Rankin, *Custom and the Muslim Law in British India*, Transactions of the Grotius society, 25 (1939), 117.

[41]Section 2 of this act states that [Notwithstanding any custom or usage to the contrary, in all questions (save question relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift ... the rule of decisions in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat)".] M. Farani, *Manual of Family Laws in Pakistan*, (Lahore: Law Time Publications, n.d), 426.

[42] Ibid.

[43]Which states that [Notwithstanding anything to the contrary contained in section 2 or any other law for the time being in force, or any custom or usage or decree, judgment or order of any court, where before the commencement of the Punjab Muslim Personal Law (*Shariat*) Application Act, 1948, a male heir had acquired any agricultural land under custom from the person who at the time of such acquisition was a Muslim: a) He shall be deemed to have become, upon such acquisition, an absolute owner of such land, as if such land had devolved on him under the Muslim Personal Law (*Shariat*); b) Any decree, judgment or order of any Court affirming the right of any reversioner under custom or usage, to call in question such an alienation on directing delivery or possession of agricultural land on such basis shall be void, in executable and of no legal effect to the extent it is contrary to the Muslim Personal Law (*Shariat*) Act; c) All suits or other proceedings of such a nature pending in any court and all execution proceedings seeking possession of land under such decree shall abate forthwith] Ibid.,430.

Secondly, section 2A of West Pakistan Muslim Personal law only emphasised on one angle of the problem and relates to the abolishment of custom of reversionary right and restriction on the alienation of property inherited under custom in which the grandson of the 'last male full owner' challenge the alienation of property by his father and according to section 2-A "the person who acquired land under custom before 15. 3. 1948 would be deemed or presumed that he has acquired land under Islamic Law. While making amendment in the form of section 2-A the legislature ignores the right of women guaranteed in the *Qur'ān* relating to succession in her father's state prior to 15-3-1948 which is also negated under the customary law by inserting a deeming clause in which the 'last male heir' would be presumed to be the full owner under Islamic law.

Thirdly, section 2-A by legislature wipes out the certainty of law of succession ordained by Almighty Allāh in the *Qur'ān* about 1400 years ago and does not give any clear picture and intent to abolish custom related to the right of a widow or daughter in her father's estate prior to 15-3-1948 where daughter challenges the main mutation passed prior to 15-3-1948.

Furthermore in early 19th century in an undivided subcontinent, while deciding the cases of succession among Muslims under section 26 of Bombay Regulation IV of 1827, the crux of the decision lies on the point of proof of customary law in the family or tribe in order to override *Sharī'ah*. Where, if custom is proved to be the rule of inheritance among family of Muslims, customary law were prevalent and Islamic law was ignored. Now under section 2-A of the West Pakistan Muslim Personal Law (Shariat) Application Act, 1962 the same rule is applicable due to that deeming clause and still female heirs of a deceased were deprived of their legal right of inheritance.

Reliance is placed on a dozens of decisions few of which are discussed in the research[44]. To examine the laws governing landed property relations in British India especially colonial laws of inheritance and waqf are also discussed here.

In British India the doctrine of 'justice, equity and good conscience' was introduced, for the first time, in the presidency of Bengal, in the year 1780. It was later transplanted in the *mofussil* of Bombay and Madras Presidencies. The doctrine was later on introduced in other territories of India also, albeit gradually. The general idea behind this doctrine was that if on a particular point of dispute before the Court there was no express/parliamentary law, no Regulation and if it fell outside the heads for which Hindu and Mohammedan laws were prescribed, then the Court was to decide the matter according to 'justice, equity and good conscience'[45]. English Law was introduced initially through the application of the principles of justice, equity and good conscience, as interpreted by the English judges and through the decisions of the Privy Council in England[46]. In 1886 the Privy Council held that the formulas, 'justice, equity and good conscience', or 'justice and right' implied the application of English Law if found applicable to Indian society and circumstances[47]. In Pakistan Courts would seldom apply

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[44]*Ghulam Haider and others v. Murad through Legal representatives 2012* PLD 501; *Bashir Ahmad v. Abdul Aziz* 2009 SCMR 1014; *Muhammad Anwar and 2 others v. Khuda Yaar and 25 others 2008* SCMR 905; *Mst. Jannat v. Msttaggi* 2007 SD 56; *Abdul Ghafoor v. Muhammad Sham* P L D 1985 SC 407; *Mst Amir Begum v. Mst Ruqia Bibi*, 2005 Y L R 2091; *Abdul Aziz v. Bashir Ahmad*, 2005 CLC 1156; *Eada Khan v. Mst. Ghanwar* 2004 SCMR 1524; *Muhammad Yaqoob v. Mst Sharaf Noor* 2004 SCMR 1518; Muhammad Yousufv. Mst Karam Khatoon 2003 SCMR 1535; *Merses Sapra Scale Manufacturers v. National Bank of Pakistan* 2000 CLC 1216; *Ghulam Farid v. Muhammad Nawz* 2000 CLC 1236; *Ghulam Muhammad v. Ghulam Qadir* 1995 SMCR 1830; *Khuda Buksh v. Mst. Niaz Bibi* PL D 1994 SC 298; *Ismail and others v. Ghulam Qadir and others 1990* SCMR 1667; *Lal v. Rehmat Bibi PLD* 1991 SC582; *Mst. Shahzadan Bibi v. Amir Hussain Shah* 1956 SC 227; *Md. Ibrahim v. Shaik Ibrahim* AIR 1922 PC 59.

[45] Pearl, David, *A Text Book on Muslim Personal Law*, 26-27.

[46] M.C. Setalvad, *The Common Law In India*, 30.

[47]*Waghela Rajsanji v. Sheikh Masludin* 1886/87 14 LR IA 89.

principles of Islamic Law to fill a gap in the law[48]. In other cases judges expressly refused to rely on Islamic Law[49]. For instance, in *Niaz Ahmed v. Province of Sindh*[50] the petitioner challenged the imposition of localised martial law, on the basis of Islamic Law. It was held that:

> [Apparently, what the Article (2 of the 1973 Constitution 1973) means is that in its outer manifestations, the State and its Government shall carry on Islamic symbol. This article does not even profess that by its own force, it makes Islamic law to be the law of the land. Otherwise, there would have been no scope for separate provisions being incorporated in a separate Part of the Constitution in Part IX under the heading "Islamic Provisions.][51]

The present work discusses not only in detail the development and application of the doctrine of 'equity, justice and good-conscience' in British-India and Pakistan but also examines the role of judiciary to interpret this doctrine.

This research provides the insight into the Anglicization of Islamic Law in British India in the form of Anglo-Muhammadan Law, which is often described as "a unique and a most successful and viable result of symbiosis of Islamic and English legal thought"[52] and the inclusion of equity, justice, fairness and good conscience as the part of the Anglo-Indian courts. It explores the historical legal process by which not only the customary succession[53] become a part of the Islamic law of succession in British India and the

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[48] See *Abdul Ghani and others v. Mst. Taleh Bibi and others PLD* 1962531; *Allah Bux v. Jano* PLD1962317.
[49] Martin, Lau, The *Role of Islam in the Legal System of Pakistan* (Leiden: Martinus Nijhoff Publishers, 2006), 40.
[50] *Niaz Ahmed v. Province of Sindh* PLD1977604.
[51] Ibid., 648-649.
[52] Joseph, Schacht, *An Introduction to Islamic Law* (Oxford and New York, 1964), 96.
[53] The details of these customs, and the manner in which they were defined by colonial administrators and judges are addressed in this research.

Musalmaan Waqf Validating Act 1913 introduced together with the issue of *waqf'alal-awlād* but also the role of the Anglo-Indian courts to interpret the laws relating to them. The present study narrowly focuses on the legal developments and thoroughly analyses the relevant case law and legal debates. It also examines the prevalence of this law (Anglo-Muhammadan Law) in Pakistan with special reference to inheritance, *waqf* and equity; and the role of superior judiciary in Pakistan to interpret the laws about these subjects.

2. Thesis Statement

During Muslim rule in India the *qāḍī*s were used to implement *Sharī'ah* rulings in their decisions. The process of Anglicization started from 1872 when various laws were implemented in an effort to provide justice, equity and good-conscience. The evolution of Muhammadan Law in sub-continent is demonstarion of contextualization of Islamic Law by colonial Power. This process partially influenced the laws of *Sharī'ah* by sometimes overrule the principles of *Sharī'ah,* particularly in the laws of Inheritance and *Waqf.* These equity based Anglo-Muhammadan Laws need a thorough study in the light of *Sharī'ah* and case laws, so the process of transformation of *Sharī'ah* into Anglo-Muhammadan Law and its impact on Pakistani Law after independence can be evaluated.

3. Statement of the Research Problems

According to the above thesis statement the following research questions are derived. These questions include:

1. How Anglo-Muhammadan law developed during British rule in India and how it affected application of Sharī'ah? Why were equity, justice and good conscience introduced in Anglo-Indian legal system and what are the effects of continued application of this law in Pakistan with special reference to inheritance, *waqf* and equity?

2. What is the place of custom in *Sharī'ah* and whether '*Urf*' can override *Sharī'ah*? If not then why the colonial state encouraged a series of adjustments in favor of tribal custom which are still part of our law to some extent?

3. Can the Ordinance of 1983 which includes Section 2A of West Pakistan Muslim Personal Law (*Sharī'at*) Act (Amendment) Ordinance (XIII of 1983) has retrospective effect prior to 15.3.1948 to replace customary law into Islamic law and give the daughters of the deceased persons their right of inheritance?

4. How the Anglo-Indian courts and the Privy Council show their attitude regarding family *waqf* and how the Musalmaan Waqf Validating act 1913 introduced?

5. What is the approach of superior Judiciary/courts in interpretations of succession in Muslim Personal Law, the law of *waqf* and equity?

4. Scope and Limitations of Study

The research topic is vast enough; therefore the research study needs to be restricted to form a clear and organised picture in front of every reader.

For this purpose this research encompasses three major areas of Law that is why the area of research is restricted to family waqf in case of waqf, women's right to Inheritance with special reference to Section 2A of West Pakistan Muslim Personal Law (Shariat) Act (Amendment) Ordinance (XIII of 1983) in case of Inheritance and role of the doctrine of equity justice and good conscience in anglicizing Islamic Law during colonial Period in case of equity.

This research is confined to the opinions of four *Sunnī* schools of thought, namely Ḥanafī, Shāfi'ī, Mālikī and Ḥanbalī.

5. Literature Review

Because of the importance of this topic number of literature is available in Classical Fiqhī books. Besides primiray Fiqhi literature, there are many relevant contemporary writings and articles that cover some aspects of the topic or another. The various works that are useful to understand on aspect of this topic or another is mentioned briefly here.

S. Ameer's, ***Mahomedan Law Compiled from Authorities in the Original Arabic***[54] , explains not only the law relating to *waqf* in Ḥanafī, Shāfi'ī, Mālikī, Ḥanbalī and Shi'ī schools of thought but also law of *waqf* in British India during the Colonial Rule in a very brief account. At some places he did comparison of Islamic Law of *waqf*

[54] Ameer Ali Syed, *Mahomedan Law Compiled from Authorities in the Original Arabic* (Calcutta & Simla: Thacker, Spink and Co., 1929).

and the decisions of the Privy Council. Case law is also discussed in this work. The present work will also encompass the case law of Pakistan on this subject.

George Rankin in his article ***Custom and the Muslim Law in British India***[55] provides us a brief account about the indulgence of the customary law in Islamic law regarding Personal Laws of Muslims. He also tried to analyse the North West Frontier Province Act (VI of 1935). But this issue needs more detailed study.

Khallāf'swork ***Aḥkām al-waqf***[56], gives very good account of endowments according to only Hanafī school of thought and at the end of his book he gave a brief account of the Egyptian Law of Endowments No. 7, 1946. In this work other schools of thought are neglected. This work only deals with the Classical Islamic Law of *waqf*, while this research will address the nature of family *waqf* and trust in Pakistani law.

M.C. Setalvad, in his book based on his own lectures ***The Common Law In India***[57], describes the basic principles of the foundation of the public and private law of England, and the system of laws and administration of justice called the Anglo-Indian or the Indo-British system into which these basic English principles have in the course of over two centuries grown and developed. In the present work the impact of this system on Pakistani law and the Islamization of this system is described regarding inheritance and *waqf*.

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[55] George Rankin,, 'Custom and the Muslim Law in British India', *Transaction of the Grotius Society*. 25. (1939): 89-118.
[56] Abdul Wahāb Khallāf, *Aḥkām al-waqf* (Egypt: 1948).
[57] Motilal Chimanlal Setalvad, *The Common Law In India* (London: Stevens and Sons Limited, 1960).

Justice, Equity and Good Conscience[58] by Duncan, M. Derrett is a good source of information about the origin and tradition of justice, equity and good conscience. This work also discusses the doctrines of justice, equity and good conscience and justice and right. It does not provide a detailed account in form of case law that how this concept is interpreted and utilised by Anglo-Indian judges in cases of inheritance and waqf regarding Islamic law. The present research will discuss the importation and imposition of the doctrine of justice, equity and good-conscience in Pakistani Courts. It will also address the Islamic concept of equity and will suggest the ways of its implementation in the present Pakistani law for filling the gaps and lacunas in statutory law.

Succession in the Muslim Family[59] by Neol, J. Coulson is an excellent work of reference for readers. The book presents a high standard of readability. The author provides a clear and lucid account of the ramification of this difficult subject of inheritance, but it does not give any detailed information about the law of inheritance of Muslims in sub-continent during colonial rule and its impact in the form of customary succession in Pakistani law.

Kabaysī, Ubaid. Muhammad al, describes in ***Aḥkām al-waqf fī Shar'iah al-islāmiyah***[60], the law of waqf not only according to the four Sunni schools of thought but also to the Shi'ī, Zaidī and Jafrī doctrines. It does not discuss the modern legislations of different Muslim countries.

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[58] *Duncan M.Derrett,, Justice, Equity and Good Conscience,* in *Changing Law in Developing Countries.*ed., Anderson, J.N.D (London: George Allen & Unwin LTD, 1963).

[59] Coulson, , *Succession in the Muslim Family* (Cambridge: The University Press, 1971).

[60] 'Ubaid Muḥammad al-Kabaysī, *Aḥkām al-Waqf fī Shar'iah al-Islāmiyah* (Baghdad: Matb'alrshād, 1977).

M. Bashir Ahmad,, in his book ***Judicial System of the Mughul Empire***[61], provides a very good account about the administration of justice under Mughuls. The book deals in extensor with the period during which the Mughul Emperors ruled India. It gives us a brief description of it in order to illustrate the working of the judicial system with those points only on which authorities exist. He also mentioned the important decided cases from the *qāḍīs* in Mughul period. The theme of this book is limited to a study of the system employed by the Muslims to administer justice in sub-continent. The real focus of this book is on the administration of justices of Mughuls. This research not only provides the insights of the legal system developed by the British after the Mughuls during the colonial era, but also its impact on Pakistani law.

Hamid Khan's work on ***Islamic Law of Inheritance***[62], provides useful information about the origin of Islamic Law of Inheritance and various schools of law. The book also contains the law of wills and bequests. It neglects the issue of the presence of the customary law of succession regarding women's right in Pakistan.

Muslim Endowments and Society in British India[63] by Gregory C. Kozlowski provides information about the Muslim endowments and the temporal order in British India. It minutely covers the *waqf* and its socio-political context under the British rule in India. Kozlowski studies a large number of court cases and engages with legal developments but his focus is wider and deals with the history of the institution of *waqf* rather than the history of family *waqf*. While the present research narrowly focuses on the

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[61]Muhammad Bashir Ahmad,*Judicial System of the Mughul Empire* (Karachi: Pakistan Historical Society, 1978).

[62] Hamid Khan, *Islamic Law of Inheritance*, 2nd ed., (Karachi: Pakistan Law House, 1980).

[63]Gregory, C Kozlowski, *Muslim Endowments and Society in British India* (Cambridge: Cambridge University Press, 1985).

legal developments on the law of *waqf* in sub-continent and Pakistan and thoroughly analyses the relevant case law and legal debates.

Ahangar, Hussain, M. A, in his book ***Customary Succession among Muslims***[64], study the rules of succession customs applicable to a Muslim in Kashmir, to compare them with the existing rule applied by Civil and Revenue Courts of Kashmir and to discuss it what material way they have been departed from. He concludes that the legacy of these customs has been borrowed from the member of the Hindu community. This work provides good information about the rules of inheritance in Kashmir.

David S. Powers in his article ***Orientalism, Colonialism, and Legal History: The Attack on Muslim Family Endowments in Algeria and India***[65] describes the relationship between European colonial behaviour and the study of Islamic Law by focusing on the specific historical context of French Algeria. This study is about the understanding of the orientalists towards the symbiotic relationship between the law of inheritance and family endowments. Case of British India regarding the law of *waqf* is discussed briefly. While the present research discusses in detail the difference between *waqf* and trust.

Life Interests and Inter-Generational Transfer of Property Avoiding theLaw of Succession[66] by Lucy Carroll, provides information about several tactics that have been utilised to avoid the application of the Law of Inheritance to some or all of the property. These tactics are either inconvenient to the donor (*hiba)* or can no longer be relied upon with confidence (*waqf*). But her major focus in this article is about (*hiba*).

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[64] Ahangar, Hussain, *Customary Succession Among Muslims* (New Delhi: Uppal Publishing House, 1986).
[65]David S. Powers, , Orientalism, "Colonialism, and Legal History: The Attack on Muslim Family Endowments in Algeria and India", *Journal of Comparative Studies in Society and History*, 31, no. 3 (Jul., 1989): 535-571.
[66]Lucy Carroll, 'Life Interests and Inter-Generational Transfer of Property Avoiding the law of succession', *Islamic Law and Society*, 8, no. 2 (2001): 245-286.

Outlines of Indian Legal and Constitutional History[67] by M.P Jain, discusses the legal history of Indian Law. This book contains the information of the past and the present: like progress of India after Independence, movement in the direction of a Uniform Civil Code, review of the Constitution, reports of the Law commission of India and amendments of the Constitution. It does not embark with detail on the case law of inheritance, *waqf* and equity of Pakistan.

Matthew Nelson in his book, ***In the Shadow of Sharī'ah: Islam, Islamic Law, and Democracy***[68] tried to unravel the logic of Muslim politics in colonial and post-colonial Pakistan. Focusing on the law related to female inheritance rights in the Punjab he shows the interaction between custom and *Sharī'ah.* This book basically deals with the political economy of the landed property relations in Pakistan and the parameters of local politics and more specifically, local notions of electoral accountability which dramatically transformed as a result of the shift from custom to *Sharī'ah.* This work is about the link between Islam, Islamic law and democracy, one that focuses, primarily, on the ways in which specific efforts to introduce Islamic laws of inheritance came to shape and in many ways, transform prevailing expressions of postcolonial electoral accountability. This book does not address in detail the conflict between *Sharī'ah* and customary law in the laws of inheritance during Mughul period, colonial era of British India and after the independence. It also does not embark on the relationship between the law of inheritance and family *waqf.* In this research the different interpretations of judiciary/Courts of these laws in sub-continent and Pakistan are analysed.

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[67] Jain, , *Outlines of Indian Legal and Constitutional History.* 6th ed., (Nagpur: Wadhwa and Company, 2007).

[68] Matthew J. Nelson, *In the Shadow of Sharī'ah: Islam, Islamic Law, and Democracy in Pakistan.* (London: Hurst & Company, 2011).

Magada Ismail Abdel Mohsin in his article ***Family Waqf: It's Origin; Law Prospects***[69] gives an overview of the origin of family *waqf*, its law and its development. The paper also highlights the importance of the creation of family *waqf* during the time of the Prophet (SAW) and the reasons of its abolishment in almost all the Muslim countries since the 1950's, focusing on the law of Egypt. The present research will explore the difference between the laws of family *waqf* in Egypt and Pakistan.

Neol James Coulson in his article ***Muslim Custom and Case-Law***[70] discusses the official recognition of customary law in regard to matters of personal status. He gives the reforms of different countries like Nigeria, Algeria, Java, Yemen and Indian sub-continent. He raises many questions regarding the relation between Islamic law and custom, the notion of binding judicial precedent and its relation with Islamic law. The present research addresses these issues with detail and tries to provide the satisfactory answers of these questions.

Gideon Libson in his article ***On the Development of Custom as a Source of Law in Islamic Law: Al-rujū'u ilā al-'urfī aḥadual-qawā'idi al-khamsi allatī yatabannā 'alayhā al-fiqhu***[71] discusses the status of custom in Islamic law and Jewish law. According to him custom was incorporated into Islamic Law in variety of ways: by including judicial preferences (*istiḥsān*) and to secondary sources of law, such as *fatawās*; and by using legal fictions (*ḥiyal*). This article does not discuss the role of custom in a legally pluralistic society.

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[69] www.kantakji.com (last accessed 12.09.2012).
[70] Coulson, *Muslim Custom and Case-Law, Die Welt des Islam*, Vol. 6, (1959), 13-24.
[71] Gideon, Libson, *On the Development of Custom as a Source of Law in Islamic Law: Al-rujū'u ilā al- urfī aḥadual-qawā'idi al-khamsi allatī yatabannā 'alayhā al-fiqhu, Islamic Law and Society*, Vol. 2, No. 4, (1997) 129-155.

Anisur Rehman in his work ***Islamic Law and Colonial Encounter: On the Discource on 'Muhammadan Law' in British India***[72] analyses the transformation of Islamic law into Muhammadan law by focusing on the process of translation of Islamic texts during British rule. He argues that orientalists played a key role in developing the discource of Muhammadan Law.

Zubair Abbasi in his article ***The Classical Islamic Law of Waqf: A Concise Introduction***[73] provides a concise and brief introduction to the classical Islamic law of waqf. This study is based on the Fiqh literature of four Sunni schools of thought. The primary focus is on the Ḥanafī Fiqh, however, the representative texts of other schools have also been taken into account.

Dr, Hamid Harasani in his book ***Towards the Reform of Private Waqfs: A Comparative Study of Islamic Waqf and English Trusts***[74]explores the interplay of Islamic Law of Waqf and English Law of Trust during English rule in sub-continent. In his book he also suggests the possible ways in which Islamic Law of waqf can operate in English Law. The analysis is based on those cases which embody the height of legal clash between Islamic law of waqf and English Law of Trust.

The works discussed do not deal significantly with the Anglicization of the laws of inheritance and *waqf* in Anglo-Indian Courts and its impact on Pakistani Law. The

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[72]Anisur Rehman , Islamic Law and Colonial Encounter: On the Discource on 'Muhammadan Law' in British India [https://papers.ssrn.com/sol3/Delivery.cfm?abstractid=2170464 [accessed 14th January 2019]

[73]Zubair Abbasi, The Classical Islamic Law of Waqf: A Concise Introduction, *Arab Law Quarterly*, 26 (2012) 121-153.

[74]Dr. Hamid Harasani, *Towards the Reform of Private Waqfs: A Comparative Study of Islamic Waqf and English Trusts* (Brill Nijhoff: Boston, 2015).

importation and imposition of the doctrine of justice, equity and good-conscience in Pakistani Courts is also a neglected subject. Not a single work provides a case study of Pakistani Law on the issues regarding the laws of inheritance, family *waqf* and equity. Therefore, the present research addresses the question about the development of Anglo-Muhammadan law regarding inheritance, *waqf* and equity and its prevalence in Pakistani Law and the role of Courts regarding the above topics. It examines that why a persistent effort to avoid Islamic law of inheritance and *waqf* would be done by the authorities of colonial state? It will also examine that if custom is proved to be the law of Inheritance then what law would be considered for the inheritance? Are the family *waqfs* used as a legal means of circumventing the law of Inheritance and cause to the immobilization of property? An extensive case study of sub-continent and Pakistan on the concerned topics will be utilised to answer all these questions.

6. Research Methodology

A variety of the comparative research methods from classical Islamic Law and contemporary socio-legal and social science methods will be used to complete various components of this research.

The opinions of Muslim Jurists about *waqf* and inheritance are analysed on the basis of methods such as *Istiqra'* (induction) and *Istadlāl* (deduction). Their elaboration, explanation, interpretation and derivation of rulings from classical Islamic texts are also studied on the basis of these sources.

The Law of waqf and Inheritance are based on texts of the *Qur'ān*, the Sunnah and classical manuals of Islamic law. The texts are understood on the bases of *Manhaj Naqlī*

(Textual Methodology). *Manhaj Aqalī* (Rational Methodology) has also been used to elaborate historical facts of the evolution of Anglo-Muhammadan Law.

Social sciences methods such as descriptive methods, historical methods, and philosophical methods are used to study the contemporary legal thoughts in Pakistan.

Pure legal methods have been used to explain, discover, examine, analyse and present in a systematic way the concepts, doctrines, and theories of codification of laws to analyse the laws of waqf, inheritance and equity in British India and Pakistan. Almost 40 cases related to these laws are discussed.

7. Outline of the Research

The current study consists of six chapters. The detail of the outline is mentioned below.

Chapter No. 1: Anglicization of *Sharī'ah* Law in Sub-Continent during Colonial Rule

1. Islamic Law during Muslim Rule in India
2. English Law in India
3. Anglicization of *Sharī'ah* through the Creation of Anglo-Muhammadan Law
4. Application of New Legal Methods
5. Transformation of Islamic Law into Muhammadan Law

Chapter No. 2: Islamic Law of *Waqf*

1. Foundation of *Waqf* Law
2. The Objectives and Purpose of *Waqf*
3. English Law of Trust

Chapter No. 3: Analysis of the Case Law on Family *Waqf* in Sub-Continent

1. *Waqf* Management in Pre-Colonial India

2. *Waqf* Management Practice in Colonial India

3. Judgments of *Awqāf* in Anglo-Indian Courts

4. Family *Awqāf* and English Legal System

5. Family *Waqf* in Pakistani Law

Chapter No. 4: Basic Rules of Islamic Law of Inheritance

1. The Pre-Islamic Rules of Inheritance

2. The Sunni Law of Inheritance

3. Order of Entitlement to Inheritance

4. Exclusion Deprivation

5. Special Cases in the Islamic Law of Inheritance

Chapter No. 5: Analysis of the Case Law of Inheritance in British India and Pakistan

1. Concept of *'Urf in Islam*

2. Customary Law in British-India

3. Customary Law in Punjab

4. Law of Inheritance in Pakistan

Chapter No. 6: Historical Background of Justice, Equity and Good-Conscience in British-India and Pakistan

1. Historical Nature of Equity

2. English History of Equity

3. Islamic Concept of Equity (*Istiḥsān*) in *Sharī'ah*

4. Origin and Application of the Doctrine of Justice, Equity and Good-Conscience in British-India

5. Analysis of the Case Law Regarding the Doctrine of Justice, Equity and Good-Conscience in Pakistan

Although multi-lateral issues evolve in this research such as Islamic, English and Pakistani law of waqf and Inheritance and equity in general and the concepts of *'Urf* and *Istiḥsān* but it was difficult to do justice with every topic. But after compromising over 100,000 words, 300 pages and exploring all the possible aspects of the topic it is the blessing of Allah Almighty that I am able to complete this difficult task. This is purely a human effort and different aspects of this research can also be explored in future. Nothing happens unless decreed by Allah and this research is good enough because of Almighty Allah and the researcher is responsible for all the weaknesses.

Usmat Batool

Chapter No. 1

Anglicization of *Sharī'ah* Law in Sub-Continent during Colonial Rule

Chapter No. 1: Anglicization of *Sharī'ah* Law in Sub-Continent during Colonial Rule

The *Sharī'ah* laws had been the law of the land during the Muslim rule in India for centuries. The civil and criminal disputes were decided in accordance with the rules of the *Qur'ān* and the *Sunnah*. The legal system and judicial structure of sub-continent was based on *Sharī'ah* laws. The principle courts for the resolution of disputes were presided over the King, the governors or other administrative officers. The law was usually ascertained from the *'ulamā*, the administrators followed the same procedure in the provinces.[75] Usually the *qāḍī* functioned as judge and was assisted by a *muftī* who usually performed only an advisory role.[76] The *Sharī'ah* laws were enforced in India in the beginning of the colonial rule till the time when Lord Warren Hastings[77] was appointed as the first Governor General of India in 1774. Lord Hasting was the first person who, in the name of legal reforms, gradually abrogated the Islamic Legal System of India. So firstly, they abolished the *qāḍīs* (used the texts in the courts for taken decisions in different matters were not authoritative) and substituted secular courts[78], secondly, introduced the English doctrine of precedent, and finally they applied the doctrine of 'Equity, Justice and Good Conscience'.[79] This chapter addresses that how Anglo-Muhammadan law was developed and how it affected the application of *Sharī'ah*? Why were equity, justice, fairness and good conscience introduced in Anglo-Indian legal

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[75] Ahmad, *The Administration of Justice in Medieval India* (Aligarh Historical Research Institute, 1941), 133.

[76]The Hindus generally preferred their own five men village council panchayat for the settlement of their legal differences.

[77]Warren Hastings, (6 December1732 to 22 August1818), the first and most famous of the British governors-general of India, who dominated Indian affairs from 1772 to 1785 and was impeached (though acquitted) on his return to England.

[78] Fyzee, *Outlines of Muhammadan Law* (Delhi: Oxford University Press 1974), 32.

[79] David pearl, *A Text Book On Muslim Personal Law*, 2nd ed (Croom Helm: Australia, 1979), 20.

system? It also examines the process of Anglicization of *Sharī'ah* law in sub-continent during British rule. It is argued in this chapter that the discourse of Anglo-Muhammedan law highlights the representation of exercise of the sovereign power by the English colonial authority in India. In addition, it also argues that basically the concept of Muhammedan law is developed by the Orientalists.

1. Islamic Law during Muslim Rule in India

Islamic Law was introduced into the Indian sub-continent in the early eighth century, when Muḥammad bin Qāsim conquered Sind (712 A.D.).[80] But due to the political, administrative and military difficulties, which the early founders of the Sultanate faced, the regular enforcement of *Sharī'ah* in the authoritarian sense of the term took place only in 1206, during the time of Sulṭān Quṭbub al-dīn Aībak[81]. Although there are different opinions of historians on the extent of the application of *Sharī'ah* during this period, as in fact during the Mughal dynastic era, it is likely that the law was applied in a strict manner[82]. From 1206 to 1526 five different Muslim dynasties – the Slaves, the Khiljīs, the Thughluqs, the Sayyids, and the Lodhīs ruled India. The Mughal dynasty was established in 1526 and remained till 1857, it was in decline since the death of Awrangzeb 'Ālamgīr in 1707[83]; although from 1707 till 1857 their power saw a steep and steady decay[84]. In the beginning *Sharī'ah* was applied strictly, but soon difficulties began to happen with the Mughals, it was recognised that while Muslims were to be governed

[80]Vincent Arthur Smith, *The Oxford History of India: From the Earliest Times to the end of 1911* (Oxford University Press: London 1976), 11.
[81] Ahmad, *Administration of Justice in the Medieval India* (Aligarh, 1941), 25; Fyzee, "Muhammadan Law in India", *Comparative Studies in Society and History*, 5, no. 4 (1963): 401.
[82] David Pearl, *A Textbook on Muslim Personal Law*, 20.
[83] Muhammad Munir, "The Judicial System of the East India Company", *Annual Journal of International Islamic University Islamabad*, no. 13 & 14 (2005-06): 53-68.
[84] Muhammad, Munir, *Precedent in Pakistani Law* (Oxford University Press: Karachi, 2014), 1.

by Muhammadan Law[85], the non-Muslims were to be allowed to continue the practice of their own laws and customs, unrestricted by considerations drawn from other sources[86]. Morley writes that 'in the peculiar circumstances of the country it was very inadvisable to alter the tradition established by the Mughals and introduces reforms which would not by appreciated by the people[87].'

Apparently the Muslims tried to follow the law of *Sharī'ah* very strictly, but customs and the laws of their non-Muslim citizens created many troubles.[88]

The Mughals in their reign allowed their non-Muslim citizens to follow their own laws and customs and later this policy was adopted by the British from them[89]. The Muslim rulers who ruled India brought with them a system of jurisprudence where they had to deal with an established body of indigenous laws, known as the *dharma*. And it is the Muslims, who first established this rule of law in sub-continent that *Sharī'ah* would govern the Muslims and Hindu Law, the Hindus; and this was accepted by the East India Company, which later was confirmed by British authority and is now firmly established in the Union of India[90].

In the Muslim state the sovereignty essentially belongs to Almighty Allāh [91] and the King can only rule in His name, as his representative[92]. The King was responsible to observe that the orders of Allāh were properly obeyed, unless any exception appears in

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[85] Mughal emperors were Ḥanafīs, and the qāḍīs appointed by them administered the Ḥanafī Law. Fyzee, *Outlines of Muhammadan Law*, 48.
[86]. Fyzee, Muhammadan Law in India, 402.
[87] William Hook Morley, *Administration of Justice in British India* (London: 1858), 193; Fyzee, *Outlines of Muhammadan Law*, 42.
[88]Fyzee, "Muhammadan Law in India", 403.
[89] Fyzee, *Outlines of Muhammadan Law*, 42; Ahmad, *Administration of Justice in the Medieval India*, 32.
[90] Ibid., 37
[91] Waheed Hussain, *Administration of Justice during the Muslim Rule in India* (University of Calcutta: India 1934), 3. M. B. Ahmad, *Judicial System of the Mughul Empire* (Karachi: Pakistan 1976), 42.
[92] Ahmad, *Judicial System of the Mughul Empire*, 43.

the form of custom. It is believed that *Akbar*, "passed every moment of his life in self examination or adoration of Allah". *Jehāngīr*[93] considered the daily administration of justice in public as one of his sacred duties, and *Shahjahān* said that "justice was the mainstay of his government"[94]. The same strict regulation was followed by *qāḍī*. If he passed rules in overriding *Sharī'ah*, he would risk not only removal from office, but also be legally responsible to be put to death for apostasy in extreme cases[95]. The Muslim rulers did not interfere with justice and refrained from changing the rules of the *Sharī'ah*; but as time goes on many form of regulations having the force of law came to be accepted and enforced[96]. During the later rule of Mughals the laws were of these kinds[97].

Qānūn-i-'urf: This was a very important branch of Law. According to *dharma* tradition custom can override the scripture or text of law. *Sharī'ah* on the other hand rules that the *naṣṣ* prevails against custom. So in India large number of conversioners and certain communities retained their own customary law as being favourable to their sense of possessions and propriety. In their case land cannot be dispenced for the benefit of a son-in-law; a business cannot be divided for a prodigal son; woman whether a daughter or wife, cannot acquire part of father's land. This really demonstrates in case of Kashmir. In Kashmir where Ḥanāfī law is followed, by custom the female heir (daughter or sister)

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[93]"The Emperor Jehāngīr adopted another device to bring justice within the easy reach of every person without the intervention of the court officials. He ordered to make a chain of gold thirty yards in length containing sixty bells. One end of the chain was fastened to "the battlements of the Shah Burj of the fort at Agra and the other to a stone-post fixed on the bank of the river" (Jamna). The Emperor generally held the royal court to hear complaints. The aggrieved parties used to pull the chain". Hussain, *Administration of Justice during the Muslim Rule in India*, 5.

[94] Ahmad, *Administration of Justice in the Medieval India*, 66.

[95] Ibid., 68.

[96] *Aḥkām-i- Sharī'ah*. These related absolutely to religious matters such as conversion, apostasy and heresy.*Aḥkām-i-jināyāt*. The consisted of both crime and torts, e.g. theft, negligence, adultery and drunkenness.*Qānūn-i- shāhī*. These included of *farmāns* and *dastūru'l-'amals*, and they dealt with gifts of land under feudal tenures.

[97] Fyzee, "Muhammadan Law in India", 406.

is deprived of her share of lands[98]. They usually give a considerable dowry at the time of marriage but do not allow any claim to be made by daughter at the time of inheritance opens out. They justify their practice by arguing that this prevents the division of agricultural land[99], in a country where even a bare subsistence level is hardly maintained; and in business communities, splitting up a profitable business into an uncertain partnership between two strangers, are barely an enviable end. The daughter or sister married "outside" the family; she is "given away", and therefore the agnatic relations naturally desire to protect their rights and prevent the imposition of relations by marriage[100].

Use of Fatwa and Precedents: Although the *Sharī'ah* does not have the concept of precedent as established in the Common Law in sub-continent, and elsewhere the swaying force of the *fatāwa* (a jurist's opinion on a legal question) is in one form or the other recognised all over the Muslim world. According to Muslim tradition *fatwā* of a scholar has not only its legal authority but also an ethical sanction, and cannot be compared with counsel's opinion in England, however renowned he may be. Many books of *fatāwā* were compiled during Mughal rule. This *fatāwā* literature was revised by *qāḍīs* because many of them were written on the commands or directions of different Muslim Kings. *Fatāwa 'Ālamgīrī* was recognised as one of the most reliable sources of Islamic Law in sub-continent. It was compiled during the rule of Aurangzeb 'Ālamgīr, who also had good knowledge of *Sharī'ah*. Under the command and supervision of Aurangzeb 'Ālamgīr a team of *fuqahā* of that time compiled this work. The King ordered the court to

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[98] Muhammad Altaf Hussain Ahangar, *Customary Succession among Muslims* (New Delhi: Uppal Publishing House,1986), 80.
[99] Nelson, *In the Shadow of Sharī'ah: Islam, Islamic Law, and Democracy in Pakistan* (London: Hurst & Company, 2011), 31.
[100] Ibid., 32.

implement it and even today it is being consulted by the courts of Pakistan. *Fatāwā-i-Fīruzshāhī* is another inclusive work related to different work compiled by Ṣadruddīn Ya'qūb Muẓaffar Kirmāni and revised by Fīruz Shāh. *Fatāwā Ḥāmdīyah* was another comprehensive collection of *fatāwa*. This collection of *fatāwa* was prepared by Abū-al-Fatāḥ Rukan-al-Dīn ibn Ḥasām, *muftī* of Nagore (India) and his son in ninth century (Hijrī) by the order of *Qāḍī-al-Quẓāt* of Naharwal, Qāḍī Jamāl Aḥmad ibn Qāḍī Akram. The work originally is written in Arabic and contains *fatāwā* related to all topics of *fiqh*. *Fatāwā-i- Tātārkhānī* another comprehensive work was prepared by Farīd-al-Dīn 'Ālim bi Allāh Ḥanafī on the direction and help of 'Āmir Tātār Khan. *Fatāwā-i-al-Ghiyāsīyah* prepared by Daūd ibn Yūsuf Alkhatīb in the reign of Sultan Giyās-al-Dīn Balban and was submitted to him by the author. *Fiqh-i- Fīruz Shāhī* was promulgated in the reign of Fīruz Shāh Tughlaq. The original work was in Arabic but later translated into Persian by the order of Feroz Shah Tughlaq. It is basically related to the procedural law and law of civil matters. It remained the basis of Judicial System of Muslim ruler in sub-continent up to the rule of Auragzeb 'Ālamgīr.[101]

All these *fatāwā* are swaying authorities of great value, but the *qāḍī* (Court) has a liberty to adopt any opinion which is most consonant to reason and commanding principles[102], but the concept of English Law known as 'precedent' was not embodied in *Sharī'ah* as understood in sub-continent in early times[103].

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[101] Zafar Islam, Socio Economic Dimension of Fiqh Literature in Medieval India (Lahore: Dyal Singh Trust Library, 1990), 9-40.

[102] Throughout Islamic legal history, the decision of one *qāḍī* was not binding on another *qāḍī*, or, in other words doctrine of a binding precedent did not exist under Islamic law in the sense that it exists today in common law; Munir, *Precedent in Pakistani Law*, 1.

[103] Fyzee, "Muhammadan Law in India", 406.

Equity, Fairness and Good Conscience: During Mughal rule the regular system of equity did not exist, in terms it existed in Law of England, but there were clear directions given to the *qāḍī* to moderate the rigours legal interpretation of the law in exceptional cases. First of all there were the *ādāb al-Qāḍī* (Duties of the *qāḍī*), and in them we find not only legal norms, but directions for private conduct, for the due administration of justice, and for engendering confidence in the public mind[104]. But according to M. Bashir the courts were enjoined to act, when there was no clear law on the principles of equity and good conscience[105], the judgment of Lord Parker of Waddington in *Hamira Bibi v Zubaida Bibi*, suggests that 'the chapters on the duties of *Qāḍī*s in the principle works on Muhammadan Law clearly shows that the rules of equity and equitable considerations commonly recognised in the courts of chancery in England were in fact often referred to and invoked in the adjudication of cases. The collection of selected jurist opinion in the *Fatāwa 'Ālamgīrī* was primarily meant to guide judicial discretion, in the lines of equity[106]'.

When the Company took control on Indian sub-continent a well organised and recognised structure of judicial system, i.e., civil courts and criminal courts; was existed. According to Mughals, courts can be classified into three categories: (a) revenue courts whose responsiblility was to settle the disputes on the matters on the rights of the land which arose out of complaints; (b) *Qāḍī*'s courts who were responsible to deal with the matters relatede to family law governed by religion, i.e., marriage, divorce, will, inheritance; and (c) "secular" courts which were governed by administrative officers,

[104] Fyzee, "Muhammadan Law in India", 403.
[105] Ahmad, *Judicial System of the Mughul Empire*, 55.
[106] Ibid.

were responsible to deal with non-religious as well as undefined offences[107]. In addition, there were a system of caste Panchayats and village Panchayats which fell outside the proper established judicial set up. He also claims that the structure of judiciary was as same as the courts laid down by Muslim *fuqahā* in different periods. In the words of Jain: "...territorially the courts formed a concentric organization with the king as the pivot to which all cases of original judication could be referred and appeals could be made. The King was the centre-his being the supreme court irrespective of his location whether at the capital or on tour, in camp or in the capital. Under him in the capital were the *Dīwān-'A'ala* and the *Qāḍī al Qaḍāt* (chief Qāḍī). In the province were the *Subedār*, the *Dīwān* and the Provincial *Qāḍī*. "In the *Sarkār* the *Faujdār*, the *Karorī* and the *Qāḍī* and the *Siqdar*, *Amīn* and the *Qāḍī* dispensed justice in the *Parganah*"[108].

In Mughal judicial system there was no hierarchy of the court system which leads to nonexistence of the doctrine of precedent[109]. An individual had a freedom to take his complaint to either court from the Panchayat to the State courts. Because of the indistinguishable division of courts in terms of jurisdiction, it appears, presided over by a higher officer was recognised as a court of appeal which was having an authority to reverse the judgment of the officer of lower rank, i.e., lower court[110]. It also appears that courts during the Mughal reign bore the similarity to the British Courts in different matters like structure, jurisdiction and procedures[111]. That's why, the British authorities put quite little effort to establish a new judicial formation except making few changes

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[107]B.S. Jain, *Administration of Justice in Seventeenth Century India: A Study of salientConcepts of Mughal Justice* (Delhi: Metropolitan Book Company, 1970).
[108]Ibid., 81-82.
[109] Fayzee, *Outlines of Muhammadan Law*, 32.
[110] M.P.Jain, *Outlines of Indian Legal & Constitutional History* (Wadhwa Nagpur: 2007), 39.
[111]Ibid.

regarding the title of the courts and some procedural changes[112]. The Mughal kings were followed the Ḥanafī school, so the *qāḍīs* gave the rulings according to the Ḥanafī law. This whole process continued untill the British rule was established[113]. It is for sure that there was a well established judicial system which existed during Mughals which not only provided the satisfactory justice to the people but also was adopted by the British rulers in the early years of their rule. As time goes by the British administration became more strong and powerful so they not only introduced the procedures and methods of English law but also applied different doctrines particularly principles of equity and fairness and precedent. Later, the newer procedures of recruiting judicial administrators were introduced.

2. English Law in India

British Colonialism, represented by the East India Company, started its penetration in India as early as 1601[114] and continued under different charters. Beginning with its application in the seventeenth century to British subjects in small areas in certain parts of India which were known as the company's factories, the Common Law of England with its statutory modifications and the doctrines of the English Court of equity has deeply coloured and influenced the laws and the system of Judicial administration of whole sub-continent inhabited by nearly four hundred million people[115]. English took into sub-continent not only the number of legal rules in the form of Common Law but also their outlook, tradition and approach in constituting, maintaining and evolving the

[112] Hussain, *Administration of Justice during the Muslim Rule in India*. 33.
[113] Fyzee, *Outlines of Muhammadan Law*, 48.
[114] William A Archbold, *Outlines of Indian Constitutional History*, 9.
[115] Setalvad, *The Common Law In India* (London: Stevens and Sons Limited, 1960), 1.

judicial system[116]. The history of British Law in India commenced with the formation of the East India Company in 1600 during the reign of Elizabeth I[117]. The East India Company's charter gave it the power to discipline its own servants, and a 1618 treaty with the Mughal emperor recognized this power for the company's factory at Surat.[118] The exercise of judicial powers by East India Company commenced with the Charter of Charles II in 1661; and the responsibility for the administration of justice in India was confined until 1765 to the Factories of the Company[119]. In 1661 the island of Bombay on the west coast of the sub-continent was ceded to Charles II as part of a marriage treaty with Portugal for the first few years of administration (from 1661 to 1668).[120] In theory at least the island was under the direct rule of English law a charter of 1661 having empowered the governor and council in Bombay to judge all person under them in all causes whether civil or criminal according to the laws of this kingdom and to execute judgment accordingly the possibilities of administering justice to the indigenous population other than those who were servants of the East India Company was not contemplated by the charter itself, it is possible however that whenever the governor and council were called upon to adjudicate a civil dispute involving Portuguese or other non English inhabitants they allowed the Portuguese civil law to governor the dispute.[121] In the period from 1661 to 1668 as far as is known the martial law and the Portuguese civil were the governing laws, although it should be mentioned that it has been judicially held

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[116] Ibid., 5.

[117]The Charters of 1600 gave clear authority to make laws. "... so always that the said laws, orders, constitutions, ordinances, imprisonments and fines be reasonable and not contrary or repugnant to the laws statutes, customs of this our realm". Ibid.

[118] M.P. Jain, *Outlines of Indian Legal & Constitutional History*, 33.

[119] George Claus Rankin, *Background to Indian Law* (Cambridge: 1946), 1.

[120] M.P. Jain, Outlines of Indian Legal & Constitutional History, 37.

[121] Charles Fawcett, *The First Ccentury of British Justice in India* (Oxford: Clarendon Press London: Humphrey Milford, 1934), 26.

in the Advocate General v. Richmond and 1845 that the session of 1661 abrogated the application of Portuguese law and the courts.[122]

In 1668, the island was leased by the British crown to the East India Company. In the charter of that year the company was required to enact "consonant to reason and not repugnant or contrary to and as near as many to agreeable to English law". The courts were directed to be "like unto those that are established and used in this our realm of England under this authority. The company drafted laws for the administration of justice in the island of Bombay. The laws provided for the establishment of a court of judicature both for the determination of criminal and civil matters land also for the establishment of juries. It is interesting to notice that:

All trials in the said court were to be by jury of twelve men where if the matter in variance shall be between English and English there the jury shall be all English when the matters in variance are between English and other nations or between stranger and stranger then the jury be one half English and the other half of the inhabitants of the island that are not English.[123]

The judges who were appointed were directed to administer justice to all persons "according to the principles of common right". In addition the first regulations the judges were directed to behave themselves "duly and truly towards all according to justice and good conscience".

Two important points have to be made concerning the company's laws. First they do not directly impose English law as the sole governing law, second the provision relating to the non-English jurymen in appropriate eases shows that the jurisdiction of the

[122]1845 Perry's Oriental Cases 566.
[123]David Pearl. *A Text Book of Muslim Personal Law*, 22.

court extended to non-English inhabitants of Bombay the court was not in fact established until 1672 some four years after the Charter and the evidence available of the administration of the law for these four years illustrates that neither the company's laws nor the laws of England proper were necessarily binding on the council in Bombay. In 1672 however one Wilcox who was a clerk in the prerogative office was appointed judge and the court was established. From then on the Company's laws (on the whole) were followed. In the absence of any provision in the company laws the judge resorted to the laws of England. It was also at this stage that the case courts (*panchayats*) were recognised. These courts assumed jurisdiction over person who were members of the local population and who had agreed to submit the dispute to the arbitration of the *panchayat*. In the absence of such an agreement between the parties the court of judicature had jurisdiction. The court of judicature functioned satisfactorily until 1683, but in that year a revolution succeeded in closing the court for a year. After the surrender, another famous name in the development of jurisprudence in India Dr. St. John a doctor of civil law form Leiden was appointed to be the judge of a newly created Admiralty Court. According to the Charter of the Admiralty Court and maritime cases whatsoever, "according to the rules of equity and good conscience and according to the laws and customs of merchants" it has been argued that this formula as applied by this particular judge ensured the application of Roman law.[124]

In the Admiralty Courts[125] it so happened and this is one of those historical oddities, that at this particular time the court of judicature had not been formally reconstituted after the overthrow of the rebellion, so Dr. St. John who was able to assume

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[124] Ibid.

[125] J.D.M. Derrett, "Justice, Equity and Good Conscience", in J.N.D. Anderson (ed), *Changing Law in Developing Countrie*, (London: 1963): 130.

the office of *de facto* judge for all civil and criminal matters in addition to his admiralty jurisdiction naturally enough his concept of justice was not bound either by the common law on the one hand or by the company's laws on the other.

This particular period came to an end in 1687 when Dr. St. John was recalled to England. At this point in the history of the British administration in the Bombay there appears to have been a three-concerned struggle. First the administrators in Bombay wished to have recourse to English law both common law and statute. Second the company officers in London wished to rule by direct order through letters.[126] Third there was Dr. St. John who before his recall wished to extend the civil law (or Roman law) so that all suits would be administration according with its provisions.

The administration of justice in Bombay was interrupted once again in 1689 by an invasion by Mughal navy. The Court was not reconstituted until 1718 when they declared the governor and Council of Bombay empowered the justices to "hold please, hear and determine all cases, suits, actions and trespasses as well civil as criminal whatsoever, in this island of Bombay .... According to Law, equity and good conscience." In addition, the judges were required to pay due regard to caste customs, "the principles of common right, the orders of the Right Honorable Company, the policy and known and established law of the Realm of great of Great Britain, provided the same be confirmable to the instruction given to the court."[127]

One provision of the 1718 proclamation resulted in requiring the Court of Judicature to be the Court of Appeal from the caste courts. It will be recalled that thirty years or so before this date the caste courts had been directly recognised. If this provision

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[126] One particular letter from the London office talks about the law of England being a "heap of nonsense"
[127]David Pearl, *A Tex Book of Muslim Personal Law*, 22.

had not been introduced at this time, the development of Indian Law, and both the reception of English law as such and the development of what can be called Anglo-Mohammedan Law, would have been very different. This declaration of 1718 was the beginning of the involvement of the colonial court structure in the administration of local justice. Other colonial powers have followed significantly different models, and delegated the administration of all personal law matters to the courts of the indigenous communities.[128] But in 1718, the British had not made the complete commitment which was to develop later indeed; both the proclamation itself and the early reported cases prove that the British settlers in this period were fully prepared to allow the indigenous inhabitants to settle disputes, up to a point, according to their own laws. The Muslim courts on this period were better organised than the Hindu courts but, none the less, Hindu caste courts did exist, and were recognised by the British.[129]

In 1726, the authority of the court of Judicature was changed by a Charter establishing a Mayor's court in Bombay, deriving authority from the King. At the same date, Mayor's courts were constituted in the two other important settlements, In Madras and in Calcutta. In passing, it should be mentioned that the British had derived authority in Calcutta from the acquisition of three villages in 1694 by which they became landowner's with jurisdictional responsibility, and in Madras, Indian rulers in 1639 had allowed the company's courts to exercise jurisdiction by grants of sufferance. In effect, the 1726 Charters ended the three fold struggle of the 1685-87 periods by laying down the authoritative introduction of English law for the first time. The courts were authorized to "try, hear and determine all civil suits, actions and pleas between party and party" and

[128] M. B. Hooker, *Legal Pluralism* (Oxford University Press, 1975), 79.
[129] Charles Fawcett, *The First Century of British Justice in India*, 41.

to give "Judgment and Sentence according to justice and right". It has been pointed out by professor Derrett from London University, amongst other, that the Charter and the Letters Patent of 1726 expressly avoided the phase "Justice, equity and good consequence" or "equity and good conscience", with its Roman law/ civil law flavor from the days of Dr. St. John, and substituted the term "Justice and right". Thus, historically, the term "Justice and right" is different in scope from "Justice, equity and good conscience", but from the legal point of view the two phrases do not differ in their meaning.[130]

The introduction of English Law into the three Presidency towns raised the question of jurisdiction over the indigenous population on the whole; the company had encouraged the application by caste courts of the relevant indigenous law. The differences that happened between the Natives in which the King's subjects are not involved, they may and should be decided among themselves, according to their own Customs, or by Justices to be appointed by themselves or otherwise as they think fit; but if they request and choose them to be decided by English laws, those and those only must be pursued and pursued too according to the directions in the Charter and this likewise must be the case when differences happens between Natives and subjects of England, where either party is fixed and determined to go to Law.[131]

This reply foreshadowed the 1753 Charter for the three Mayor's courts, which was expressly accepted from the jurisdiction all suits and actions between natives which were "too be determined among themselves unless both parties submitted them to the determination of the Mayor's courts." There is no doubt that the Mayor's courts

[130] Ibid.
[131] Ibid.

continued to be extremely popular amongst the Indian population, and although recognised by the law, the caste courts were resorted to infrequently. This reluctance on the part of the Indian population to use the caste courts was acknowledged twenty years later when civil courts were established by the company in the newly acquired *Mofussil*, the area beyond the three Presidency towns. In 1765, the company had obtained the *Diwanī* of Bengal[132], Bihar and Orissa and in 1772, the Governor, Warren Hastings, determined to carry out the decision of the company to "stand forth as *Dīwān*" In pursuance of this policy, he established civil courts to govern both Europeans and Indians.

By the 27th Article of the Regulation 11 to 1772 Hindus and Muslims were to be governed by their own laws (but not administered in their own courts) in disputes relating to inheritance, marriage and caste and other religious usages and institutions. In 1781, the word "succession" was added to the list of subjects within the control of the indigenous laws. Another interesting development at this time was that Hindu and Muslim experts (*Pandit*s and *Maulvī*s) were empowered to instruct the courts as to the nature of the Muslim or Hindu law[133], whenever a matter of Muslim or Hindu law came to be decided upon regulation II placed the Hindus and Muslims on an equal tooting. This must be seen as an enlightened decision, bearing in mind the nature of the *Dīwanī* grant which had been given to the company and the strict Mughal interpretation of that grant. The pundits and the *Maulvīs* were bound by the "laws of the Shastras" in the further case "The law of the Koran" in the letter caste. In 1793 this regulation was replaced by section 15 of

[132]G. C. Kozlowshi, *Muslim Endowments and Society in British India* (Cambridge University Press, 1985), 20.
[133]C. A. Bayly, *Indian Society and the Making of the British Empire* (Cambridge; Cambridge University Press, 1988), 76.

Regulation IV bread Mohammedan Laws" and "Hindu laws". In 1781, regulations were enacted providing procedural instructions for the judges of the *Mofussil* courts. It is interesting to note that these instructions use the formula. "Justice Equity and Good Conscience" after an interval of nearly a hundred years Section 60 of the 1781 regulation lays down that in all cases within the jurisdiction of the *Mofussil Dīwānī 'Adālat*, for which no specific direction are hereby given, the respective judges thereof do act according to Justice, Equity and Good Conscience".[134]

There was also in the period an interesting development in the Presidency towns. In 1773 in Calcutta, the Mayor's Court was replaced by a Supreme Court. It is not necessary to describe in detail the conflict which existed at this time between and Supreme court on the one hand and the Governor and Council in Calcutta on the other hand, and it will be sufficient for present purposes to state that the dispute arose out of the assumption by the supreme court, whenever they were confronted with a dispute involving Indians, probably applied Hindu or Muslim laws rather than English Law.[135] The Act which created the Supreme Court did not regulate either the extent of the jurisdiction or the particularly unfortunate state of affairs was resolved, when the Supreme Court was granted jurisdiction overall Indian inhabitants of Calcutta. By Section 17 of this Act, however: inheritance and succession to land, rent and good and all matters of contract and dealing between panty and party were to be determined in the case of the Mohammedans and Hindus by their respective laws.

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[134] Ibid.

[135] Asim Kumar Dutta, 'Why did the East India company recognize Hindu and Muslim Law?' in N. R. Ray (ed.), *Western Colonial Policy* (Calcutta: Institute of Historical Studies, 1981), 173.

So from the above facts it is clear that the Islamic laws remained in operation for over one hundred year after the British had taken over; nevertheless, it underwent so many amendments during this period.

3. Anglicization of Sharī'ah Through the Creation of Anglo-Muhammadan Law

The transformation of Muslim law in India under British colonialism was effected by three concurrent processes throughout the late 18th and 19th centuries: (1) translation, (2) legislation, and (3) adjudication leading to judicial precedents.[136] The work of translation was the most infrequent but nonetheless significant in changing the face of Muslim law in India. Only a few texts were translated in the late 1700s, and a few more in the middle of the 1800s[137], but they eventually became the primary sources to be consulted on any question involving Muslim law.

3.1 Translation of Sources of Islamic Law

Translations gave them tools with which to question the legitimacy of *qāḍī*'s decisions, and gave them de facto authority to restructure the conception of law. This process of creating a new system of law for Bengal embodied many Orientalise dynamics. British scrutiny of Islamic law consisted of a two-fold dynamic: first, the British assumed that law exists in a formal code which they could administer, and second, if such a code did not exist, they assumed the right to alter legal practices in order to form

[136] Allan M Guenther, *Syed mahmood and The Transformation of Muslim Law in British India*, Phd Dissertation, (Mcgill University Montreal, 2004), 2.

one.[138] Through this dynamic, the British jurists translated Islamic law's 'substantial rationality' into a more 'formal rationality' which they recognised as a real system of law.[139] In the process of codifying the law by translation they tried to convert conceptual doctrines into codes. They attached those expert of "*Sharī'ah*" with courts whose personality and *fatāwās* were acceptable to people. The idea of developing new system was to minimise the role of colonial subjects and the authorities of *moulvī*s on them. In pursuance of that idea, British rulers put *qāḍī* under the control of English magistrates and started establishing precedents. But gradually they failed to ascertain the original text which necessitated them to translate existing Islamic Law in English and convert it into a single code to restrict *qāḍī*'s authority. So to address this issue they planned to translate and codify Islamic legal texts.[140]

There were two distinct types of codification in the actions of the colonial administrators. The first was conceptual and the second was textual. On the conceptual level, the British viewed the whole of Islamic law as a code. They imagined it to have been already completely codified in the remote past and ready to be simply applied. On the textual level, they advocated the project to technically reproduce this 'code' in one comprehensive text that would apply to Muslims as a single discrete community. The British never achieved codification in the textual sense; although they honestly tried, such technical codification is virtually impossible. However, the assumption that Muslim law is a code underscores the whole effort of English judges to understand it and apply it. And their assertion of this conceptual codification totally shaped their approach to

[138]For details see Muhammad Zubair Abbasi, *Sharī'a under the English legal system in British India: Awqāf (endowments) in the making of Anglo-Muhammadan law*, (Phd Dissertation: Oxford University, 2013).
[139] Ibid.
[140]Ibid.

Islamic jurisprudence. At the beginning of Anglo-Muhammadan legal process when *qāḍī*s were attached to the English courts.

The earliest generation of British Orientalists claimed to simply find the law codes. However, in reality they went to considerable difficulty to create texts that would fill this role. Translation of Hīdāyah forms the foundation for Anglo Muhammadan law.[141] Then they realised that this book was insufficient to form the foundation of Anglo-Muhammadan law because it did not explain the law of inheritance which was foremost important for British policy; therefore William Jones translated *Sirājiyah*,[142] Eventually, books with a somewhat greater degree of British authorship were produced, such as A Digest of Muhammdan Law according to the athna' 'ashriyyah (1805)- an incomplete work on transactions- based on several Shī'ah fiqh works and compiled by Captain John Baillie, a Scottish Orientalist and East India Company employee.[143] He also translated some parts of the Fatāwā al- 'Ālamgīriyya into English in the form of The Muhammadan Law of Sale (1850), The Land Tax of India (1853) and A Digest of Muhammdan Law (1875). The Fatāwā al- 'Ālamgīriyya was a compendium of rulings of Ḥanafī Fiqh based on various texts. This compendium was compiled by group of *fuqahā* under theguidance of Aurangzeb 'Ālamgīr[144]. Neil Baillie also translated some parts of the Sharā'a' al-Islām, a popular Ja'farī Shī'ī school text of Al-Muḥaqqiq al-Ḥillī in the

[141]Al-Hedaya was originally compiled by Burhān al-Dīn 'Alī al-Marghinānī allegedly from the earlier work the Mukhtasar of al-Kudurī . *Hidāyah* provides foundation for Anglo Muhammadan Law. This text was translated by Charles Hamilton on the request of Warren Hastings which was first translated into Persian and then translated into English. This double translation resulted not only in shift of essence of law but mistakes and contradiction from the original text. Thus British Government originally created a new law. Wilson Roland Knyvet, *An Introduction to the Study of Anglo-Muhammadan Law* (London: W. Thacker, 1894), 48.

[142]Originally written as Farā'id as Sajawandī, Sirāj al-Dīn Abū Tāhir Muḥammand ibn Muḥammand ibn 'Abd al-Rashīd. The English version was published in 1829.

[143] William Hook Morely, *The Administration of Justice in British India: Its Past History and Present State*, 306.

[144] Zafar Islam, Socio Economic Dimension of Fiqh Literature in Medieval India (Lahore: Dyal Singh Trust Library, 1990), 9-40.

form of the Digest of Muhammadan Law (1869). These books together with translations became the reason of the formation of Anglo-Muhammadan law[145]. Until the year 1911 the principles and objectives of Islamic Law were not used by the British authority in the formation of law[146]. Those few texts which were translated came to be treated as authoritative codes. According to Strawson, Orientalist scholars deleted Islamic public law from their legal order to meet the requirements of the colonial state[147].

This criticism is partially correct because the Fiqh texts did not include any chapters on constitutional law, though a chapter on international law (siyyīr) could be found in the Hidāyah.[148] Frederick Pollock in a treatise that he wrote on private law in India contrasted the law in India which was personal as against European law which was territorial. This 'legal emptiness' was to be filled through imperial law by the British in areas of criminal law and generally civil law and procedural law. Therefore, the 'Common Law of British India' was created through direct legislation in the form of statutes collected as the Anglo-Indian Codes, and by the judicial introduction of English law by courts[149]. The Anglo-Indian courts were not simply adjudicating legal disputes; they were also building legal principles on the basis of their decisions.[150] Legal textbooks were written which systematised court decisions for use by practitioners and judges. As Morley admits, after documenting the titles of influential legal texts for sixty-five

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[145]Muhammad Zubair Abbasi, *Sharī'a under the English legal system in British India: Awqāf (endowments) in the making of Anglo-Muhammadan law*, (Phd Dissertation: Oxford University, 2013).
[146]Abd al-Raḥīm, *The Principles of Muhammadan Jurisprudence* (Lahore, 1974), 36.
[147]John Strawson, "Islamic Law and English Texts" (1995) 6 *Law and Critique* 6, no.21 (1995): 25.
[148]Charles Hamilton, Hedaya or Guide: a Commentary of the Mussalman Laws, Preliminary Discourse, 139-256.
[149]Frederick Pollock, *The Law of Fraud, Misrepresentation and Mistake in British India* (Thacker, Spink 1894).
[150]Bernard S Cohn, "Anthropological Notes on Disputes and Law in India", *American Anthropologist* 67, no. 82 (1965): 105.

pages.[151] The early leadership of the Company felt an enthusiasm for these texts, and admired indigenous laws as sophisticated and comprehensive. However, they mistook a limited portion of the judical resources of each community to be the entire, fixed code. And then through practice, they forged this mistake into a reality.[152]

So this is how they created the new texts. But these texts were not enough for them so they created another plan to attain a mode of codification. The first of these books were written by another Orientalist and judicial official,[153] William Macnaghten. His Principles and Precedents of Muhammaddan Law (1892), go through several editions. Macnaghten collected the *fatāwās* given by the *muftīs* in the Company's courts and treated them like common law precedents, generating from them a logically arranged set of principles or doctrines of Islamic law, limited, of course, mainly to family, inheritance and personal status matters, which were the only matters for which Islamic law remained relevant in the British Indian legal system.[154] In the following years, the number of text books rose during colonial administration. The work of Ameer Ali[155], Muhammad Yusuf[156], Wilson[157], Tyabji[158], Mulla[159], Abdur Rahim[160], Fyzee[161] and

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[151] As Morley admits, after documenting the titles of influential legal texts for sixty-five pages, 'It is only a few of these that are quoted in the Courts; the Hidāyah and its commentaries, illustrated by the books of Fatāwā, generally sufficing to satisfy the Judges, and to offer sufficient grounds on which to base a decision. Anil Chandra Banerjee, *English Law in India* (New Delhi: Abbinav Publications, 1984), 160.

[152] Muhammad Zubair Abbasi, *Sharī'a under the English legal system in British India: Awqāf (endowments) in the making of Anglo-Muhammadan law*, (Phd Dissertation: Oxford University, 2013), 15.

[153] Ibid.

[154] J. Strawson, 'Revisiting Islamic Law: Marginal Notes from Colonial History;, *Griffith Law Review*, 12, (2003): 362-83.

[155] Syed Ameer Ali (1849 – 1928) was an Indian jurist. He was a prominent political leader, and author of a number of influential books on Muslim history and the modern development of Islam, who is credited for his contributions to the law of India particularly Muslim Personal Law.

[156] Khan Bahadur Muhammad Yusuf Syed-Al-Hashmi (1887–1960) was an educator, mentor, and reformer

[157] Sir Roland Knyvet Wilson, (1840 - 1919) was an English academic and political writer. He was a reader in Indian Law at the University of Cambridge from 1878 to 1892.

Vesey-Fitzgerald[162] is very notable. While taking note of the function of these textbooks to organise knowledge, Anderson observes that they transformed *Sharī'ah* into "a fixed body of immutable rules"[163]. This view is supported by Wael Hallaq who observes that the doctrine of *stare decisis* transformed the sources of legal authority in *Sharī'ah* from "dialectics of textual sources and context-specific social and moral exigencies" to "judge made law". This resulted in what he calls the 'rigidication of Islamic Law[164]'. He noted the dual function furnished by the translation of the *Hidāyah*: codification of the law and totalistic legal control independent of local agency. This, according to him, expunged flexible customary practices and fixed the law by cutting it from its 'interpretative juristic' tradition and the "native social matrix" in which it was "embedded and on which its successful operation depended."[165] This happened because the barristers and advocates trained by an English legal education, whom he calls 'Macaulay's children', replaced the *Sharī'ah* trained *'ulamā'*.[166]

The very first book of these court proceedings was Macnaghten's Principles and Precedents of Muhammadan Law published in 1825. Contrary to the concept that codifications would promulgate the principle simply established in Musalman texts, this

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[158] Badruddin Tayabji (1844-1906) was a prominent lawyer and a first Indian to practice as a barrister of High Court of Bombay.

[159] Sir Dinshah Fardunji Mulla (1868-1934) was an Indian author of legal reference books. D.F Mulla was an Attorney-at-Law of the Bombay High Court and was a professor of law at Government Law College, Bombay and a Member of the Judicial Committee of the Privy Council, India.

[160] Sir Abdur Rahim, (1867– 1952), was a judge and politician in British India.

[161] Asaf Ali Asghar Fyzee (1899 –1981) was an Indian educator, jurist, author, diplomat, and Islamic scholar who is considered one of leading pioneers of modern Ismaili studies.

[162] Seymour Gionne Vesey-Fitzgerald (1884-1954) was a barrister in law.

[163]Michael R Anderson, Islamic Law and the Colonial Encounter in British India in D Arnold and P. Robb (eds), *Institutions and Ideologies: A SOAS South Asia Reader* (Curzon Press Ltd 1993), 14. In Muhammad Zubair Abbasi, *Sharī'a under the English legal system in British India: Awqāf (endowments) in the making of Anglo-Muhammadan law*, (Phd Dissertation: Oxford University, 2013), 18.

[164] Wael Hallaq, Shariah: Theory, Practice, Transformations (Cambridge University Press, 2009), 375.

[165] Ibid., 376.

[166] Ibid., 379.

kind of legal books were written to report precedents of how Islamic judgments were enforced by colonial courts. Formerly, the doctrine of binding precedent did not exist in Islamic law properly. Yet, when it transformed into Anglo-Muhammadan law, the *qāḍī*'s judgments were more restrained by precedent. This policy brought regularity and uniformity to judgments that native laws could never deliver. The English translator's translated Muslim texts without understanding the philosophy of Islamic jurisprudence. The Orientalist's not only translated the texts of Islamic Law into a different language, but also swapeda "substantively rational" judicial system into a "formally rational" one. The colonial power neglected the Mughal tradition of two parallel methods "ordinary justice and extraordinary justice".[167] Rather they collapsed all the dimensions of Islamic judicial thought into one textual *Sharī'ah* which was both apparent to their cognition and useful to their needs. The result was that a conceptual translation followed the simpler linguistic translation of texts.

3.2 Appointment of English Judges

The major change in the administration of law in general that occurred with the British assuming a greater role in the Bengal region in the 1770s was that British servants of the East India Company were appointed as judges and magistrates to superintend the courts and decide both civil and criminal matters. As British settlements were recognised; company courts were established in them.[168] The courts in the presidency towns were created in 1726. Their administration was restricted to cases involving residents of the presidency towns or company factories. But uniformity proved elusive and jurisdictional

[167]Muhammad Zubair Abbasi. *Sharī'a under the English legal system in British India: Awqāf (endowments) in the making of Anglo-Muhammadan law*, (Phd Dissertation: Oxford University, 2013), 18.
[168] Encyclopedia of Asian History, ed. Amsler. T. Embree (NewYork: Charles Scribner's Son USA, 1988), s.v. "Judicial and Legal System of India", 412.

restrictions proved difficult to maintain in the face of the appeal of these courts to Indian litigants[169]. The Company took over the jurisdiction of civil justice after assuming the authority of *Dīwān* of Bengal, Bihar and Orissa in 1765 as well as the criminal justice after assuming the Niẓāmat by 1790. A court of civil nature, i.e., *Dīwāni 'Adālat* and a court of criminal nature, i.e., *Niẓāmat 'Adālat* were established in each *Collectorate* being presided over by the *Dīwān* or Collector in the former case and by the *qāḍī* subject to supervision of the Collector in the latter case. The chief civil court being the Ṣadar Dīwānī 'Adālat was presided over by the Governor General and Council and the chief criminal court being the Ṣadar Niẓāmat 'Adālat was presided over by a *Dārogah 'Adālat* appointed by the *Nāẓim* of Bengal but superintended by the Governor General and Council.[170] In 1774 a Supreme Court was established in consonance with the Hastings's Plan of 1772 and later in 1861 several High Courts were established in India abolishing the Supreme Court. The unhappy litigants were allowed to file an appeal from these High Courts of India to the Privy Council in England. Therefore, the re-organisation of the court system brought an occasion for the Privy Council to interpret "natives" laws.[171] In early days, English colonial power granted the existing legal system to prevail as an administrative affair for three reasons. Firstly, they wanted to stay connected with the past. Secondly, their main objective was to assert a social environment that could promote and facilitate trade activity. Thirdly, they did not want to intervene with the religious allegiances of their subjects[172]. British-formulated method unfarmed not only

[169] Fyzee, *Cases in the Muhammadan Law of India and Pakistan*, 56.
[170] Ibid.
[171] M.P.Jain, *Outlines of Indian Legal History*, 6th ed. (Bombay: N.M. Tripathi, 2006), 67.
[172] Fyzee, *Outlines of Muhammadan Law in India*, (Bombay: Oxford University Press, 1964), 53-54.

the Islamic text, but also the *qāḍī*s and *muftī*s who constituted the personnel of the new courts.

The court of the *Nizāmat 'Adālat* was constituted, by Section 67, Regulation IX, 1793, as a superior criminal court to be relocated to Calcutta. Following the East India Company's reordering of the legal system, the offices and responsibilities were hierarchized in an unprecedented manner with British judges supervising Muhammadan law officers (1 qāḍī, 1 muftī, 2 Maulavīes, and 2 Muharrirs i.e. Persian scribes) in the lower courts.[173] While the newly reformed superior court of the Nizāmat 'Adālat "consists of three judges, to be denominated respectively chief judge, and second and third judge ... assisted by the head cauzee of Bengal ... and by two moofties". Later the number of judges would be increased to five "all chosen from among the covenanted [British] servants of the Company". This institutional edifice of hierarchical subordination and bureaucratic organisation is one of the key aspects that truly set Anglo-Muhammadan law apart from any preceding practice of *Sharī'ah* in the region. The reorganisation of the court system brought an occasion for the Privy Council to interpret "natives" laws.[174] The company officials, as a result, began to take part in the adjudication of civil disputes and criminal cases later without any guidance as to the law which will be administered in the court until 1772. Therefore, the Regulations of 1772 came to provide a complete guidance about the law regarding administration of justice with a reservation that the matters regulated by religious law, i.e., marriage, inheritance, caste and religious institutions to be dealt with by the "natives" personal law, i.e., Hindu

[173] Ibid.
[174] M.P. Jain, *Outlines of Indian legal history*, 6th ed. (Bombay: N.M. Tripathi, 2006).

law and Muslim law.[175]However, it is important to mention that the Regulations of 1772 did not clarify whether the *Sharī'ah* or both the *Sharī'ah* and customary law will be applied.[176] The regulations held that the "natives ...inheritance and succession to lands, rents, and goods, and all matters of contract and dealing between party and party, shall be determined in the case of Mahomedans [Muslims] by the laws and usages of the Mahomedans, and in the case of Gentoos [Hindus] by the laws and usages of Gentoos, and where one only of the parties shall be a Mahomedan or Gentoo, by the laws and usages of the defendant".[177]

This reservation was also re-iterated in the Impey's Code of 1781 in a more clear way: the law of the *Qur'ān* should be administered to Mohammedans in suits relating to inheritance and succession, marriage and caste, and other religious usages or institutions.[178] This was reiterated at the time of establishment of the Supreme Court at Calcutta, Madras and Bombay.[179] However, this position was to change. It is notable that from the very beginning, i.e., from the Hastings's Plan of 1772 the space for the Islamic law was confined to the family affairs which culminated in introducing a popular term 'personal law' in the post-colonial South Asia.[180] It has been argued that the system of personal law is an outcome of colonialism in India.[181]The term 'personal law' was first introduced in Calcutta, Bombay and Madras during the late eighteenth century when the

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[175] Raymond West, 'Muhammadan Law in India', *Journal of the Society of Comparative Legislation*, 2, no. 1 (1900): 28.
[176] Ibid.
[177] Fyzee (1963) observed that the British East India Company inherited this policy to apply personal law in accordance with the religion of the person from the Mughal administration. See also Scott Alan Kugle. "Framed, Blamed and Renamed: The Recasting of Islamic Jurisprudence in Colonial South Asia", *Modern Asian Studies*, 35, no. 2 (May, 2001): 262.
[178] Raymond West, Muhammadan Law in India, 29.
[179] Ibid.
[180] Sir George Claus Rankin, *Background to Indian Law* (Cambridge: The University Press, 1946), 67.
[181] Ibid.

pre-colonial arbitration forum transformed to a formal legal adjudicative system: "through the introduction of a legal structure modelled on English courts and through the principle of substantive laws which were administered in these courts, i.e., Anglo-Hindu and Anglo-Muhammedan laws".[182] Moreover, as it is argued earlier that initially the British judges, who were ignorant of the Islamic legal traditions were assisted by the Muslim legal officers, i.e., *muftī* to come to a decision.[183] The official position of the native law officers was abolished in 1864. The figure of the *qāḍī* was completely redefined, and subsequently displaced during the reordering of this new judicial system. As Nizāmat judge J. H. Harrington notes: "The judicial functions, which appertained to the office of the cauzy-ul-cuzzat...under the Mahomedan government, have been discontinued since the establishment of courts of justice under the superintendence of British judges".[184] Thus the office of the *qāḍī* was no longer a judgeship; rather it became subordinated as a clerical position of the law officer.[185] Under this new categorisation, the role of the *qāḍī* would be collapsed with the *muftī* and *maulavī* jointly referred to as "Muhammadan law officers" in the Reports and Regulations. These law officers would be subject to be disciplined and terminated upon any misconduct.[186] It should be noted, that initially the *fatāwās* are legally applicable to the parties in criminal case, regardless of their professed faith. For the procedures of the *Nizāmat* and the subordinate courts, the *fatawās* would function initially qua binding legal documents stating the law officer's

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[182] Anderson. R. Michael, "Islamic Law and the Colonial Encounter in British India", *Institutions and Ideologies: A SOAS South Asia Reader* (David Arnold And Peter Robb Eds., 1993), 7.
[183] Fyzee, Outlines of Muhammedan Law, 38.
[184]Ibid.
[185]Hallaq, *Sharī'a*, 381; Schacht, *Introduction*, 95. on the clerical subordination of qadis.
[186]M Hoexter, "Qāḍī, Muftī and Ruler: Their Roles in the Development of Islamic Law" in R Shaham (ed) *Law, Custom, and Statute in the Muslim World* (Brill 2007), 67-85.

opinion on the matter.[187] On the discourse of Muhammedan law it appears from the above discussion that with a highly developed law as well as legal system the Company took over the *Dīwānī* of Bengal, Bihar and Orissa. It is said earlier that initially the colonial authority did not abandon the "native" laws. Derrett sought to provide three reasons behind the Company's adherence to the indigenous laws: (a) at the time when Hastings's Plan of 1772 was adopted it was the time of French Revolution and "all Europe was accustomed to a confusion of local laws"[188], (b) for Hastings, and the administrator even to the lawyers of the generation the application of a separate set of laws derived from religion was not an easy task and (c) the colonial power just adhered to the Portuguese policy to leave the judicial administration to "natives" themselves.[189] Dutta, however, argues that during the first century of British justice in India the colonial power was oblivious of interfering in the administration of justice due to their interest in trade. As Dutt opines- ...one serious practical consideration must have warned them of the possible results of interfering with the customary rules of the natives in matters tied up with their religions. It must have occurred to the English merchants of the seventeenth century that if the religious susceptibilities of the natives were wounded they might migrate to the settlements of the rival European merchants.[190] Another reason is that one

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[187] "*fatāwās* are not binding. The British, however, erroneously thought they were and regarded them as justification for the harsher sentences desired by them" Rudolph Peteres. *Crime and punishment in Islamic Law* (Cambridge: Cambridge University Press, 2005), 11.in Muhammad Zubair Abbasi. *Sharī'a under the English legal system in British India: Awqāf (endowments) in the making of Anglo-Muhammadan law*. (Phd Dissertation: Oxford University, 2013).

[188] Romash Chandr Dutt, *England and India: A Record of Progress during a Hundred Years, 1785-1885* (London: Chatto & Windus, 1897), 178. in Muhammad Zubair Abbasi. *Sharī'a under the English legal system in British India: Awqāf (endowments) in the making of Anglo-Muhammadan law*. (Phd Dissertation: Oxford University, 2013).

[189] Ibid., 178-180.

[190] Ibid., 179-180.

who sat as a judge of the Company's court was the Company's own servants or merchants who became the justice of the peace, mayor and aldermen later.

They administered justice whether civil or criminal depending on their common sense and therefore were happy to leave the questions regulated by religious belief to the *Qāḍī*, *Pandits* and caste *Panchayats*.[191] However, from the Hastings's time the British colonial power started taking an interest in the "native's" administration of justice system as a number of intellectual's study of the "native" system and a new set of cadre of civil servants came into being by this time. The decision that the natives would be enabled to practice their religion and to enjoy the benefits of their civil law and institutions had, however, been taken more than a century before they started taking an interest in the legal systems of the natives.[192] Two incidents, it appears, had influenced the administration of Islamic law in Indian sub-continent during the nineteenth century: replacement of existing general laws through direct legislation in the western sense and withdrawal of the native law officers from the court. English legal doctrines, it appears, came to replace the existing general laws in India as a direct consequence of codification of laws. In addition, codification of laws contributed to confine *Sharī'ah*, as it is stated earlier, to questions related only to the 'family relations and statuses which culminated in the development of a new branch of law later which was classified as 'personal law'.[193] Besides, the withdrawal of the native judicial officers in 1864, who had been attached to the court to provide explanation of religious doctrines, contributed to establish absolute control over the judicial administration by the British colonial authority. As a result the

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[191] Ibid.
[192] Ibid., 182
[193] Alamgir Muhammad Serajuddin, Shari'a Law and Society: Tradition and Change in South Asia (Karachi: Oxford University Press, 2001). See also, M.R.Anderson, 'Islamic Law and the Colonial Encounter in British India".

English judges became the sole interpreters of the religious laws in India. Unlike criminal law a reservation, it is necessary to mention, had been maintained on the application of "native" religious laws, from the Hastings's plan of 1772 to the whole era of English regulations in Indian sub-continent.[194] Despite this promise to respect the personal laws of the "natives" it appears that the colonial authority invested their utmost endeavour to develop a legal system based on the English ideology which would support their policy in India in the long run.[195]

Especially, the event of withdrawal of the "native" law officers from the courts in the guise of re-organisation of the courts brought an opportunity for the British judges to interpret Islamic law independently. These "semi-autonomous judges"[196] of the British India relied mostly on the translations of some traditional texts, i.e., Hidāyah, Fatāwā 'Ālamgīrī and so on to resolve disputes involving interpretation of *Sharī'ah* instead of applying the Islamic law from its historical and philosophical perspective.[197] Besides, the colonial authority sought to codify the "native's" religious laws on the ground, allegedly, that the language of the religious texts of these two religions was unknown to the colonial authority.[198] It appears, on the contrary, that not only the alien language of the religious texts but also lack of trust on the native law officers was one of the major causes which drove the colonial authority to codify native laws.[199]

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[194] William H. Morely, *Administration of Justice in British India: Its Past History and Present State* (New Delhi: Metropolitan Book Company, 1858); Tahir Mahmood, *Muslim Personal Law: Role of the State in the Indian Subcontinent* (Nagpur: All India Reporter, 1983).

[195] It appears that from the last quarter of the eighteenth century to the middle of the nineteenth century the colonial authority had experimented different court systems, from Mayor's court

[196] For detail account see M.P. Jain, Ibid.,48.

[197] Anderson. R. Michael, "Islamic Law and the Colonial Encounter in British India", 13.

[198] Ibid.

[199] "The British deemed this arrangement unsatisfactory because the native officers were seen as "men sometimes themselves too ill informed to be capable of judging, and generally open to corruption" as Charles Hamilton (1753-1792) stated in the "Preliminary Discourse" to his translation of the Marghīnānī's

3.3 Codification[200] of Laws of Sub-Continent

On the issue of the codification of Muslim and Hindu laws through legislation, the Report of the Law Commission of 1855 recommended that such laws should not be codified because the codification would obstruct gradual progress of the society. Secondly, it was argued that because both Muslim and Hindu laws derive their authority from Islam and Hinduism, a British legislature could not presume to make religion.[201] Henry Maine[202] had argued for codification of Indian laws because in its absence judges were legislating under the principle of equity and expediency.[203] These views were endorsed by the first Muslim judge of the Allahabad High Court, Syed Mahmood who was a proponent of the codification of law because he saw it as a means to restrict the on-going importation of English law by the judges unacquainted with India or its traditional law. He preferred legislation by the government to creation of law at the whim of individual judges. Syed

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Hidāya in 1791[199].It was this belief in the superiority of British justice that motivated the translations of works of Muslim law by him and other early Orientalists in India. Although Hamilton opined that the British government had introduced as few innovations into the native forms and principles of the administration of justice "as were consistent with prudence," the major change had been the appointment of Englishmen to run the courts. The view of the unreliability of Indian judicial officers was shared by Jones also[199].In his preface to his translation of al-Sajawandī's (fl. 1023) *Sirajiyyah* , Jones demonstrated the way he was changing both the law itself and the way it was administered by executing his translation.7 He noted that the Persian translation of the work by Maulavi Muhammad Kasim from which he was doing his own translation into English was too lengthy for his purposes, prompting him to select what was "important" and to omit minute criticisms, various readings and literary curiosities, anecdotes of lawyers and their subtle controversies. 8 He also rejected Kasim's accompanying commentary on the text, complaining that "it is often impossible to separate what is fixed law from what is merely his own opinion..9 He thus misconstrued the working of Muslim law in seeking to isolate an elusive "fixed text" from the accretions of the centuries of Muslim jurists, and failed to understand that it was precisely the debates and controversies of learned Muslim past and present that constituted a living and dynamic law."

[200] According to Ilbert it is the expression in authoritative writings, of law previously to be gathered from traditions and records of a much more flexible and less authoritative character. This word in the Anglo-Indian jurisprudence means the reduction to the clear and compact and scientific form of different branches of law whether the rule of law codified are to be found in systems of law of other countries. Bijay Kishore Acharya, Codification in British India (S.K Benerji & Son: Calcutta, 1914), 7.

[201] RK Wilson, "Should the Personal Laws of the Natives of India be Codified?" *Asiatic Quarterly 6*, (1898): 225, 240. in Muhammad Zubair Abbasi. *Sharī'a under the English legal system in British India: Awqāf (endowments) in the making of Anglo-Muhammadan law*. (Phd Dissertation: Oxford University, 2013).

[202] He was a law member of the Governor-General's Council between 1862 and 1869.

[203] HS Maine, "Mr. Fitzjames Stephen's Introduction to the Indian Evidence Act", The *Fortnighly Review* 51, (1873): 19.

Mahmood's father, also preferred codification because of its certainty and because it limited the discretion of judges. He criticised the uncertainty in law caused by the individual application of the principle of justice, equity and fairness by judges. Thus the whole project of codification was aimed at curbing the wholesale importation of English law into India. This is manifest in the observations of Lord Salisbury, the Secretary of State from 1874 to 1878. So, it is said, several principles that were not suitable to oriental institutions are indirectly finding their way into Indian sub-continent through that informal regulation that is progressively effected by legal judgments. Thus, it is apparent that analysing this method of appropriating English doctrines and principles from the English rule is by replacing for those principles as system of codified law, adjusted to indigenous customs and to the ascertained well-being of the country.[204]

However, about a century ago the intellectual father of codification, Jeremy Bentham, had advised against changing indigenous Indian customs simply because of their repugnance to English law.[205] This advice was accepted and Muhammadan law was not codified by the legislature. And as we have seen above, this gap was filled by the legal commentators who produced 'judicial codes' of case law. So the code of Civil Procedure (1859) followed by the Limitation Act (1859) the Indian Penal code (1860) and the Code of Criminal Procedure (1861) was enacted. The report on the Law of succession in 1863 by the third law commission was enacted into law by the Indian succession act of 1865 which excluded Hindus, Muslims and Buddhists. In 1872, the evidence Act and the contract act were passed. The work of the fourth, the final, and law

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[204]W Stokes, *The Anglo-Indian Codes* vol. 1 (Clarendon Press 1891) xxi-xxii.
[205]J Bowring (ed), *The Works of Jeremy Bentham* vol. 1 (W. Tait 1843) 181Chapter III on Rules respecting the Method of Transplanting Laws in essay title "Of the Influence of Time and Place in Matters of Legislation".

commission resulted in the enactment, in particular of the negotiable instruments Act of 1881 and Transfer of Property Act of 1882. The Transfer of Property Act contained a special provision in section 2 that noting in the act relating to transfer of property "should be deemed to affect any rule of Hindu, Muslim or Buddhist law".[206] The same respect for personal laws was expressed in the Trust Act of 1882, Section 1 Indeed, the British believed at this time that the personal laws were so interconnected with religious feelings that any attempt at major improvement, or any pursuance to codify the personal laws, would necessarily involve injury to religious susceptibilities and for this reason reform was enforced after significant pressure from the communities themselves. For example, in 1856 the Hindu Widows' Remarriage Act, designed to make legally possible the remarriage of Hindu widows was enacted. This cautious approach was followed in particular, in the case of Muslim law.[207]

Provoked by the insufficiency of Islamic laws texts and indigenous law officials, in nineteenth century, British administrators began to consider custom as a source of law. After the promulgation of Punjab Laws Act of 1872, a direction was given to the revenue collectors of Punjab, to carry out surveys in each village of Punjab for the assessment of their customary practices. Although the focus on custom was very strong in the Punjab, but the legal administration of sub-continent reconsider custom at national level.[208] Basically the characteristics of custom are that it is ancient, constant and established. During British rule a large amount of codification regulated by mean of exploration for

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[206]Muhammad Zubair Abbasi. *Sharī'a under the English legal system in British India: Awqāf (endowments) in the making of Anglo-Muhammadan law*. (Phd Dissertation: Oxford University, 2013).

[207] Amiya Charan Baneerjee. *English Law in India* (Abhinav Publications: New Delhi, 1984), 165.

[208] Ibid.

precedent and basic rules in what occasionally it appeared as the confused incoherence of village life. This sort of juridical homogenization occurred, because the native expressions were adopted to explain a variety of separate practices.[209]

The social lives of people shattered because of codification due to selecting and illustrating text. Like the problem of land tenure, was a difficult issue relating equal privileges and duties in many relations. It could not at all restrict sufficiently in easy question that worried several British authorities who would acquire the area.[210] Nonetheless, it can be said that codes of custom were not only used for the formulation of government strategy but also as principle for collection of revenue. In the early nineteenth century British rulers compiled texts on district and regional level which equally can be used by the courts and administrators.[211] Many texts were written to set up the legality and applicability of custom by legal administration. The Privy Council declared in 1868 that custom can override the texts of Hindu Law.[212] After this declaration similar kind of law was established in some matters of Muslims.[213] However the application of custom was firmly constrained in the favour of Anglo-Muhammadan law. According to the Common Law a lawful custom had to be sound and ancient[214]. The recognition of some aspects of societal practices that was significant to specific group or

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[209]P. Robb, "Law and Agrarian Society in India: The Case of Bihar and the nineteenth-century tenancy debate", *Modern Asian Studies* 22 (1988): 2. in Muhammad Zubair Abbasi, *Sharī'a under the English legal system in British India: Awqāf (endowments) in the making of Anglo-Muhammadan law*, (Phd Dissertation: Oxford University, 2013).

[210]Bhattacharya, 'Custom and Rights. in Muhammad Zubair Abbasi, *Sharī'a under the English legal system in British India: Awqāf (endowments) in the making of Anglo-Muhammadan law*, (Phd Dissertation: Oxford University, 2013).

[211]A. Steele, *The Law and Custom of Hindoo Castes (within the Dekhun Provinces subject to thePresidency of Bombay)* (London, 1868), 98.

[212]*Collector of Madura v. Moottoo Ramalinga* (1868) 12 MIA 397.

[213]Sripati Roy, *Customs and Customary Law in British India*, (Calcutta: 1911), 365.

[214]*Abdul Hussain v. Bibi Sona Dero* (1917) 45 IA 10. Sripati Roy, Customs and Customary Law in British India, See ch. 18.

class was permissible in British India because of the jurisprudence of custom. But its recognition was restricted to some extent that would be contrary with the economical and political imperatives of British rule. More than that, the application of custom in Indian law and its codification supplied administrators with a set of various practices within the political recognition of the British India.[215]

4. Application of New Legal Methods

During the colonial rule in British India the pre-colonial arrangements were abolished by court administrators mainly by introducing the new methods of inquiry and bureaucratic procedures by way of systemising and categorising native phenomenon. In this framework proper procedures were introduced for making reports, collecting information and distilling information that could be used in London or Calcutta. Due to this framework the use of standardised printing forms increased in the early nineteenth century in district administration. So the detailed information of districts and villages was recorded after 1857. Regarding legal aspects the documentation in matters of evidence and law was the most remarkable improvement that happened. [216] In early days of colonial rule in criminal laws the courts were relied upon oral testimony but as time passed the rules regarding oral testimony were revised and customised constantly and the form of writing into adjudication was introduced in 1797.[217] Till 1793 all the cross examinations of witnesses were first written in the deponent's language; then translated into Persian, which was examined by the officers of the courts for the sake of accuracy,

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[215]Before long codification of custom was contested politically; For Detail See D. Gilmartin, *Empire and Islam: Punjab and the Making of Pakistan* (Berkeley, 1988).
[216]Anderson, *Islamic Law and the Colonial Encounter in British India*, 178.
[217]T.K. Banerjee,*Background to Indian Criminal Law (Bombay* 1963), 249; Regulation IV of 1797.

and then told in English to the Megistrate.[218] Progressively, English language became the official language of the court of law instead of Persian. Soon in the form of Criminal Procedure Code of 1861, and the Indian Evidence Act of 1872, procedures and evidence of English Law were introduced in systematic form.[219]

4.1 Equity, Justice and Good-Conscience

The origin of the doctrine of 'equity, justice and good-conscience' is Roman canonical law. English jurists adopted this concept in sixteenth century as "an appeal to sources of law other than English common and statute law", namely "an appeal to fundamental laws, recognized universally".[220] The main reason behind the adoption of this doctrine was to liberate England from the papal power during the reformation of the Church of England.

In 1780, the doctrine of equity, justice and good- conscience was first time introduced by British authorities, in the presidency of Bengal. Later it was introduced in Bombay and Madras Presidencies and then gradually in different parts of sub-continent. The main reason behind the transplantation of this doctrine was that if in a dispute a kind of situation occurs that where there was no law or regulation exists in Muhammadan and Hindu Laws, then court was allowed to decide the dispute according to equity, justice and good-conscience. Due to the implimentation of this doctrine many changes occured in the laws and legal system of sub-continent due to the interpretation of this concept by Privy Council and English Judges. Due to the lack of any specific and exact connotation

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[218] Ibid., Regulation IX of 1793.

[219] Ibid.

[220] J. Duncan M. Derrett, "Justice, Equity and Good Conscience," *Changing Law in Developing Countries*, edited by J. N. D. Anderson, Studies on Modern Asia and Africa, 2 (London: George Allen & Unwin, 1963): 128.

sometimes this doctrine became disadvantageous. Simply in many cases, this doctrine is nothing else but the discretion of judge. So this doctrine meant, "in substance and in circumstance the rules of English law wherever applicable."[221]

By the end of seventeenth century this doctrine made its way in all the courts of sub-continent especially in Madras and Bombay in a way that it became mendated for judiciary to make decisions according to this doctrine.[222] After a century in 1781, in the period of Warren Hasting this concept was revived as he revised different regulations in British Judicial administration. In Section 60 of the regulation it is stated, "That in all cases within the jurisdiction of the Mofussil Dīwānī 'Adālat, for which no specific directions are hereby given, the respective judges hereof do act according to justice, equity and good-conscience," and this is repeated in Section 93 regarding the rule for Ṣadar Dīwānī 'Adālat.[223] It appears that the disputes must be judged in accordance with the regulation where there was no law existed. It does not mean that laws of Muslims and Hindus did not remain authoritative; they were also implemented by the Company Courts.[224] In some next decades the English Judges with the help of indigenous law officers applied Muslims and Hindus law but where the areas were not covered by existing laws not only the doctrine of justice, equity and good-conscience invoked but the judges were also free to apply the other sources of Roman Law, English Law and Natural

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[221]M. C. Setalvad, *The Common Law in India*, 23.

[222] Ibid., 129-132.

[223]*Regulations for the Administration of Justice in the Courts of DewanneeAdaulut, Passed in Council, the 5th July, 1783, with a Bengal Translation by Jonathan Duncan* (Calcutta: Honorable Company's Press, 1885), 165, 213.

[224] The regulations drawn up by Warren Hasing and his Council also stated, "in all suits regarding Succession, Inheritance, Marriage, Caste and other Religious Usages, or Institutions, the Laws of the Koran will respect to Mahometans, and those of Shaster with respect to Gentoos, shall be invariably adhered to: and on all such occasion the Moulavies or Pundits shall respectively attend to expound the Law". Ibid., 121.

Law.[225] The vow to the implementation of Muslim and Hindu Laws in sub-continent from British administrators repeatedly reaffirmed. This commitment was modified in 1832, by passing a bill in which a liberty has been given to the converts from Islam and Hinduism in order to retain their inheritances. But this rule still stipulated, "In all such cases the dicisions shall be governed by the principles of justice, equity and good-conscience, it being clearly understood, however, that this provision shall not be considered as justifying the introduction of the English or any foreign Law."[226] The Bengal Civil Court Act (VI OF 1871) and the Bengal, Agra and Assam Civil Courts Act (XII of 1887) also reaffirmed this pledge. Section 37 of the later Act stated, "Where in any suit or other proceeding it is necessary for a Civil Court to decide any question regarding succession, inheritance, marriage or caste, or any religious usage or institution, the Muhammadan law in cases where the parties are Muhammadans, and the Hindu Law in cases where the parties are Hindus, shall form the rule of decision except in so far as such law has, by legislative enactment, been altered and abolished. In cases not provided for by sub-section or by any other law for the time being in force, the Court shall act according to justce, equity and good conscience".[227]

The major issue in order to the application of this notion was that the lawyers were more trained and well versed in English Law (because this knowledge paves their way towards

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[225]Derrett, "Justice, Equity and Good Conscience," 140-141.

[226]William H. Morley, *An Analytical Digest of All the Reported Cases decided in the Supreme Courts of Judicature in India, in the Courts of the Hon. East-India Company, and on appeal from India, By Her Majesty in Council.* Vol 1, containing the Introduction and the Digest (London: Wm. H. Allen, 1850), clxxiii-clxxiv. in Muhammad Zubair Abbasi. *Sharī'a under the English legal system in British India: Awqāf (endowments) in the making of Anglo-Muhammadan law*, (Phd Dissertation: Oxford University, 2013).

[227]India. Ministry of Law, *The Unrepealed Central Acts with Chronological Table and Index*, 2nd ed., vol. 3, From 1882 to 1897, both inclusive (Delhi: Manager of Publications, 1950), 303.

the civil service of East India Company) comparative to indeginous laws, so they applied this doctrine more and more regularly. Sir Fredrick Pollock a renowned English Jurist said in his Lecture in 1894, "The only 'justice, equity and good conscience' English judges could and did administer, in default of any other rule, was so much of English law and usage as seemed reasonably applicable in [India]. Hindu and Mahometan law not affording any specific rules, or certainly not that were practicable for a mixed population, in a large part of the common affairs of life outside religion and the family, there was only English law to guide them".[228] Large number of cases decided on the basis of this doctrine.[229] The issue has been discussed in Chapter No. 6 in detail.

4.2 Theory of "*Stare Decsis*"

The doctrine of a binding precedent did not exist under Islamic Law in the sense it exists today in Common Law. Under the Mughal judicial system a *qāḍī* was not bound by the decision of another *qāḍī*. However the Mughal judicial system was gradually replaced by Anglo-Indian legal system during the eighteenth and nineteenth century. Some English judges in India wanted a legal assistance for the doctrine of precedent quite early on. This was provided under section 212 of India Act, 1935. Gradually theory of *stare decsis* becomes a binding source of law for judges. The strict doctrine of precedent under English law was introduced in nineteenth century, induced by transforming legal theory associated with the rise of

[228]Frederick Pollock, *The Law of Fraud, Misrepresentation and Mistake in British India*. Tagore Law Lectures, 1894 (Calcutta: Thacker, Spink& Co., 1894), 7-8.

[229]*Bireswar Ghosh v. Panchcouri Ghosh and others A I R 1923* Cal. *538; DadaHonaji v. Babaji [Jagushet (1865) 2* Bom. H C R *38; Shivarao v. Pundlik (1902) 26 Bom. 437; Varden Seth v. Lackpathy (1862) 9 M I A 307; Waghela v. Masluddin 14 I A 89; Maharaja of Vizianagram v. Raja Setru Cherla (1903) 26 Mad.* in Muhammad Zubair Abbasi, *Sharī'a under the English legal system in British India: Awqāf (endowments) in the making of Anglo-Muhammadan law*, (Phd Dissertation: Oxford University, 2013).

[229]J Evans, 'Change in the Doctrine of Precedent during the Nineteenth Century' in L Goldstein (ed) *Precedent in Law* (Clarendon Press 1987), 35-72.

positivism, legal hierarchy and an increasing necessity for certainty in law to meet the requirements of state.[230] This principle is based on a process of judicial decisions which culminates with the final judgments of highest court of appeal.[231] It is true that the judgments of higher judiciary were binding on lower judiciary. But, as is shown later regarding waqf cases, the higher judiciary did not strictly apply this principle. The rigor of this principle was also mitigated by the presence of several High Courts in India. Each High Court was independent and was not bound by the decisions of the others. Rather, different Indian High Courts delivered conflicting decisions on legal points on particular issues. Various legal issues were subjected to judicial analysis by judges, lawyers and legal commentators before they could become a binding principle. The Privy Council took these legal debates into account before laying down a judicial principle. Even when a certain legal principle was conclusively laid down, there were still two options available to amend it. First, through legislation as happened in the case of family *awqāf* after they were declared invalid by the Privy Council, and second, by judicial revision of that principle in a subsequent case, though this was rare. It is also important to note that unlike the House of Lords in the late nineteenth and mid twentieth century, the Privy Council was not bound by its previous decisions.[232] But in a case on family waqf, the Privy Council refused to deviate from its earlier decision. Further, judges could restrict or expand a judicial principle by distinguishing it based on the facts of a particular case.

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[230]J Evans, 'Change in the Doctrine of Precedent during the Nineteenth Century' in L Goldstein (ed) *Precedent in Law* (Clarendon Press 1987), 35-72.
[231]L Goldstein (ed), *Precedent in Law* (Clarendon Press 1987). 4.
[232]*Read v Bishop of Lincoln* (The Arches Court of Canterbury) [1892] UKPC 46, AC 644; Mercantile Bank of India v Central Bank of India (Madras) [1937] UKPC 105, [1938] AC 287; Gideon Nkambulev R (Swaziland) [1950] UKPC 1, AC 379.

Finally, courts could develop new legal principles by taking into account various socio-economic factors. Thus after laying down the principle that a valid waqf could only be created if there was a 'substantial dedication to charity' in 1894, the Privy Council introduced a new test of 'dominating purpose and intention of the grantors' in 1916.[233]

5. Transformation of Islamic Law into Muhammadan Law

The interaction between Islamic law and English law in British India was a unique incident in Indian legal history. When these two different types of legal systems interacted with each other the resulting mixture was fundamentally different from both.[234] The translation, codification and implementation of Islamic Law created "a product quite different from the sum of its parts—a hybrid law, not a plural law".[235] Schacht described Anglo-Muhammadan law as "a unique and most successful and viable result of symbiosis of Islamic and English legal thought".[236] According to Wael B. Hallaq, Anglo-Muhammadan law was the law that the British created or caused to be created in India. Therefore, it was affected by the British perception of governance and the requirements of a modern state. He regards Anglo-Muhammadan law as an interim colonialist's solution that mediated the British dominance of India.[237]Asaf Fyzee, distinguished Anglo-Muhammadan law from *Sharī'ah* or Fiqh. He later adopted the term 'Muslim

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[233]*Mutu K. A. Ramanndan Chettiar v Vava Levvai Marakayar* (Madras) [1916] UKPC 107, 44 IA 21.

[234]IR Hussin, *The Politics of Islamic Law: Local Elites, Colonial Authority and the Making of the Muslim State* (University of Chicago Press, 2016), 29-31.

[235] Ibid., 240.

[236] J. Schacht, *An Introduction to Islamic Law*, 96. In Muhammad Zubair Abbasi. *Sharī'a under the English legal system in British India: Awqāf (endowments) in the making of Anglo-Muhammadan law*. (Phd Dissertation: Oxford University, 2013).

[237] WB Hallaq, *Sharī'a: Theory, Practice, Transformations* (Cambridge University Press, 2009), 377-83.

Personal Law' instead of 'Muhammadan Law'. He explained that the term 'Muhammadan Law' was 'neither accurate nor felicitous'. He objected to the use of 'Muslim Law' on the ground that 'Muslim' could not be applied to any thing or concept because only a rational human being is capable of making a decision about faith. Thus the term 'Muslim' cannot be applied to non-human objects or a field of study.[238] In his later work, he defined Muhammadan law as "that portion of the law of Islam, which is received in India, and which is affected both by the changing social conditions prevailing in the country and by the principles of English law and equity, so far as they conduce to justice".[239] [240] M.B. Hooker takes a different approach to this terminology. He distinguishes Muhammadan law and Islamic law from a cultural perspective. He defines Muhammadan law as the law applying to the individual Muslim, hence called Muhammadan or Muslim law. In contrast, Islamic law is derived from the *Qur'ān* and the *Sunnah*. He accepts that both terms are not mutually exclusive since 'to a significant extent the Islamic element is included in all cultural manifestations of the Muhammadan laws, but the latter are also sui generis to an important degree.'[241] The social and cultural aspect of Muhammadan law is also accepted by Fyzee. The political development is deeply implicated in the political relationship among diverse local elites and colonial officials.[242] The colonial elites included officials, administrators, judges, politicians and prominent merchants. The local elites comprised local chiefs, rulers, *'ulamā'*, landlords and traders. The transformation of *Sharī'ah* or Fiqh during colonialism is also evident in the legal terminologies employed by various authors. The translations of classical Fiqh

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[238] Fayzee, *The Reform of Muslim Personal Law in India* (Nachikita Publications, 1971), 1.1
[239] Fayzee, Muhammadan Law in India, 401-413.
[240] Ibid.
[241] MB. Hooker, Islam in South-East Asia, 160-161
[242] Hussain, F, *The Musalman Law of Wakf* (Central India Printing Works 1939), 232.

texts were termed as 'Muhammadan codes of law'.[243]When these codes were applied in courts and were supplemented with precedents of higher courts, the legal commentaries, which organised these decisions in systematic forms, were named 'Anglo-Muhammadan law'.[244] However when Muslim commentators wrote their treaties combining not only case law but also selected parts of translations from a large variety of Islamic legal texts, they preferred to use the term 'Muhammadan law'.[245]

The Anglicization of Islamic law in sub-continent under British colonialism was affected by translation, legislation and adjudication leading to judicial precedents. The work of translation was the most infrequent but nonetheless significant in changing the face of Islamic law in British India. The objective behind these translations was to empower British judges to decide disputes between indigenous people without the help of local experts. In the process of codifying the law by translation they tried to convert conceptual doctrines into codes. After sometime they planned to codify these Islamic legal texts. Then the English administrators published the text books. While taking note of the function of these textbooks to organize knowledge, Anderson observes that they

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243 Muhammad Zubair Abbasi, *Sharī'a under the English legal system in British India: Awqāf (endowments) in the making of Anglo-Muhammadan law*. (Phd Dissertation: Oxford University, 2013).

244RK Wilson, A Digest of Anglo-Muhammadan Law, 14.

245The treatises of Ameer Ali, Abdur Rahim and Faiz Tyabji show this trend, which was followed by Dinshah Mulla and Vesey-Fitzgerald. The earliest use of the term 'Muhammadan Law' in the title of a book was made by a Hindu author Shama Churun Sircar for his Tagore Law Lecture of 1873. Earlier, Macnaghten had called his treatise the Principles and Precedents of Moohumudan Law. By the end of colonialism the inadequacy of the term 'Muhammadan' was realised and it was translated as 'Muslim'. At the same time, transformation in the nature of Fiqh under colonial experience was also recognised. During colonialism, Fiqh was confined to family law and personal affairs. Therefore, the treatises of Muhammadan law were entitled as 'Muslim Personal Law' in the post-colonial period. SC Sircar, *Tagore Law Lectures_1873 The Muhammadan Law* (Thacker, Spink and Co. 1873); WH Macnaghten, Principles and Precedents of Moohummudan Law (3rd edn first published in 1823. J. Higginbotham 1864.

transformed *Sharī'ah* into "a fixed body of immutable rules"[246]. Meanwhile English authorities not only replaced the existing laws by English doctrines like equity, justice and good-conscience, but also eliminated the native law experts. They attached those experts of "*Sharī'ah*" with courts whose personality and *fatāwās* were acceptable to people. The idea of developing new system was to minimise the role of colonial subjects and the authorities of *moulvī*s on them. In pursuance of that idea, British rulers put *qāḍī* under the control of English magistrates and started establishing precedents. But gradually they stuck in ascertaining the original text which necessitated them to translate existing Islamic Law and convert it into a single code to restrict *qāḍī* from applying its discretionary power. Besides, the withdrawal of the native judicial officers in 1864, who had been attached to the court to provide explanation of religious doctrines, contributed to establish absolute control over the judicial administration by the British colonial authority. As a result the English judges became the sole interpreters of the religious laws in India. This whole process became the reason of the formation of Anglo-Muhammadan Law.

[246]Michael R Anderson, Islamic Law and the Colonial Encounter in British India in D Arnold and P Robb (eds), *Institutions and Ideologies: A SOAS South Asia Reader* (Curzon Press Ltd 1993). 14.

Chapter No. 2

Islamic Law of *Waqf*

Chapter No. 2:

Islamic Law of *Waqf*

Islamic law recognised *Waqf*, (*pl. awqāf*) as religious as well as charitable endowment. It has been utilised for the development and maintenance of *madāris*, mosques traveler's lodges, libraries, educational institutions and inns.[247] Waqf impacts are not restricted to benefit only the Muslim Community; rather its impressions go beyond than religious, sectarian, and cultural boundaries.[248] *Waqf is* considered as the most important institution and one of the sources which laid the foundation for Islamic civilization.[249] as it is 'entwine with the social economy and religious life' of Muslims.[250] This institution was not restricted to shower its blessings only on public at large but its outcome also encompasses to the creator of that waqf and his family by reserving a substantial portion of waqf properties for their benefit,[251] generation after generation[252]. In this way, waqf ensures welfare of both *wāqif* and beneficiary which are poor of the society.[253] Institution of *waqf* is based on three major parties: The creator is called the *wāqif*, who creates a *waqf* either by pronouncing his intention or by writing, to make a *waqf* of his property in

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[247] However there are *awqāf* of books, agriculture machinery, live stocks, shares and cash money.

[248]Moḥammad Tāhir Sabit, 'Abdul Ḥamīd, *Obstacles of the Current Concept of Waqf to the Development of Waqf Properties and the Recommended Alternative, Malaysian Journal of Real Estate*, 1, no.1 (*2006*), 1-95.

[249] P.G.Hennigan, *The Birth of Legal institution: The Formation of the Waqf in Third-Century A.H. Hanafi Legal Discourse* (Liden: Brill, 2004), xiii.

[250] Syed Ameer Ali, Mahommedan Law, Tagor Law Lectures, 1884, vol 1, ed. fourth (Calcutta, 1912), 193; Asaf A. A. Fyzee, *Outlines of Muhammadan Law*, ed. fourth (Oxford University Press: New Delhi, 2005), 274.

[251] In the *waqf* treaties of Hilāl al-Ra'y and al-Khaṣṣāf, no distinction is made between a waqf dedicated to mosque and one made for a family. Likewise in *Mudawwana* of Saḥnūn, Mālik bin Anas uses the term 'ḥubs' to refer to endowment for family members or slaves. Hilāl b. Yaḥyā b. Muslim al-Rā'y, *Aḥkām al-Waqf* (Matb 'āt Majlis Dā'irat al-Ma'ārif al-'Uthmāniyya, 1937), 13; Abū Bakr Aḥmad bin 'Amr al Shaybānī al Ma'rūf bi'l -Khaṣṣāf, *Kitāb Aḥkām al-Awqāf* (Cairo: Maktabat al-Taqāfat al-Dīniyya, 1904), 18; 'Abd al-Salām b. Sa'īd al-Tanūkhī, (known as Saḥnūn) *Al- Mudawwana al-Kubrā*, (Aḥmad 'Abd al-Salām (ed.), vol. 5 (Dār al-Kutub al-'Ilmiyya, 1994), 425-426.

[252] Muhammad Zubair Abbasi, The Classical Islamic Law of Waqf: A Concise Introduction, *Arab Law Quarterly* 26, (2012), 122.

[253] Ibid.

favour of the beneficiary or beneficiaries, called *mawqūf 'alayh*. A waqf can also be formed for a particular purpose, e.g., promotion of religious education or the welfare of the needy and the poor. Third and last party of *waqf* is administrator, called the *mutawallī*, who manages the waqf according to the terms laid down by the creator. The *qāḍī* has a supervisory role over the management of waqf by keep checking the administration of waqf. Umayyad dynasty (661-750 AD) also established an independent government department (*dīwān*) to govern public or private *awqāf*.

The *waqf* was not explicitly referred to in the Holy *Qur'ān*,[254] although it contains verses that ordained believers to be beneficent and benevolent towards fellow being and donate in the name of Allah (SWT).[255] The main rational base of *waqf* originates from the *Sunnah* of the Prophet Muhammad (SAW). Initially institution of *waqf* started to develop in a very simple manner during second and third *hijrā*.[256] But after three centuries of Islamic calendar, creation and management of *awqāf* emerged as a complex body of law.[257] Historians observed that religious endowments had mushroom growth throughout the Muslim sphere, in such a way that in the beginning of nineteenth century it covered major portion of landed property which includes one-half to two-thirds of land in the Ottoman Empire, one-half of the property in Algeria, one-third in Tunisia and one-fifth of the land in Egypt.[258] With the conquest and foundation of Muslim rule in India large-scale construction of public places like *madāris,* mosques and *dargāh* were endowed for

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[254]The derivatives of the word '*waqf*' have been used in the *Qur'ān* in these verses: *Al-An'ām*: 27; *Al-Sabā*: 31; *Al-Ṣāffāt*: 24.

[255]Qur'ān, 2: 177, 215, 267 and 3: 92

[256] P.G.Hennigan, *The Birth of Legal institution: The Formation of the Waqf in Third-Century A.H. Ḥanafī Legal Discourse*, 3.

[257]Monica M. Gaudiosi , Comment, The Influence of the Islamic Law of *Waqf* on the development of the Trust in England: The Case of Merton College, *University of Pennsylvania Law Review* 136, (1988), 1231.

[258] David Stephen Powers, Orientalism, Colonialism, and Legal History: The Attack on Muslim Family Endowments in Algeria and India, *Journal of Comparative Studies in Society and History*, 31, no. 3 (1989). 537.

the benefit of the succeeding generations.[259] Islam is the first religion which introduced the concept public and private endowment (*waqf*) and no other system of such kind ever existed in any jurisprudence of the world.[260] English concept of trust and uses came into practice and recognised as law after over more than one and a half thousand years of advent of Islam.[261] According to Imam Shāf'ī, "the first institution of *Waqf* came to be known with the advent of Islam; as in the time of ignorance no similar kind of munificent deed was in practice".[262]

The aim of this chapter is firstly to provide an overview of the Islamic Law of *waqf* which in opinion of *Zuḥaili* was developed by jurists on the basis of *qiyās* (analogy), *ijma'* (consensus), *'urf* (custom) and *istiḥsān* (juristic preferences).[263] And later on new practice of cash waqf was legalissed by utilizing the principle of *istiṣlāḥ* (public good).[264] This study not only deals with the origin, significance and background of *waqf* in Islam but also analyse the basic rules, regulations and principles of *awqāf* with special focus on a waqf primarily for family purpose (*waqf ahlī*). The primary focus is on the Ḥanafī School of thought but other classical texts of Sunnī Schools have also been

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[259] The grave of Khawja Majd al-Dīn and others in Bilgiram, the *dargāh* of Lal Pīr in Gopaman, *Shamsī Mosque* at Badaun, *Motī Masjid* and *Taj Maḥal* are some of the examples of *waqf* in India. Hasanuddin Aḥmed, Ahmedullah Khan, Strategies to Develop Waqf Administration in India, Research paper no. 50 (Islamic Research and training Institute Islamic Development Bank, 1418H), 31-36; I Habib, *The Agrarian System of Mughal India* 1556-1707, ed. 2nd (Oxford University Press 1999), 359.

[260] Some pre Islamic civilizations were aware of such kind of institutions like in Byzantines in the form of *piae causae*; Romans in the form of *res sacrae* and *fidei commissum*; Jews in the form of *heqdēsh*: Persians in the form of pat *ruvan* or *ruvānagān*; and Arabs in the form of *ḥaramand or ḥimā*. According to Henry Cattan the institution of waqf has developed with Islam and there is no evidence that such a complex system of appaopriating usufruct as a life interest to varying and successive classes of beneficiaries existed prior to Islam. For further discussion about the origins of *waqf* and the impact of these institutions on it, see P.G. Hennigan, *The Birth of Legal institution: The Formation of the Waqf in Third-Century A.H. Ḥanafī Legal Discourse*, 50-70.

[261] The Franciscan Friars are generally credited with the introduction of uses in thirteenth-century England. Monica M. Gaudiosi , Comment, The Influence of the Islamic Law of *Waqf* on the development of the Trust in England: The Case of Merton College, *University of Pennsylvania Law Review* 136 ,(1988), 1240.

[262] Muḥammad bin Idrees al Shāf'ī, *Kitab al Umm*, part 3,(Egypt: 1321), 275.

[263] Wahbah al-Zuḥaylī, *Al-Fiqh al-Islāmī wa Adillatuhu* vol. 10 (Dār al-Fikr, 2004), 7603.

[264] Muṣṭaf ā Aḥmad Al-Zarqā, *Aḥkām al-Awqāf* (Dār 'Amār, 2010), 19-20.

consulted for this study. Secondly, it examines the origin and legal framework of the perpetuity and ownership in English Law of trusts to understand what are the least interesting parallels between Islamic law of waqf and English trust.

1. Foundation of Waqf Law

Literally, the word *waqf* has its roots in Arabic word '*waqafa*' which means 'to stop' or 'to stay'[265]. In Northern Africa jurists use the word *ḥbs*[266] (pl. *aḥbās*) and *tasbīl* to define the word *waqf*.[267] Juristically *Waqf* is a special kind of perpetual philanthropic deed that encompasses a devoted tangible property by designating the specific categories of beneficiaries to receive its revenues, usufructs or outcomes[268]. The *Qur'ān* contains no direct reference to *waqf* but one can easily track its origin or footsteps in injunctions ordaining men to spend on charity:

"*Ye will not attain unto piety until ye spend of that which ye love. And whatsoever ye spend Allāh is aware thereof*"[269]

لَيْسَ ٱلْبِرَّ أَن تُوَلُّوا۟ وُجُوهَكُمْ قِبَلَ ٱلْمَشْرِقِ وَٱلْمَغْرِبِ وَلَٰكِنَّ ٱلْبِرَّ مَنْ ءَامَنَ بِٱللَّهِ وَٱلْيَوْمِ ٱلْءَاخِرِ وَٱلْمَلَٰٓئِكَةِ وَٱلْكِتَٰبِ وَٱلنَّبِيِّۦنَ وَءَاتَى ٱلْمَالَ عَلَىٰ حُبِّهِۦ ذَوِى ٱلْقُرْبَىٰ وَٱلْيَتَٰمَىٰ وَٱلْمَسَٰكِينَ وَٱبْنَ ٱلسَّبِيلِ وَٱلسَّآئِلِينَ وَفِى ٱلرِّقَابِ وَأَقَامَ ٱلصَّلَوٰةَ وَءَاتَى ٱلزَّكَوٰةَ وَٱلْمُوفُونَ بِعَهْدِهِمْ إِذَا عَٰهَدُوا۟ ۖ وَٱلصَّٰبِرِينَ فِى ٱلْبَأْسَآءِ وَٱلضَّرَّآءِ وَحِينَ ٱلْبَأْسِ ۗ أُو۟لَٰٓئِكَ ٱلَّذِينَ صَدَقُوا۟ ۖ وَأُو۟لَٰٓئِكَ هُمُ ٱلْمُتَّقُونَ[270]

'It is not righteousness that ye turn your faces to the East and the West: but righteous is he who believeth in 'Allah and the Last Day and the angels and the Scripture and the Prophets; and giveth his wealth, for love of Him, to kinsfolk and to orphans and the

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[265] Muḥammad bin Mukaram bin Manẓūr, *Lisān al-'Arab*, vol. 15 (Beirut: Dār al-Turās al-'Arabī, 1988) 374; Mahar ibn Yaqūb Ferozābādī, *Al-Qāmūs al- Muḥīṭ* vol. 3, ed. 1st (Beirut: Dār al-Turās al-'Arabī), 296.
[266] Literally the root word *habaas* mean: 'to prevent', or 'to restrain', Ibn Manẓūr, *Lisān al-'Arab*, 374
[267] Asaaf A.A. Fyzee, Outlines of Mummadan Law (Oxford University Press, 1974), 274
[268] Zaid 'Abdullah bin Aḥmad, *Ahammīat al-Waqf wa Ahdāfuhu* (Riyaz: Dār al-Taībah, 1996), 35
[269] Al- Qurān, 3:92.
[270] Al- Qur'ān, 2:177.

needy and the wayfarer and to those who ask, and to set slaves free; and observeth proper worship and payeth the poor due. And those who keep their treaty when they make one, and the patient in tribulation and adversity and time of stress. Such are they who are sincere. Such are the God fearing'

The true measure of charity is indicated in the following Qur'ānic verses:

يَسْـَٔلُونَكَ مَاذَا يُنفِقُونَ ۖ قُلْ مَآ أَنفَقْتُم مِّنْ خَيْرٍ فَلِلْوَٰلِدَيْنِ وَٱلْأَقْرَبِينَ وَٱلْيَتَٰمَىٰ وَٱلْمَسَٰكِينِ وَٱبْنِ ٱلسَّبِيلِ ۗ وَمَا تَفْعَلُوا۟ مِنْ خَيْرٍ فَإِنَّ ٱللَّهَ بِهِۦ عَلِيمٌ[271]

'They ask thee, (O Muhammad), what they shall spend. Say: That which ye spend for good (must go) to parents and near kindred and orphans and the needy and the wayfarer. And whatsoever good ye do, lo! Allah is Aware of it.'

Waqf is prominent from all other forms of endowments, charity and alms in terms of its unique idea, objectives, principles and methods of application.[272] Juristic always consider the sacred building of *K'abah* at Makkah as the first *waqf* ever made in Islamic history, as according to *Qur'ān,* it is the first place of worship of Allah built for people. So, they recognise *waqf* established in seventh century as touchstone, while formulating legal framework for *awqāf*[273]. In Madīnah first religious *waqf* was believed to be the Mosque of *Qubā'* that was constructed at the time of prophet's (SAW) arrival to this place while he was migrating from Makkah to Madīnah[274] for religious purposes. Soon after, a Jewish companion of the Prophet (SAW) named Mukhaīrīq; had gifted his seven orchards to the Prophet (SAW) in Madīnah , which was later on, devoted for the welfare

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[271] Al-Qur'ān, 2:215.
[272] *Waqf* is believed to be a form of perpetual philanthropy (*Ṣadaqa e Jarīyah*).
[273] Al- Qur'ān, 3:96.
[274] Aḥmad bin Muḥammad al-Qisṭalānī, *Al Mawāhib al-ladunīah bilmanḥ al-Muḥammadī*, vol.1 (Beirut: Al maktab al-Islāmī), 308.

of needy and poor people as a charitable waqf by the Prophet Muhammad (SAW).[275] As far as, books on Islamic jurisprudence are concerned, most of the writers considered the beginning of *Waqf* by narrating the story of 'Hazrat Umar (R.A)', who came to the Prophet Muhammad (SAW) for seeking consultation about utilizing a piece of land in the best manner as recommended by *Sharī'ah* so that he might earn Allah's utmost pleasure.[276] The Prophet declared,

"Tie up the property (asl-corpus) and devote the usufruct to human beings that it is not to be sold or made the subject of gift or inheritance;devote its produce to your children, your kindred and the poor in the way of God"[277]

And afterwards, abiding by the Prophet Muhammad (SAW) suggestion 'Hazrat Umar (R.A)' devoted the land as *Waqf.* Another tradition which is considered to form the foundation of a family endowment is that when the verse

'By no means shall ye shall attain piety until ye spend of that which ye love'

was revealed, Hazrat Ṭalḥa (R.A) furnishes his valuable, much-loved garden in charity but the Prophet (SAW) advised him to do so, in favour of his own nearest and dearest, so Abu Ṭalḥa gave the garden as a *ṣadaqa*h for Ubaiy and Hassan.[278] The Prophet further declared,

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[275] Aḥmad bin al-Ḥusayn bin 'Alī al-Khurāsānī Abū Bakr Bayhiqī, Al Sunan al- Kubra, Bāb Ṣadqāt al Muḥrimāt, vol. 6 (Beirut: Dār al-kutub al-'Ilmiyah), 265.

[276] Aḥmad bin Muḥammad bin Qudāmah al- Maqdasī, *Al-Mughnī*, vol. ed. 3rd (Riyāḍ: Dār al 'Ilm-al-Kutub. 1997).

[277] Muḥammad ibn Ismā'īl Bukhārī, *Saḥīḥ al-Bukhārī* (Muḥammad Muḥsin Khān (trans.). Kitāb al-Waṣāyā, Bāb al-Waqf kayfa Yuktab, vol. 4 (Kazi Publications, 1979), 27, 2764.

[278] Abū 'Abd Raḥmān Aḥmad ibn Shu'aib al- Nisā'ī, *Sunan*, Bāb Ḥabs al-Mush'a, vol. 6 (Beirut: Dār al-Bashāir al-Islāmiyah, 1986), 3368.

"That the best of all pious offerings is a provision for one's self, so that one may not need and the giving of sadaqa should commence with those whose subsistence is obligatory".[279]

On the basis of these traditions and saying of Prophet Muhammad (SAW), jurists founded the Islamic theory of *waqf*. The events altogether were interpreted to have established trusts for religious purposes, public need, and family protection which will be discussed below. But before we venture into those details it is necessary to explain the meaning of the term and its legal implications.

1.1 Definition of *Waqf*

According to Imam Abu Ḥanīfah (R.A) retention of specific property in the ownership of the *wāqif* and distribution of the profits, earnings or usufructs in charity for the poor or for other welfare deeds for people is called waqf.[280] According to Imam Abu Ḥanīfah, the characterstics of waqf includes the continuation of ownership of devoted property to *waqif* and the disbursment of its proceeds to beneficiaries. According to him, therefore, *waqf* does not become absolute, rather holding the ownership of property with *wāqif* himself and making propitiatory offering of its profits to others is in the category of lending *('āriyat)*. According to him *waqif*, even after establishing the *waqf* does not forgo the authority to revoke the *waqf* during his lifetime, or can gift that property to others or to alienate it by sale, until the *waqf* attained perpetuaity or become absolute. According to him, the waqf shall become absolute only in three cases; (1) if the *Waqf* is for the purpose of building a Mosque (2) if the *wāqif* has created *waqf* of his property by will and in

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[279] Ibid., 2498.

[280] Zaīn al-Dīn Aḥmad bin Ibrāhīm Ibn Nujaym, *Al Baḥar al Rā'iq Sharḥ Kanz Al Daqā'iq*, vol. 5, ed. 2nd (Dār Al Kitāb al Islāmī), 202; Muḥammad Amīn al-Shaḥīr Ibn 'Ābdīn, *Rad al Muḥtār 'alā al Dur al Mukhtār*, vol. 4, (Dār al Fikr, 1992), 337.

which he postulates that after his death the property is *waqf* (3) and thirdly, in case of any dispute pertaining to *waqf* deed between the *wāqif* and *mutawallī* and that dispute compels them to assail the matter to the state-appointed *qāḍī*, and the *qāḍī* gives a decision affirming the nature of *waqf* as irrevocable. Imam Mālik agrees with Abū Ḥanīfah on the point that the waqf does not signify the oblivion of ownership in the *waqf* property by the founder; however, he holds that the *waqf* extinguishes the founder's right of extract benefit for a limited period of time. According to him, perpetuity is not an essential ingredient for a valid *waqf*. Thus only the Mālikī school allows a temporary waqf.[281] The majority of jurists, including Aḥmad Bin Ḥanbal and Shāf'iī, opined that a *waqf* signifies the elimination of the ownership of the creator of *waqf* in the *waqf* property, which are transferred in the ownership of Allāh and their profits are spent for the benefit of fellow beings.[282]According to Muḥammad al-Shaybānī and Abū Yūsuf two students of Imam Abu Hanifa, in the concept of waqf extinguishment of the proprietor's ownership in the property, its dedication and detention in the implied ownership of Almighty Allāh is the primary ingredient for valid *waqf* along with the manner in which it is applied for the benefit of mankind.[283]According to Abū Yousuf, "Taking the corpus of any property out of the ownership of oneself, transferring it permanently to the

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[281] Abū al-Barakāt Aḥmad bin Muḥammad al-Dardīr, *Al-Sharḥ al-Saghīr*, vol. 4 (Egypt: Dār al-M'ārif, 1396), 97; Al-Zuḥaylī, *Al-Fiqh al-Islāmī wa Adillatuhu*, 7602.

[282] Al- Siwāsī al-Iskandarī Kamāl al- Dīn Muḥammad Ibn al-Humām al-Dīn 'Abd al-Waḥīd ibn 'Abd al-Ḥamīd, *Sharḥ Fatḥal-Qadīr 'alā al-Hidāya* ('Abd al-Razzāq Ghālib Mahdī (ed.),vol. 2, Dār al-Kutub al-'Ilmiyya, 2003) vol. 6, 187-191; Al-Shaykh Nizām, *Fatāwā al-'Ālamgīriyya* (Nawal Kishawr, 1865), 962; 955; Muḥammad Amīn al-Shahīr ibn 'Ābdīn al-Shāmī, *Radd al-Muhtār 'alā al-Durr al-Mukhtār Sharḥ Tanwīr al-Abṣār* 'Ādil Aḥmad 'Abd al-Mawjūd and 'Alī Muḥammad Mu'awwaḍ (eds.), vol.6, (Dār al-Kutub al-'Ilmiyyah, 2003), 517;Yaḥyā bin Sharf al-Nawawī, *Minhāj el Tālibīn: A Manual of Muhammadan Law according to the School of Shafi'ī* Translated into English from French Edition of L.W.C. Van Den Berg by E.C. Howard (W. Thacker & Co., 1914) 232.

[283] 'Alā' al-dīn Ḥaskafī, *Dur al-Mukhtār ḥāshīā Rad al-Mukhtār*, vol. 3 (Egypt,1256), 369.

ownership of Allah and dedicating its benefits to other is *waqf*, although the one in whose favour the *waqf* is created may be a rich person".

Yet another opinion of Abū Yusuf is that *waqf* become absolute at the moment when that word "*waqf*" is used for a certain property, and consequently *waqif* has extinguished his right to revoke the *waqf*. Thus neither he can alienate that *waqf* property by way of gift to any other person nor can sell it, and it would also be excluded for the devolution of inhertience.[284] According to his opinion, for purpose of attaing perpetuity of waqf, decree of an official or the possession by a "*mutawallī*" is not necessary. However, so far as formation of a *waqf* is concerned there is consensus of opinion on the interpretation of Abu Yusuf and it becomes generally accepted practice throughout Muslim community.[285] This view has been dissented a little, by Muḥammad al-Shaybānī, a pupil of Imam Abu Hanifa, for him an order of some official for creating *waqf*, Delivery of "*waqf* property" to mutawalli (according to its nature), and pronouncement by *waqif* specifically for the creation of *waqf* in a manner, "I dedicated such and such property as waqf in my life and after my death and forever" and if creation of waqf is contingent on death of *waqif* the incident of death are the conditions for establishing valid waqf.[286] This reflects the conflicting opinions among Muslim Jurists, on the issue of ownership of *waqf* property. Imam Abu Ḥanīfah holds that the *waqif* remains the owner of *waqf* property till *waqf* becomes absolute. Whereas Imam Abū Yousuf and Imam Muḥammad al-Shaybānī and other jurists consider that ownership belongs to Allāh.[287] According to all Muslim jurists, a *waqf* to build a mosque is irrevocable and perpetual in

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[284]Ibn ʿĀbidīn, *Radd al-Muhtār ʿalā al-Durr al-Mukhtār Sharḥ Tanwīr al-Abṣār*, 517.
[285]Ibid.
[286] Zaīn al-Dīn Aḥmad bin Ibrāhīm Ibn Nujaym, *Al Baḥar al Rā'iq Sharḥ Kanz Al Daqā'iq*, vol. 5, ed. 2nd (Egypt: Dār Al Kitāb al Islāmī), 202.
[287]According to Mālikīs the proprietorship is that of the dedicator of the waqf property.

its nature as mosques are built for Allah.[288] Therefore the property of a mosque cannot be alienated in any case though the construction may have deteriorated and it becomes impossible to reconstruct it.[289]

However, property purchased from the profits of *waqf* after its creation can be sold because according to the commonly accepted view, it will not become the *waqf* property though remain under the control of administrator of waqf *mutawallī*.[290] According to Mālikīs, *waqf* is "the imprisonment of the capital to those who have the right to derive its benefits in perpetuity"[291] Some Mālikī jurists opined that a waqf property is simply non transferable.[292] According to Shāf'iī, *waqf* is defined as "imprisonment of a property's capital that is capable of creating a benefit that is permissible".[293] According to Ḥanbalī school of thought *waqf* is "imprisonment of capital and liquefaction of benefits".[294] These definitions have its roots in the tradition of the Prophet Muhammad (SAW),الثمر هاحبس الاصل وسبيل'[295] According to Al Kubaysī, definition of *Waqf* given by Ḥanbalī jurists is the most accurate among different schools

[288]In order to establish an irrevocable waqf for a mosque, prayer must be offered by a group of two or more persons and according to one opinion attributed to Abū Ḥanīfa there should be ādhān (call for prayer) and an undisclosed offering of prayer to make the establishment of the waqf public. Al-Shaykh Niẓām, *Fatāwā al-'Ālamgīriyya* 1030. Al-Rushdānī Burhān al-Dīn, 'Alī ibn Abū Bakr ibn 'Abd al-Jalīl al-Farghānī Al-Marghīnānī, *Kitābal-Hidāyah, Al-Hidāya* vol. 3 (Muḥammad 'Adnān Darwīsh (ed.), 4 vols., Dār al-Arqam, 1997), 19- 21.

[289] Nawawī, *Minhāj al-Tālibīn: A Manual of Muhammadan Law according to the School of Shafi* Translated into English from French Edition of L.W.C. Van Den Berg by E.C. Howard (W. Tacker & Co., 1914) 233.

233; Wahbah Al-Zuḥaylī, *Al-Fiqh al-Islāmī wa Adillatuhu*, vol. 10 (Dār al-Fikr, 2004), 7673.

[290]Al-Shaykh Niẓām, *Fatāwā al-'Ālamgīriyya*, 1003.

[291] Muḥammad al Ḥaṭāb, *Al Mawahib Al Jalīl Sharḥ Mukhtaṣar al Khalīl*, vol. 6 ed. 3rd (Dār al Fikr 1992), 18.

[292] Aḥmad Al Qarāfī, *Al Thakhīrah*, ed. 1st (Dār Al Kutub al 'Ilmīyah 2001), 422.

[293] Muḥammad Al Ramlī, *Nihāyat al Muḥtāj Sharḥ al Minhāj*, (Dār al Fikr, 1984), 358.

[294] Ibn Qudama al Maqdsī, *Al Mughnī*, (Maktabāt al Qāhirah 1968), 3.

[295] Aḥmad bin 'Alī bin Ḥajar al-'Asqalānī, Fatḥ al-Bārī (Lahore: Dār Nashr lil kutub, n.d), 259; Muḥammad bin Muḥammad al-Shawkānī, *Nail al-Awṭār* vol. 6 (Egypt: Muṣṭafā al-Bābī al-Ḥalbī, 1347), 19.

of thought.[296]Abū Zahrah described *waqf* as "the prevention of a benefit-generating estate from corporal disposal but using its usufruct and benefit in charity, intended so at the time of creation and thereafter."[297] Abū Zahrah's definition of *waqf* is generic; he includes the fundamental ideas propounded by various jurists, and still limiting the endowment only to the extent of immoveable property[298], immediately brings an impression that *waqf* is always perpetual in nature. Contemporary Islamic jurists preferred another view of defining *waqf*: for example, Kahf and eminent jurist states that waqf is "separating productive wealth or immovable property away from charitable, social, religious or public purposes".[299] According to many Islamic scholars, *wāqif* can establish three types of "waqf: *Khayrī*, *Dhurrī*, and *Mushtarak*".[300] A *waqf khayrī* is a charitable waqf whereby a *wāqif* devoted his property absolutly for a specific charitable purpose. *Waqf Dhurrī* commonly known as a family waqf, this type of waqf is distinguished by the bifurcation of its beneficiaries, in it the major portion is reserved for the settler's family, his decendents or both, until they become extinct, after which the *waqf*'s benefit will be solely dedicated to a specifically designated charitable purpose.[301] *Waqf Mushtarak* is a *waqf* that is charitable as well as private in its nature.[302]According to Islamic Law in all three types of *waqf* the property is deemed to be owned by Allāh.

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[296] Muḥammad Al Kubaysī, *Aḥkām al Waqf fī al Sharī'ah al Islāmīyah*, vol 1 (Maṭba'at Al Irshād, 1977), 88.
[297] Abū Zahrah, *Muhadarat fī Al Waqf*, 5.
[298] Ibid., 69.
[299] Monzer Kahf, *Al Waqf al Islāmī: Taṭhūruhu, 'Idāratuhu, Tanmiyatuhu* (2nd ed, Dār al Fikr Almu'aṣir 2006) 17.
[300] Maada Ismail Abdel Mohsin, 'Revitalization of waqf administration & family waqf law' (2010) 7 US-China Law Review 57, 58.
[301] Hisham Marwah and Anja K. Bolz, 'Waqfs and Trusts: a comparative study', *Trusts and Trustees*, 15 (2009), 811-812.
[302] Ibn Qudama al Maqdsī, *Al Mughnī*, vol.10, 198.

1.2 Fundamentals of *Waqf*

Legally, only that person is held capable of expending his assets and possessions that is prudent and major. Thus every Muslim who is prudent and major has the right of dedicating his assets in waqf. In other words, a waqf created by a minor or insane person shall not be valid. But if a person is barred from expending his assets on the ground of his being an idiot and he dedicates his assets in waqf for meeting his expenses during his lifetime and for chartable purpose after his death, then according to an authentic opinion reported of Abū Yusuf, such a waqf shall be valid and if the waqf is in writing the waqf shall be valid. A valid waqf is concluded if the general or special conditions on disposal of the property by the owner and the object which form the subject matter of the waqf, as well as the beneficiaries thereto, are satisfied. They are as follows:

1.2.1 Ownership

Property dedicated in *waqf* at the time of its dedication must be in the ownership of the dedicator, Dedication of the *waqf* property, not in dedicator's possession as owner, shall not be valid.[303] Consequently if a person after purchasing a land from another person dedicates it in *waqf*, thereafter a third person proves that the land did not belong to the seller; the dedication would be void although a mosque might have been built upon that land. Similarly, if after the dedication of a property in *waqf*, someone claims his right of pre-emption over it and proves his claim; its dedication in waqf shall become converted into mosque.[304] The dedication in *waqf* of a land as well shall not be valid which on account of arrears of revenue is made over to the Government for the realisation. The

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[303] Muḥammad Amīn Ibn 'Ābdīn, *Radd al-Muḥtār*, vol. 3 (Egypt: 1252 A.H), 370; Zaīn al-Dīn Aḥmad b. Ibrāhīm Ibn al-Nujaīm, *Baḥr al-Rā'iq*, 203; Ibn al-Humām, *Sharḥ Fatḥal-Qadīr 'alā al-Hidāya* ('Abd al-Razzāq Ghālib Mahdī (ed.), vol 5, Dār al-Kutub al-'Ilmiyya, 2003), 38.

[304] Ibrāhīm Ibn al-Nujaīm, Al *Baḥr al-Rā'iq*, 203.

same form the income of that land [305] proposal or declaration of *waqf*. According to Ḥanafī's, a *waqf*, contrary to general contracts, comes into being by more proposal or declaration of the dedication of his property in *waqf*. Acceptance is not a condition for the creation of *waqf* or for the rights being created therein whether the beneficiaries be known and limited in number or unknown and unlimited of Mālikī and Ḥanbalī jurists. The Shaf'iī in certain cases, hold acceptance to be essential.[306] According to the assertions of Abū Yusuf and Shaf'iī the waqf for its completion of property being made over about this, there is a difference of opinion that making over its possession is a condition, and the others say that it is not.[307] According to Ḥanbalī jurists in *waqf* what is definite is the divestment of the proprietary right of the dedicator of property in *waqf*. *Waqf* becomes the object of *waqf* is realised by the word "*waqf*". According to another opinion of Aḥmad Ibn Ḥanbal, *waqf* is not completed without possession of its property being made over.[308] Muhammad al- Shaybaānī, Mālik Bin Ans and Shīa Imamiyah hold the transfer of possession a condition essential for the completion and perfection of *waqf*. *Waqf* immediate, not contingent: it is essential that the waqf be immediate and be not based upon uncertain condition. The *waqf*, which is created through will, shall not apply to more than one-third of the legacy except where after the death of the dedicator, his heirs give their consent.[309] *Waqf* must be unconditional: in the creation of *waqf*, a condition that nullifies the *waqf*, as sale or gift, must not be laid down.[310] Property-existing and specific: it is essential that the property which is intended to be dedicated in

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[305] Aḥmad ibn 'Umar al-Khaṣṣāf, *Kitāb Aḥkām al-Awqāf* (Maktabat al-Taqāfat al-Dīniyya, 1904), 35
[306] Ibn Qudama al Maqdsī, *Al Mughnī*, vol. 10, 198.
[307] Shāfi'ī, Muḥammad ibn Idrīs, *Kitāb al-'Umm* vol. 8 (Beirut: Dār Qutaibah, 1996), 139.
[308] Ibid.
[309] Shams al-A'immah Abū Bakr Muḥammad ibn Abī Sahl Aḥmad Shamsuddīn al-Sarakhsī, *Al-Mabsūt*, vol. 12 (Cairo: Maṭba' al-Sa'adah, 1324A.H), 34.
[310] Ibid.

waqf must be known and existing. Dedication in *waqf* of a property which is unknown or unspecified cannot be valid. The things that are attached with the waqf property like land, building or garden shall without their details being mentioned be included in the waqf. But moveable articles that are not attached with the dedicators at the time of *waqf* be included in the *waqf*, for instance, agricultural tools, seeds, animals etc.[311]

1.2.2 Perpetuity

The majority of jurists hold the perpetuity of waqf to be a condition for the validity of waqf. A waqf which is temporary or for a fixed period is void, because the object of waqf is everlasting act of virtue which is realisable only by means of permanent dedication. Shāf'iī and Aḥmad bin Ḥanbal hold perpetuity to be a condition is strongly of the view that the fact of perpetuity must be specified. Abu Yusuf too holds the permanency of *waqf* to be a condition but as against Imam Muhammad he does not hold such positive averment to be a necessary condition. He argues that the perpetual mature of transaction is inherent in the word *waqf*. The Zāhiriyyah too, like the majority to jurists, are convinced of the permanency of *waqf*. According to Ibn Ḥazam if a person dedicates his property in *waqf* and puts a condition that he in time of his need may sell the property. The *waqf* shall be valid but the condition shall be void.[312] Imam Abū Ḥanīfah and Mālik, as against the overwhelming majority of the jurists, do not hold the permanency of *waqf* to be a necessary condition for the validity of *waqf*; rather they hold the *waqf* for a period only to be valid. Likewise, they hold that in a *waqf* the condition for sale too in time of need is valid. Some Shīah jurists as well agree with this view.

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[311] Ibid., 36.
[312] Abu Muḥammad Ibn Ḥazam al-Ẓāhirī, *Al-Muḥallā*, vol.9 (Cairo: Maṭbah al-Imām, 1352A.H). 183.

There are two groups of jurists who differ on the question of permanency of *waqf*. The first group is convinced of the permanent nature of dedication in *waqf* and does not consider a *waqf* for a period to be valid. This group includes Ḥanafī's, Shafʿiī's and Ḥanbali's. Whereas the other group holds a *waqf* for a period also as valid includes Mālikīs. Among Ḥanafī's, Abū Ḥanīfah, favours permanency to be no condition. Imām Shafʿiī is fully convinced of the condition of permanency for a *waqf* without any limitation of period. However, in case a person in the dedication of *waqf* specifies a mode of disposal which by nature is bound to become extinct, Imam Shafʿiī has expressed two opinions. The first is that such a *waqf* is void, because the object of creating a *waqf* is to attain a permanent virtuous reward, and in such a *waqf* this object is unattainable. The second is that the *waqf* is valid and after the specified mode of disposal is extinct, the poor and needy shall be the beneficiaries of the *waqf*; but the poor and needy among them who are the relatives of the dedicator of *waqf* shall get preference.[313] According to Aḥmad Ibn Ḥanbal, the permanency in *waqf* is a necessary condition. If a dedicator in *waqf* places a condition that he may, whenever he wishes, sell the *waqf* property or make a gift of it or have recourse to it, in all such events neither the condition nor the *waqf* shall be valid, because such a condition is contrary to the purpose of a *waqf*. If, however, such a disposal is prescribed in the waqf which shall in due course become extinct, the *waqf* shall be valid; and on the disposal (disbursement) becoming extinct the income from the waqf property shall be spent on the relatives of the dedicator of *waqf*.[314]

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[313] Abū al-Barakāt Aḥmad bin Muḥammad al-Dardīr, *Al-Sharḥ al-Saghīr*, vol. 4 (Egypt: Dār al-Mʿāfīf, 1396), 97.

[314] Ibn Qudāmah, *Al Mughnī*, vol. 10, 195.

The Ḥanafī jurists particularly Imam Muḥammad strongly believe that the condition of perpetuity of *waqf* is mandatory. According to Muḥammad Shaybānī, it is incumbent that there ought to be such words in the writing of the dedicator in *waqf* deed that must, at least implicitly indicate permanency. Hence, he has said that if the declaration of *waqf* specifies the permanency of waqf, but status is such disbursement which must discontinue and be inconsistent with perpetuity the waqf shall be invalid. Imam Abu Yusuf agrees with Imam Muhammad about the "condition of perpetuity" but he considers. The word "*waqf*" to be sufficient indication of the perpetuity of *waqf* hence if the dedicator of *waqf* specifies such disbursement that must come to an end the *waqf*, according to Abu Yusuf, shall be valid disbursement that must come to an end the *waqf* according to Abu Yusuf, shall be valid and the *waqf* by itself shall devolve to the benefit of the poor and needy. Imām Abū Ḥanīfah is, however, not convinced that the *waqf* should be permanent.[315]According to Zāhiriyyah as well the *waqf* must be permanent and perpetual. If the dedicator introduces a condition in *waqf* it shall be void and the waqf shall be valid.[316] From the above description it is clear that most of the Imams believe in the permanency of *waqf*. According to them perpetuity is one of the components of *waqf* which is inherent in the company of *waqf* which is inherent in the very concept of *waqf*. Indeed, Imām Mālik as opposed to the views of a large number of jurists, seem to hold a different view about the permanency of *waqf*. He is convinced of the nature of *waqf* being only permanent and perpetual. Rather, according to him, as is a permanent *waqf* valid so is the *waqf* for a fixed period valid. If it is stipulated, according to him, that the dedicator in *waqf* is entitled to sell the *waqf* property in time of his need the *waqf*, with the

[315] Muḥammad Amīn Ibn ʿĀbdīn, *Radd al-Muḥtār* vol. 3, 497.
[316] ʿAlāʾ al-Dīn al-Ḥaṣkafī, *Al-Dur al-Mukhtār*, vol. 3 (Cairo: Maṭbaʿ al-Amīrīyah, 1328A.H). 370.

stipulation as well shall be valid. Likewise, if it is stipulated in the waqf that after the death of the person in whose favour the *waqf* is made, the waqf property shall revert back to the dedicator in *waqf* (if he is alive), or if he is dead it shall revert to his heirs, that stipulation too shall be valid. In short, according to him, permanent *waqf* and *waqf* for a fixed period (even though not limited by years) both are valid.[317] So the Shāf'ī and Ḥanbalī schools accept the possibility that a family *waqf* may not be perpetual. Thus they seem to tolerate instances of incidental non-perpetuity but maintain their position against temporary *waqfs*. Both schools create a constructive ultimate charitable purpose to ensure perpetuity. The only opinion that is comprisable to the rule against perpetuities is the Mālikī opinion. Kubaysī opined that the waqf that is explicitly temporary will be void. The reason he uses to support his conclusion is, as it is illegal to construct a temporary waqf in Islamic law the only way to uphold a waqf that the settler declares to be temporary would be to make it perpetual. But making a temporary *waqf* perpetual would force upon the settler's will that which he did not intend, so the best remedy would be to declare the waqf void and return the waqf property to the settler.[318]

The argument of those who consider the perpetuity of *waqf* to be its inherent feature is based on the tradition 'Umar whose words are signify "Perpetuity" the word has (confinement or restriction) in Arabic signifies perpetuity. If a *waqf* is, however, held to be reversible there remains no meaning of that word. Hence, the prophet's saying. "Restrict or continue real property" is a kind that shall continue in perpetuity till the world exists or may exist. And the words لايباع ولا يوهب ولا يورث i.e. it should not be sold,

[317] Shamsuddīn al-Sarakhsī, Al-Mabsūt vol. 12-34.
[318] Muḥammad 'Ubaid al-Kabaysī, Aḥkām al-Waqf fī al Sharī'ah al-Islāmiyah (Baghdād, n.d), 19.

neither should it be given away in gift, nor should it be turned into heritage; are indications for conveying the meaning of perpetuity, in as much as if a period is fixed for waqf, after the expiry of that period its sale, gift or inheritance shall all necessarily follow. Similarly حبس مادات السموات والارض، too is a perfect manifestation of the perpetuity of *waqf*. Now there remains no need of any other proof. The words of 'Umar were used by him at the time of his creating the waqf with the purpose of conveying the waqf with the purpose of conveying the sense that perpetuity in waqf is the intrinsic part of the meaning of *waqf*. Besides this, all the traditions and reports that have reached us concerning *waqf* form the companions of the Prophet (SAW) clearly prove that for a *waqf* it is essential that it be unconditional and absolute of which perpetuity is result oriented.[319] There is no indication in their statements that may show the propriety of fixing a period of *waqf*. The fact that stands proved is that permanency of transfer in waqf is its essential ingredient and fixing a period in waqf is contrary to and against the meaning and essence of waqf. In all religious tents the alienation of a property or a right is valid when such alienation is absolute and unfettered. It shall not be valid with any time limit. It is thus clear that waqf cannot be fettered by time. It shall be valid only when it is permanent.

1.2.3 The Beneficiaries

Capibility is the foremost condition for the recipient of the waqf property, irrespective of being real or legal person; thus real persons as the relatives and the poor or the artificial persons such as mosque, hospitals etc. are consideedr legally recognised beneficiaries. But a donation is not valid if it is immoral or for sinful purpose according

[319] Kāsānī, Abū Bakr ibn Mas'ūd, *Kitāb Badā'i'al-Ṣanā'i'fī Tartīb al-Sharā'i'* vol. 5(Cairo: Sharikat al-Maṭbū'āt al-'Ilmiyah, 1910), 326.

to Ḥanafī's and Ḥanbalī's. To Shafi'ī's and Mālikī's, however, moral righteousness is not the condition.[320] The beneficiaries otherwise could be a Muslim or non-Muslim citizen poor, rich and so on.[321]

Waqf on the donor himself is rejected by Mālikīs, Muḥammad from Ḥanafīs and one view in Shafi'ī and Ḥanbalī schools; other jurists allow so.[322] Because *waqf* extinguishes individual ownership or it is the transfer of the title and possession from the owner; that is why it is useless to suppose the legality of waqf of property as its proprietary privileges are still concentrated in the owner of the property. It is similar to that if one were legally able to sell or lend his property to himself.[323] The correctness of either view depends on their principle concept of *waqf*. If *waqf* is considered to be the transfer of title from the owner then the reasoning of the Imam Muhammad seems analogically correct. But if there is no transfer of title, as held by Imam Abū Ḥanīfah and Mālikīs, then such a condition is meaningless despite the fact that the best charity starts from one made for one's own interest as reasoned by Imām Abū Yusuf.[324]

2. The Objective and Purpose of *Waqf*

Basically the intention of creator determined the aim of *waqf*; and most of the time the real purpose behind this is humanitarian or spiritual; helping those who do not help themselves, or protection of decendents from financial crisis. In accordance with

[320] The sin according to the religion of the donor is recognised only by the Malikīs.
[321] Ḥasan 'Abdullah al-Amīn, *al-Waqf fī al-Fiqh al-Islamī*, 118.
[322] Ibn Qudamah, *Al-Maghni*, vol.6.196; Ghazālī, Abū Ḥāmid Muḥammad ibn Muḥammad, *al-Wajiz* (Beirut, Dar al-Ma'rifah, n.d), 245; Ibn Abidin, *Radal-Mukhtar* vol. 4, 385.
[323] Ḥasan 'Abdullah al-Amīn, *al-Waqf fī al-Fiqh al-Islamī*, 114,115.
[324] See the opinion of Abu Yusuf in Al-Sarakhsi, *al-Mabsūt*, vol. 12, 21-34.

these objectives *waqf* is divided into two types i.e. charitable and family.[325] Charitable *waqf*s are established and the return and income of which is spent on specific class of individuals such as poor, needy, old, sick, widows, orphans, travellers etc. or anyone or anything provided the disbursement of the returns of the funds and property is beneficial to the well being of the society at large. In the case of family *waqf*, its property can be sold, provided only when the family becomes poor according to some jurists, or when upon interpretation of the document the transfer by sale of such property is permitted by the founder, expressly or implied, according to others.[326] If any one of the purposes as mentioned in waqf deed fails or becomes unrealisable the waqf shall not become void merely on that ground. If the intention of the creator of waqf, with reference to the purposes mentioned in the waqf deed be clearly found to be of religious charitable or pious nature, the waqf shall be valid, and the income three of it shall be spent on such purpose that are akin and similar to the purposes that has failed or has become unrealisable. In English legal phraseology it is called the "Doctrine of Cypres". A *waqf* shall not be considered to be invalid merely on the ground that its use for the poor and the destitute for other permanent religious, pious or charitable purposes has been kept in abeyance till the interests of the family, issues or of the progeny of the creator of waqf comes to an end.

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[325] Also Section 2 of The *Trengganu Administration of Muslim Law Enactment No. 4* of 1955; section 41 of the *Administration of Islamic Law Enactment No. 14* of 1978.

[326] Abū Zahra, *Muhadarat*, 197- 207, al Dardir, *Sharh al-Kabir*, vol. 4, 89; Ḥasan Abdullah al-Amīn, *Al-waqf fi al-Fiqh al-Islāmī* (Jeddah, 1994), 114.

2.1 Waqf Property and Its Uses

The Ḥanafī's require that the subject matter of a waqf should be immovable property[327] in the absolute ownership of the founder[328] and must also be specified at the time of the creation of the *waqf*.[329] The Ḥanbalī's and Shāf'ī's view is that everything that can be used without extinguishing its substance can be the subject matter of a waqf.[330] The waqf property should be revenue generating and as a general rule the *waqf* of mere usufruct of the property without the substance is invalid.[331] Similarly, the *waqf* of a building without the land is invalid.[332] The *waqf* of easement rights is invalid according to the Ḥanafī's.[333] The Ḥanafī and Ḥanbalī jurists unanimously held that the waqf of a subject matter, which could only benefit by its consumption, e.g., food, drinks and silver and gold currency is not valid because the *waqf* is made for eternity and this condition cannot be fulfilled with consumable property.[334] The *waqf* for public services like schools, hospitals, orphanages, soup kitchens, waterways, bridges, public roads, mosques etc., consists of two types of properties. One is for the utility itself and the other generates revenue for its maintenance and operations. The second type included rent generating houses, shops and agricultural lands. In some cases whole markets and many villages were owned by awqāf.[335] When

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[327] Al-Shaykh Nizām, *Fatāwā al-'Ālamgīriyya*, 962. According to Abū Ḥanīfa, the waqf of military horses and weapons is not permissible because they are movable and it is not customary to make them subject to a waqf. His two disciples, Abū Yūsuf and Muḥammad, however, regard such a waqf as valid relying upon the saying of the Prophet: "Khālid made a waqf of his horses in the way of God (fī sabīl lilāh) . . ."; Al-Marghīnānī, supra note 19, 17. *Waqf* of the *Qur'ān* and books is valid according to the Ḥanafīs. Al-Shaykh Nizām, *Fatāwā al-'Ālamgīriyya*, 963.

[328] Al-Zuḥaylī, *Al-Fiqh al-Islāmī wa Adillatuhu*, 7635. Al-Shaykh Nizām, Ibid., 957-958.

[329] Ibid., 958.

[330] Ibn Qudāma, *Al- Mughnī*, 229-230.

[331] Al-Zuḥaylī, *Al-Fiqh al-Islāmī wa Adillatuhu*, 7637.

[332] Al-Shaykh Niẓā m, *Fatāwā al-'Ālamgīriyya* 963.

[333] Al-Zuḥaylī, *Al-Fiqh al-Islāmī wa Adillatuhu*, 7613.

[334] 81 According to the Ḥanbalīs and Shāfiīs, the waqf of jewellery, however, is allowed and no Zakāt is payable on it. Ibn Qudāma, *Al- Mughnī*, 229-230; Al-Shaykh Nizām, *Fatāwā al-'Ālamgīriyya*, 963.

[335] For examples of such *awqāf*, see O. Peri, "The Waqf as an Instrument to Increase and Consolidate Political Power: The Case of Khasseki Sultan Waqf in late Eighteenth-Century Ottoman Jerusalem" in:

the waqf properties become useless due to change in circumstances, they are to be used for the similar objectives. For example, if a khān (lodge for travellers) in a village becomes useless, it is to be used for another khān in the village.[336] As the *waqf* is a perpetual charity, the waqf property cannot be sold or consumed. However, serious challenge was posed when the *waqf* properties were seriously damaged or destroyed or they became useless due to the change of circumstances. In order to deal with such situation, the waqf property could be exchanged for a similar property (*istibdāl*).[337] The Ḥanafīs regard *istibdāl* and the sale of waqf property as valid where it is stipulated by the founder for himself or for the future *mutawallī*.[338] They still allow it where it is not thus stipulated or even prohibited by the founder but the waqf property becomes entirely useless. The *istibdāl* or sale of a mosque is not valid, which is to remain as such until the day of judgement. Muḥammad al-Shaybānī's view is that if the waqf property becomes useless it reverts to the founder or to his heirs.[339] The Mālikīs do not allow the sale of the immovable property of the waqf except for widening the mosque or the street. The Ḥanbalīs are the most permissive in this respect. They allow sale or *istibdāl* if the property is damaged or destroyed to an extent that it is no longer useful. The Shāfi'īs hold that the waqf remains in existence as long as there are goods left that can be used or exploited in some way. The beneficiaries own the property if the remaining property can only be used by consuming it. However, all schools agree that the sale of waqf property is

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G.R. Warburg and G.G. Gilbar (eds.), Studies in Islamic Society: Contributions in Memory of Gabriel Baer (Haifa: Haifa University Press 1984); and M. Hoexter, Endowments, Rulers and Community (Leiden: Brill 1998).

[336]Al-Shaykh Niẓām, *Fatāwā al-'Ālamgīriyya*, 1042.

[337]Kāsānī, Abū Bakr ibn Mas'ūd, *Kitāb Badā'i'al-Ṣanā'i' fī Tartīb al-Sharā'i'* vol. 5, 329.

[338]In cases where the founder allows istibdāl to the mutawallī in a waqf deed and does not reserve this power for himself, he is still authorised to exchange. Al-Shaykh Niẓām, *Fatāwā al-'Ālamgīriyya*, 991.

[339]Ibn 'Ābidīn, *Radd al-Muḥtār* vol. 3, 573.

prohibited and the waqf property cannot be sold or exchanged only to make its use more profitable.[340]

2.2 The Administration of Waqf

Perpetuity is one of the fundamental conditions for the validity of waqf. Islamic law, however, did not have the concept of juristic personality for non-human entities. Therefore, the legal status of the waqf posed a complex juridical problem. Some scholars have suggested that the waqf has a financial dhimma[341] (capacity) as the *mutawallī* does not own waqf property; he does not incur any personal liability while administering the *waqf*, though he can borrow for the maintenance of waqf properties with the permission of the court.[342] The problem of perpetuity is resolved through the legal fiction under which the waqf property is vested in Allah. Jurists identified the separation of the substance and usufruct in waqf property. Whereas the substance is reserved (either in the ownership of the founder or Allah), the usufruct belongs to the beneficiaries. This is the unanimous view of all jurists.[343] The entire class of beneficiaries is, however, not identifiable as the waqf is perpetual and every beneficiary has only a lifetime interest in the usufruct of waqf property. However, in a family waqf, the entire class of beneficiaries is identifiable at one point in time, though the future beneficiaries remain unidentified. Moreover, even in this type of waqf, according to the accepted view of Ḥanafīs, ultimate beneficiaries are the poor who are not identifiable. This gives rise to a complex question

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[340]Al-Zuḥaylī, *Al-Fiqh al-Islāmī wa Adillatuhu*, 7672-7682.

[341]The concept of dhimma is the Islamic equivalent of legal personality. Generally, dhimma means a presumed or imaginary repository that contains all the rights and obligations relating to a person. Muṣṭafā Aḥmad Zarqā, *Al-Madkhal al-Fiqhī al-'Āmm* vol. 2, ed. 6th (Matbáāt Jāmiat Dimashq 1959), 733-741.

[342]Al-Shaykh Nizām, *Fatāwā al-'Ālamgīriyya* 1008; Ibn 'Ābidīn, 21, 657-658.

[343] According to Aḥmad ibn Ḥanbal and some Shāfiīs the ownership of waqf property is vested in the beneficiaries. Some scholars have attributed to Aḥmad the saying that the beneficiaries are not owners, as the waqf property is neither to be sold nor inherited. Ibn Qudāma, *Al Mughnī*, 188.

about the nature of the waqf: whether it is a private or a public arrangement? If it is private, then the state cannot interfere in its administration. Some awqāf are a mixture of private and public interests. Since according to the commonly accepted view, the poor are the ultimate beneficiaries even in a family waqf, theoretically state interference is justified in all types of awqāf. The external control of the waqf was primarily vested in the qāḍī. Therefore, the duties of the qāḍī in this respect are discussed in the Fiqah literature. As the primary object of a waqf is charity, which involves public welfare, the community represented by state has a stake in it. This is how a qāḍī (court) assumes the responsibility of supervision of a waqf.[344] The qāḍī is a supervisor for the overall management of the waqf. He is authorised to interfere in its management where there is a danger to waqf property either from the negligent mutawallī or the founder himself when he is also a mutawallī.[345] The qāḍī is to oversee that the valid conditions of a deed of waqf are properly enforced and where a deviation is required in order to make effective use of waqf properties, permission of the qāḍī is mandatory. For example, where a stipulation is made that the waqf property should not be rented for more than one year[346] and it is beneficial to enter into a long-term lease.[347] In this case the mutawallī is required to apply for the permission of the *qāḍī* before entering into a lease extending one year.[348] The internal administration of the waqf is simple. The founder lays down a procedure for the appointment of one or more than one *mutawallī* to administer the waqf according to

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[344]The waqf deed found in *Kitāb al-Umm*, however, assigns the qāḍī a duty to appoint an administrator in case "among the existing generation there is no one who is capable and trustworthy".

[345] Al-Shaykh Niẓā m, *Fatāwā al-'Ālamgīriyya*, 997.

[346] Such conditions were normally laid down in the waqf deeds in order to avoid expropriation of waqf properties by lessees.

[347]Al-Zuḥaylī, *Al-Fiqh al-Islāmī wa Adillatuhu*, 7688.

[348] Muḥammad ibn Yūsuf Kindī, The Governors and Judges of Egypt, supra note 92, 394- 395 and 384.

the terms and conditions of the waqf deed.[349] He could do this either by specifying the names like A, B and C or conditions like the wisest, eldest or most knowledgeable person amongst the family or community. However, if the founder does not appoint a *mutawallī*, the *qāḍī* is to appoint one according to the Mālikīs and Shāfiīs.[350] The Ḥanafī view is that the founder is the *mutawallī*[351] whether he made this a condition or not and after his death the appointment would be according to the will, if such a will is made, and where it is not made, the ruler is to appoint a mutawallī. The Ḥanbalīs agree with the Ḥanafīs that the ruler will appoint a mutawallī in case the beneficiaries are unspecified like the poor or 'ulamā' or madrasa or mosque. However, if the beneficiaries are specifeid then every beneficiary is mutawallī to the extent of his shares as Ḥambalīs regard the beneficiaries to be the owners of waqf properties.[352] The *mutawallī* must be a capable person with necessary skills to manage the waqf. He should be a trustworthy (*amīn*) and just (*'ādil*) person and must not be a *fāsiq* (sinful).[353] The condition of capability requires that the mutawallī be a major, however, if a minor is nominated as a mutawallī he will assume that position upon attaining the age of majority.[354] Masculinity and Islam is not a condition as a woman and non-Muslim can also be a *mutawallī*.[355] The *mutawallī* should not put himself into a position of conflict of interests and where he buys from the waqf

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[349]Another expression used for the mutawallī is 'qaiyyam'. This is the simplest form of a waqf. In other cases a *nāzir* (accountant) might be appointed by either the founder or the *qāḍī* to keep an eye on the accounts of the waqf. Ibn 'Ābidīn, *Radd al-Muḥtār*, 683.

[350]Nawawī, supra note 21, 233.

[351]This is the view of Abū Yūsuf. According to Muḥammad al-Shaybānī, however, the *waqf* is invalid in this case. The reason for this difference is that the former does not require transfer of property as the necessary requirement for the validity of the waqf as against the latter who requires it. Al-Shaykh Niẓā m, *Fatāwā al-'Ālamgīriyya*, 996.

[352]Ibn Qudāma, Al Mughnī, 237.

[353]Al-Shaykh Niẓām, *Fatāwā al-'Ālamgīriyya*, 996.

[354]Ibid., 996.

[355]Ibid.

property or mortgages it for personal interests, he is to be removed from office.[356] The ruler can remove the mutawallī through the court, though he be the founder, in case he is found wanting in any of these requirements.[357] The mutawallī is personally liable for an inappropriate conduct; for example where he pays more than normal wages out of waqf funds.[358] The first and foremost duty of the mutawallī is to maintain and exploit waqf property according to the stipulations of the waqf deed. The valid conditions of the founder have the force of law, as there is a maxim: "the stipulations of the founder are like the provisions of the law giver" (*shurūṭ al-wāqif ka-naṣṣ al-shāra'*). The *mutawallī* is like the guardian of a minor or an insane person and owes utmost duty of care and loyalty to the founder and beneficiaries. However, he is entitled to take remuneration for his services.[359] Since a waqf is founded in perpetuity, the waqf property is to be maintained in a proper condition and the *mutawallī* is to repair it whether he is authorised by the founder or not. The maintenance expenses are to be incurred before making any payment to the beneficiaries. If the property is exploited by renting it out, maintenance must be paid from the proceeds. If the beneficiaries of a waqf have the right to use only, they themselves are liable for the maintenance of the property and where they are unable to do so or neglect the property, the ruler or *qāḍī* can evict them and rent out the property in order to generate money for its maintenance.[360] However, those who have the right of residence cannot give it on rent, as their right is limited to the residence only and they are not the owners of the property.[361]

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[356] Ibid.
[357] Ibn 'Ābidīn, *Radd al-Muḥtār*, 578.
[358] Al-Shaykh Niẓām, *Fatāwā al-'Ālamgīriyya* 1034.
[359] Al-Zuḥaylī, *Al-Fiqh al-Islāmī wa Adillatuhu*, 7688.
[360] Ibid., 7670.
[361] Ibn al-Humām,, 208.

2.3 The Validity of the Instrument of Waqf and Its Legal Consequences

Jurists vary as to the effect of the instrument of waqf.[362] Based on the opinion of Ibn Mas'ūd(r), and Ibn Abbas (r) according to Imam Abu Ḥanīfah and Zufar the title to the subject matter is still vested in the donor and therefore the instrument of the *waqf* is not binding on the grantor. Other jurists including the majority of Ḥanafīs consider initial deed of *waqf* final. A group of Shaf'iī's thought that the deed is binding and effective soon after it is declared irrespective of the non-existence of the beneficiaries, or their willingness, and possession of the subject matter by the trustees or beneficiaries.[363] Where the first in the rank of beneficiaries ceases to exist, the subsequent one substitutes it automatically.[364] Other group of jurists from the same school opined that acceptance is a condition similar to any gift, that the beneficiary should accept the donation otherwise the donation would be ineffective.[365] The Ḥambalī school however does not consider the acceptance of the donation neither for the validity nor for the efficacy of the deed. As far as the right to the benefit is concerned, a preferred view in this school excludes the acceptance by the trustee as a pre requisite while other opinion makes acceptance a precondition for having such a right. The Mālikī school is similar to Ḥanafī, that it recognises acceptance of the donation by the beneficiary a condition for having the right to the *waqf* property provided the beneficiary is a specific individual. Hence on part of the donor, once the donation is made he has the option to revoke and terminate the trust anytime according to one group; according to the other, however, termination of a trust is

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[362] Abu Zahrah, *Muhadarat*, p. 48-49.
[363] Muḥammad Al-Sharbini, *Mughni al-Muhtaj*, vol. 2 (Beirut: Dār al-Turāth al-'Arabī, 1977), 230-383.
[364] Abū Isḥāq Al-Shirāzī, *al-Muhadhdhab*, vol. 1 (Egypt: 'Isā al-Bābī, n.d), 618-19.
[365] Abū Zahrah, *Muhadarat*, 50.

irrevocable.[366] As regarding to the rights of the beneficiary, mere declaration of a *waqf* is enforceable only if it is accepted by the specified beneficiary according to some; other jurists however consider such declaration enforceable irrespective of the fact whether the beneficiary is specific individual/individuals or a class of individuals. This issue however does not arise if one has to follow the opinion of Abu Ḥanīfah and Zufar.[367]

2.4 The Interpretation of the Document of Waqf

Jurists agree that the words of a donor are the words of law.[368] The question that should follow is that what is the jurisdiction of the court of law, also of the administrators, in regard to the interpretation of the instrument of *waqf*? Is such a deed binding on the donor? Is the deed enforceable by the courts even though the trust is rejected or is impossible to implement by reason of non-existence of the beneficiaries? Is the court bound by the conditions of the donor? To answer this question, one has to take note of the intention of the donor, and the basic rules of law applicable to *waqf*.

The decision of courts in the interpretation of the instrument of *waqf* should be based on the legal concept of the *waqf*, the type of the undertaking, and the intention of the donor. The court has to consider the constituents of *waqf* that is the status of the donor, the subject matter and the beneficiary. In addition, court must take notice of the nature of undertaking as being unilateral and thus whether the instrument is capable of transferring the title to someone else or not; that whether binding on the donor preventing him from any dealings in the subject matter by way of sale, gift, charge, pledge and transmission. In doing this, the court is bound to look at the existing opinions of the jurists and apply

[366] See the first provision of the directive given by Sudanese Supreme Court. They allow repudiation of *waqf* by the founder, or change of the terms of the document if pronounced by court (p.2). According to the directive (p.4) repudiation is valid in family *waqf*.
[367] Hasan Abdullah al-Amin, al-Waqf fi al-Fiqh al-Islami, 120.
[368] Qahf, *al-Waqf al-Islami*, 118.

only those which are prevailing in the juristic school of the donor. The court will be acting out of its jurisdiction if it imposes its own intuition, the opinion prevailing in the school to which the judges of the relevant court adhere. This duty of court is dictated by the principle of certainty, and predictability of law, and also fairness to the donor. Fairness dictates the respect of the wishes of the donor. His wishes can be ascertained only if his words are interpreted correctly, and the correct interpretation of his words is possible only if one considers the mind set of the donor, which is usually fixed according to the rules and principles of the law that govern his life, the language, the grammar and the over all context of the document. The court in this regard, the jurists agree,[369] is bound by the contents and conditions of a document of *waqf* such as the specification of the beneficiaries, the appointment of a specific administrator, the method of distribution, the authority of the administration, and the payment of debts owed by his heirs when they fall due. The restriction imposed by law is that the conditions must be lawful and harmonious with the objective of the *waqf*.[370] The court however has the jurisdiction to impose or overrule conditions under special circumstances. This power of the court should be used only when the very existence and usefulness of the fund is at stake.[371]

Concerns with waqf of property created in favour of one's family members ordinarily creating waqf of all kinds under the Sharī'h is an act of piety but creating waqf in favour has preference over the creation of other waqf. It is an act of high virtue as it is the duty of every Muslim to secure maintenance first for those whose responsibility of

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[369] Hasan Abdullah al-Amin, "al-Waqf fi al-Fiqh al-Islami",122.

[370] ibid. Conditions that are against the law of Islam or contradict the objective of the document of the *waqf* are considered not binding. For instance, the condition to sell the fund or give it as a gift to someone, to be the property of an heir, or to include or exclude anyone according to the discretion of the donor such conditions are considered invalid and are, therefore, not binding. Conditions, which are contrary to the objective of the *waqf*, for instance, that the income of the fund shall not be spent on the damaged parts of the property, are void but the document of undertaking would be valid.

[371] Ibn Qudamah,Al *Mughni*,195;Al Sharbini, *Mughni al Muhtaj,* 385.

maintenance rest upon him. In case of waqf alal awlad the ultimate benefit has necessarily to be reserved for permanent religious pious or charitable purpose for instance, the maintenance and support of the poor for construction of mosques and their getting the graves and the burial of the poor as well as for all kinds of charitable purposes that may benefit the human beings such as construction and maintenance of inns, bridges and roads etc., it shall however be enough if the permanent charitable and pious purpose for which the income rents and profits of the waqf property shall be put is specified either expressly or impliedly in the waqf deed; the motive behind ultimate benefit being religious pious or charitable is that waqf in issues of relatives are in fact mortal and at one time or the other are liable to become extinct and the chain of progeny of the deceased creator of waqf may end, hence to keep intact the permanent nature of waqf it is necessary that its ultimate purpose be of such permanent religious pious or charitable nature and character that may continue in perpetuity.

2.5 Family Waqf in the Early Period of Islam

In early age of Islam awqāf were created by the saḥābās of the Holy Prophet (SAW). According to Imām al-Shāfiī eighty saḥābās from *anṣār*'s made awqāf.[372] The custom of family *waqf* also traced back in the era. Some awqāf were created after the approval of the Holy Prophet (SAW). The first family waqf was created by Abu Ṭalḥah after the revelation of this verse "You shall never attain virtue (*birr*) until you spend out of that which you love" [373] Abu Ṭalḥah (RA) donated his garden to his close relatives.[374] However, there is a point of difference among scholars and some claim that the first waqf

[372] "Restricted donations" (*Ṣadaqāt muḥarramāt*) is a term used by Imām al-Shāfiī to refer to awqāf. *Al-fiqh a lManhaji*, vol 2, 215.
[373] Qur'an, 3: 92.
[374]Muḥammad ibn Ismā'īl Bukhārī, *Saḥīḥ al-Bukhārī* (Muḥammad Muḥsin Khān (trans.). Kitāb al-Waṣāyā. Bāb al-Waqf kayfa Yuktab, vol. 4 (Kazi Publications, 1979), 27 h. 2764.

for family was created by 'Umar (RA).[375] Ḥaḍrat Zubair, also made waqf for his kin.[376] So, the concept of family waqf was originally given by Islam.[377]

2.6 Some Rules on Family *Waqf*

By the word "awlād" in waqf are meant all those relatives who are ascendants or descendents of the creator of waqf (or of his forefathers). If a person creates a waqf in favour of issues then both the whole and the female issues who are in distance at that time or at the time of the death of the creator of the waqf, shall be included therein but after the death of the wāqif the word "issues" shall mean only the male issues one generation after another except when it appears form the waqf deed itself that both the male and female issues one generation after another are all included there in case of waqf alal awlād if the creator of waqf creates it in favour of one or two generations its benefits shall remain limited to one or two generations only as the case may be benefits shall remain limited to one or two generation only, as the case may be unless the intention of the wāqif (creator of waqf) appears to be otherwise. But when he creates the waqf for the benefit of there or more than three generations the benefit of the waqf shall accrue to generation after generation in perpetuity.

Works of Islamic law contain detailed rules on every conceivable aspect of waqf. As an institution that factually existed on a large scale and thrived in Islamic communities and countries for long centuries, there had been ample opportunity for the derivation of legal aspects relevant to application from the sources of law, that are documented in major manuals of Islamic law as well as compilations of *fatāwā* providing legal solutions to

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[375]Muḥammad ibn Ismā'īl Bukhārī, *Saḥīḥ al-BukhārīAl-Bukhari*, Kitāb al-Waṣāyā, Bāb al-Waqf Kayfa Yuktab, h. 2586.
[376] Ibn-Humām, *Musannaf 'Abd al-Razzāq*, Bāb al-Raqbi, vol. 9 (Beirut: al-maktab al- Islami, 1403), 196.
[377]Khaṣṣāf, Abū Bakr Aḥmad ibn 'Umar al-Shaybānī, *Kitāb Aḥkām al-Awqāf* (Cairo: 1999), 12.

specific situations that occurred in practice. Family waqf is no exception, where various aspects of legal importance related to awqāf for the benefit of family and progeny have been dealt with in detail in works of Islamic law. An area of special importance in the context of family waqf concerns the waqf declaration made by the endower and its legal significance. In their effort to conform to the aspirations of the endower in creating the waqf, scholars have taken especial pains in discussing the relevance and scope of the text of the endower in specifying the beneficiaries of the endowment created by him or her. Some of these rules that pertain to the text of family waqf are given below succinctly. An important aspect in designating the beneficiaries relates to terms used by the endower in specifying the parties, whether their entitlement to the benefits of the waqf would be concurrent or whether various parties would become entitled in succession.[378] In this regard, scholars have ruled that when the endower says, "I have made this house an endowment for my children (*awlād*), and the children of my children," all of them would be entitled to the endowment together, concurrently. Its income and benefit would be divided among them equally, without a difference between a male and a female or a child and a grandchild, as the text is not indicative of preference of any over the other. However, if he had mentioned that the house is "an endowment on my children," the grandchildren would not be entitled to the waqf, as the term "child" does not apply to them directly. This is when the endower had children as well as grandchildren. If he had grandchildren only, they would be included in the meaning and be entitled to the waqf. If the endower had said that "this garden is an endowment on my progeny (*dhurriyyah*)," or "on my descendants (*nasl*)," or "on my posterity (*'aqb*)," it would include the children

[378] Khaṣṣāf, Abū Bakr Aḥmad ibn ʿUmar al-Shaybānī, *Kitāb Aḥkām al-Awqāf*, 14.

of daughters as well as the children of sons, near and distant, male and female, as the text encompasses them all.[379] In the above instances, where the endower had specified the beneficiaries as the grandchildren who carry his lineage, the waqf is assigned to the grand children through his sons to the exclusion of children of daughters, as the latter would carry the lineage of their own fathers.[380] The Ḥanbalī school records some difference regarding whether the children of daughters would be included when the term grand children is used.[381]

According to all jurists, when a waqf is constituted in favour of the *wāqif*'s descendents, and they are mentioned in general terms, or when three generations are mentioned, the trust takes effect in their favour so long as they exist. For example, if a man were to say, 'this land of mine is a waqf for my children, using the term *awlād*, the term being general, it will endure for 'the benefit of his descendents so long as they are in existence and so long as a single descendent of the *wāqif* is in existence, no portion of the usufruct will go to the poor. Similarly, if he were to say, 'this waqf is for my child and the child of my child and the child of the child of my child' (using the word in singular, but mentioning three generations), the effect would be the same.[382]

This is clear from the following passage in the Fatāwā 'Ālamgīrī: "And if a man should say 'this is a waqf for (original, upon) my child and for the child of my child and for the child of the child of my child,' mentioning three generations, the income has to be expended upon his *awlād* for ever, so long as there are any descendents, and is not to be applied to the poor; while one remains, the *waqf* is to them, and the lowest among them,

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[379] Al-Shaykh Niẓā m, *Fatāwā al-'Ālamgīriyya*, 975.
[380] Al- Sharbīnī, *Mughni al-Muḥtāj*, vol. 2, 388.
[381] Ibn Qudāmah, *Al-Mughnī*, vol. 5, 554.
[382] Al-Shaykh Nizām, *Fatāwā al-'Ālamgīriyya*, 972.

the nearer and more remote being alike, unless the *wāqif* say in making the waqf, 'the nearer is the nearer,' or say, 'on my child, then on the child of my child,' or say, 'generation after generation', when a beginning must be made with them whom the *wāqif* has begun. Or if he should say, 'this my land is a waqf on my children, all generations are included on account of the general character of the name; but the whole is to the first generation while it remains and when they are exhausted, to the second, and, when they are exhausted, to the third and fourth and fifth, all these generations participating in the division, and the nearer and remote being alike." [383]

The Fatāwā 'Ālamgīrī, states that if a person were to say, 'this my land is a *mauqūfah* as a pious offering on my child,' the produce is for the child of his loins, males and females taking equally and so long as there is in existence one child of his loins, the produce him or her only.[384] When there no longer remains one of the first generations, the produce is to be extended on the poor, nothing being allowed to the child or the child. But if he had no child of his loins at the time of the settlement, and there was then a child of a son, in the event on there being no child of loins, thus coming into place. The child of the daughter is not included.[385] As it is also in Radd al-Mukhtār. But if a man were simply to say that it is a waqf for his *walad*, then the daughter's children will not be included, for *walad* itself means his own child...though it includes in the language of custom the son's children, owing to the fact that son's children are descended from the *wāqif*.[386] But there is a considerable divergence of opinion regarding the exclusion of daughter's children

[383] This principle is given in identical terms in the Fatḥ-al-qadīr; It would be otherwise if he said 'this is a waqf for my child, using the singular expression, or even if he said 'my child's child,' unless he extending his meaning by other expressions, indicating that though the term was used in the singular, or though only two generations were mentioned, his intention was to give the proceeds to his descendents so long as they happen to be in existence.

[384] Al-Shaykh Nizām, *Fatāwā al-'Ālamgīriyya*, 972.

[385] 'Alā' al-Dīn al-Ḥaṣkafī, *Al-Dur al-Mukhtār*, vol. 3, 381.

[386] Ibn 'Ābdīn, *Radd al-Muḥtār*, vol.3, 389.

when two generations are mentioned. According to Imām Muḥammad, the term 'child's child' or 'children's children' includes daughter's children. Other scholars like Khaṣṣāf and Ibn Ḥamām opined that in such a waqf the children of daughters are not to be excluded.[387] Khaṣṣāf says that there is no warrant for the doctrine of exclusion except a statement of Abu Ḥanīfah which is applicable to the case of bequest.[388]So according to him when a person says this is a waqf for my children and their children, in all such cases it will include the children of sons and children of daughters.[389] So if a person say 'this is the *waqf* on my child and the child of my child and then on the poor,' in this all the children of his loins participate, the children of his daughter alike with the children of his sons.[390] It may be taken, therefore, that the view expressed in Fatāwā 'Ālamgīrī represents only one set of opinions, while Khaṣṣāf doctrine appears to be supported by greater weight of authority.[391]

When a man makes a waqf for his (or anybody else) child and does not mention that after the death of his child it will ensure the benefit of succeeding generations, on the extinction of the first generation, the waqf will go to the poor. But if he uses the term awlād, nasl, aqab or khalāf, the waqf for his descendents, male as well as female, in perpetuity. When the general term of this character is used, no further condition is necessary. Similarly, if he mentions three generations as the recipients of the benefit of the waqf, it is tantamount to his declaring that it is a perpetual waqf in favour of his

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[387]Ibn al-Humām, *Sharḥ Fatḥal-Qadīr 'alā al-Hidāya* ('Abd al-Razzāq Ghālib Mahdī (ed.), vol 5, 137; Khaṣṣāf, Abū Bakr Aḥmad ibn 'Umar al-Shaybānī, *Kitāb Aḥkām al-Awqāf* (Cairo: 1904), 170.
[388] Qāḍī Khān, Fakhr al-Dīn al-Ḥassan ibn Manṣūr al- Uzjānī al-Farghānī, *Fatāwā Qāḍī Khān* vol.2 (Būlāq, 1310), 298.
[389] Khaṣṣāf, *Kitāb Aḥkām al-Awqāf*, 172.
[390]Ibn al-Humām, *Sharḥ Fatḥal-Qadīr 'alā al-Hidāya* ('Abd al-Razzāq Ghālib Mahdī (ed.), vol 5,138.
[391] Khaṣṣāf, *Kitāb Aḥkām al-Awqāf* (Cairo: 1904), 190.

descendents, and will be applied to their benefit as long; as any of them is alive.[392] If a waqf is made in favour of children specifically named, the others not named will be excluded. A waqf in favour of A and after him for his children generally will include all the children, both male and female. Similarly if a person makes a waqf for his own children both males and females will be included.[393]

If a man were to say, this waqf is for my children and their children and their children's children, those of his children who were living at the time of creation of that waqf, or who are born afterwards, and their children would take, but not the children who had died before the waqf.[394] But if he says, the waqf is for my child or children and for my children's children and for their children's children, then the children of those children who had died before the creation of the waqf would participate; for the term 'my children's children' refers to all his grandchildren, not merely to the children of those who are entitled to participate in the waqf of its inception.[395]

It must be noted that these principles proceed on the validity of waqfs in favour of one's family and descendents. The application of the rules depends on the intention of the *wāqif* as deducible from the language used by him.

When a waqf is in favour of children without any right of survivorship, as each child dies, his interest goes to the poor, for the interest of each is separate. But the case is different where there is a right of survivorship or joint tenancy implied from the nature of a grant. For example if a man were to make a waqf in favour of his children and then for

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[392] Zain al-Dīn bin 'Abd al-'Azīz al Malībārī, Fatḥ al-Mu'īn bihāmish 'I'ānah al-Ṭālibīn, vol. 3(Beirut: Dār al-Turāth al-'Arabī, n.d), 166.

[393] Al -Syed Muḥammad shaṭā al-Dumyāṭī, 'I'ānah al-Ṭālibīn, vol. 3 (Beirut: Dār al-Turāth al-'Arabī. n.d). 166.

[394] Ibn al-Humām, *Sharḥ Fatḥal-Qadīr 'alā al-Hidāya* ('Abd al-Razzāq Ghālib Mahdī (ed.), vol 5, 137.

[395] Al-Shaykh Nizām, *Fatāwā al-'Ālamgīriyya*, 973.

the poor; it is clear that the intention of the donor was that the waqf should continue for the benefit of the wāqifs children so long as any one of them was living, and it is only on their failure that the waqf should go to the poor; consequently when each child dies his interests goes to the survivors, or his or her child as the case may be.[396]

If the waqf is made 'for my sons,' or 'for my brethren,' the females will be included. If a man were to say, 'the waqf for my daughters,' and he has only sons, the waqf will be applied to the benefit of the poor, until a daughter is born to him, or it is shown that the expression had been used by mistake, and though he used the term daughters he meant sons or both.[397]

If a waqf is made generally without any specification regarding the proportion in which the males and females of each line should take the produce, the distribution should take place in the usual proportion of two for each male and one for each female. The word *nasl* includes all descendents on the male as well as the female side.[398] The words *'aqab* or *khalaf* include descendents through males; *al-jins* and *ahl-al-baiṭ* of the *wāqif* include those persons who are related to him through the father or grandfather or any other male ancestor.[399]

If a man were to say, 'this is a waqf for my *walad* and for my *nasl* in perpetuity and that should anyone of them die, his or her share should go to his *nasl*,' in such case the entire produce would be divided among all the *wāqif*'s children and *nasl*; and the shares of those among them who are dead will go to their children.[400]

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[396] 'Alā' al-Dīn al-Ḥaṣkafī, *Al-Dur al-Mukhtār*, vol. 3, 381.
[397] Al-Shaykh Nizām, *Fatāwā al-'Ālamgīriyya*, 975.
[398] Ibn 'Ābdīn, *Radd al-Muḥtār*, vol.3, 389.
[399] Ibn al-Humām, *Sharḥ Fatḥal-Qadīr 'alā al-Hidāya* ('Abd al-Razzāq Ghālib Mahdī (ed.), vol 5, 139.

[400] Ibrāhīm bin Mūsā bin Abū Bakr al-Ṭarāblisī, *Al- As'āf fī Aḥkām al- Awqāf* (Egypt: Maktabah Hindiyah, 1360), 107.

If a person were to make a waqf in favour of his children, and make no provision declaring that upon the death of anyone of them his or her share should go to his or her children, such share or interest will merge in the general produce and will be divided among the beneficiaries for the time being. If the *wāqif* were to make a condition, that upon the death of any of his descendants, his or her share should go to his or her *nasl*, in that case it would devolve upon all the children of such deceased descendants, and should any of the children be dead, the children of such child would take his or her share.[401]

If a person were to make a waqf in favour of his children according to their number and their legal shares, and were also to provide therein that the female children should get no share, unless they are widows and that after the children, the waqf should be for their children, and their children's children and their descendants, on condition, that if anyone of them should die leaving children his or her share should go to such children, the aforesaid condition would refer to all.[402]

If a man were to make a waqf in favour of his children, and after that upon their children and so on, generation after generation and provide also that any one of them die leaving children, then his or her share should go to his or her child, and if such person dies before becoming entitled to a share in the rents and profits, leaving him surviving a child, the later will take his place and become entitled at the distribution of profits to the share of his parents.

If a person were to make a waqf for his *lineal* descendents, the children's of daughter will not be included, unless those children's are the offspring of husbands who are the lineal descendants of the *wāqif*. If a woman were to make a waqf for her *ahl al-*

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[401] Ibid., 108.

[402] Qāḍī Khān, Fakhr al-Dīn al-Ḥassan ibn Manṣūr al- Uzjānī al-Farghānī. *Fatāwā Qāḍī Khān* vol. 2, 301.

bait or her *jins*, her children will not be included unless the father of the children belongs to her tribe.[403]

Where a waqf is constituted in favour of a child, and after him for the poor, the child who may be in existence at the time the produce comes into being enters into the benefits of the waqf, whether he was born at the time of the creation of the waqf or after it.[404]

2.7 Waqf Created in Death-Illness

When a person laboring under the death-illness makes a waqf of his property in favour of his children and children's children in perpetuity so long as his nasl exists, upon the death of the testator, the waqf will not be valid in favour of the heirs but according to Imām Abu Ḥanīfah and Abu Yūsuf will be valid in favour of the non-heirs, i.e., the grand children, in respect of one-third of the estate, 'for the waqf of a marīẓ, is like a will and is valid so far as the third if the estate extends when it is in favour of a non heir'. So long as there is a child of *wāqif* is living the produce is to be divided per capita among the children and grandchildren.[405]

3. English Lawof Trust

While Western legal scholars dispute the origin of the trust in England, whether Roman or Germanic, it is well established that the institution "developed from a medieval English device for holding land known as the use." "Indeed, until the enactment of the "Statute of Uses" in 1535, trusts were commonly referred to as uses." The Franciscan Friars are generally credited with the introduction of uses in thirteenth-century England.

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[403] Ibn 'Ābdīn, *Radd al-Muḥtār*, vol.3, 389.
[404]Ibn al-Humām, *Sharḥ Faṭḥal-Qadīr 'alā al-Hidāya* ('Abd al-Razzāq Ghālib Mahdī (ed.), vol 5.141.
[405] Ibn- 'Ābdīn, Al-'Uqūd al-Dariyah fī tanqīh al-Fatāwa al-Ḥāmdiyah, vol. 1 (Quetta:Maktabah Rashīdayah, n.d), 112.

Under the laws of their Order, the Friars were not permitted to own property. They could, however, be named the beneficiaries of a use. This arrangement was soon expanded to other contexts as well, for it provided a beneficiary with all of the benefits and none of the liabilities of land ownership.

3.1 English Law against Perpetuity

According to Gray's classic statement of the Rule "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."[406] Although Gray's one sentence must be qualified in several ways, because of its brevity it is the most useful working description of the Rule.

The fundamental policy assumption of the Rule against Perpetuities is that vested interests are not objectionable, but contingent interests are. The Rule therefore limits the time during which property can be made subject to contingent interests to "lives in being plus twenty-one years." The assumption that only *contingent* future interests are objectionable is questionable. The Rule has three basic purposes: (1) to limit "dead hand" control over the property, which prevents the present generation from using the property as it sees fit; (2) to keep property marketable and available for productive development in accordance with market demands; and (3) to curb trusts, which can protect wealthy beneficiaries from bankruptcies and creditors, decrease the amount of risk capital available for economic development, and after a period of time and change in circumstances, tie up the family in disadvantageous and undesirable arrangements. (4) Whenever future interests, vested or contingent, exist, these three objectives are compromised. These objectives are fully realised only when a person owns an absolute

[406] J. Gray, *The Rule Against Perpetuities*, 201.

fee simple free of trust.[407] At the time of the formulation of the Rule against Perpetuities, heads of families -the fathers- were much concerned about securing the family land, perhaps acquired only a couple of generations earlier, from incompetent sons. This is similar to family waqf and suggests that the Common Law could potentially accommodate a family waqf if the property would then be applied to a charitable purpose before the end of a perpetuity period.

3.2 The Branches of the Rules against Perpetuities

The rule against perpetuities has three branches: 'the rule against remoteness and vesting', 'the rule against inalienability', and 'the rule against accumulation of income'.[408]

A contingent future interest is invalid under the rule if, at the time of the creation of the interest, the circumstances are such that the contingency may go unresolved for too long a time. The Rule is not concerned with the duration of interests, that is, the length of time that they endure. It is not a rule against suspension of the power of alienation, nor a rule against restraints on alienation. It is not a rule which limits directly the duration of trusts. The perpetuities period is any reasonable number of lives in being at the creation of the interest, plus actual periods of gestation and twenty-one years. If a contingent future interest is created by deed, the perpetuities period ordinarily begins to run upon delivery of the deed. If a contingent future interest is created by will the perpetuities period begins to run on the death of the testator. If a contingent future interest is created by a revocable deed of trust the deed of trust is for perpetuities purposes like a will and the perpetuities period begins to run at the death of the grantor rather than upon delivery

[407]Jesse Dukeminier, A Modern Guide to Perpetuities, *California Law Review*, 74 (1986), 1868-69.
[408]Robert J. Lynn, A Practical Guide to the rule against Perpetuities, *Duke Law journal*, 2 (1964), 211.

of the deed.[409] S.1 (1) of the Perpetuities and Accumulation Act 1964 set the perpetuity period at 80 years.[410] Perpetuities and Accumulation Act 2009 states that the perpetuity period is 125 years.[411] The Act also maintain the application of the wait and see[412] doctrine: provides, 'until such time (if any) as it becomes established that the vesting must occur (if at all) after the end of the perpetuity period the estate or interest must be treated as if it were not subject to the rule against perpetuities.[413] The second branch of the rule against perpetuities, the rule against inalienability is unaffected by the 2009 Act. Moffat et al. explain, 'if the capital fund must be intact so that the income produced can be used for specific purposes for longer than the perpetuity period, the trust will be void irrespective of the applicability of the beneficiary principle'.[414] However charities are exempt from the rule against perpetuities.[415] According to Gardner 'the two surviving branches of the rules against perpetuities address two variants of the same phenomenon, the prolonged subjection of property to a trust regime'.[416] The third branch of the rule against accumulations prohibits adding the trust capitals accruing income to the trusts capital beyond the perpetuity period. The 2009 Act has abolished the rule against accumulation.

The rule against perpetuities is not entirely driven by economic reasons; initially, the rule also has religious roots in the belief 'that perpetual gifts trench on God's prerogative to provide future well being.'[417] In the case of Pells v. Browne, Dodridge J.

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[409] Ibid.
[410] Perpetuities and Accumulation Act 1964.
[411] Perpetuities and Accumulation Act 2009.
[412] Wait and see rule was first introduced in Perpetuities and Accumulation Act 1964.
[413] Perpetuities and Accumulation Act 2009.
[414] Sarah Wilson, *Todd& Wilson Textbook on Trust*, ed. 10th (Oxford University Press, 2011) 85.
[415] Perpetuities and Accumulation Act 2009.
[416] Simon Gardner, *An Introduction to the Law of Trusts*, ed. 3rd (Oxford University Press, 2011), 47-48.
[417] Gart Watt, *Trusts and Equity* ed. 4th (Oxford University Press, 2010), 115.

states, 'because God gives land to the children of men, if men were able to keep land in their families forever it would deny the Providence of God'.[418] This can be contrasted on Islamic position of *waqfs*. Islamic jurists who advocate perpetuity belief that once property is settled, its ownership is transferred to Allah and could never again be retrieved. The idea that perpetual settlements deny the 'Providence of God' is never considered in Islamic Law of *waqfs*. Rather perpetual *waqfs* are seen to please Allah as they are means maintaining good deeds after death and a perpetual source of reward for their creators.

3.3 Ownership in Common Law

To understand the concept of ownership it is important to understand the concept of property. Kohler, define property as "Property is no more than a normative set of relationships which might be attached to whatever subject matter society deems it necessary or beneficial to make the subject of property. Those who seek offer a definition that goes beyond this are simply attempting to make property support a philosophical, moral or political burden that it cannot bear."[419] Penner says that "Property is a normative relation between an individual, or co-owners and others which has as its focus and justification the exclusive determination of the uses of which a thing may be put."[420]
In English law, it is generally understood that property can moon one of three things: 'a tangible things owned by a person? "'Rights in a tangible thing', and rights in nothing tangible at all' such as debts or intellectual property". [421]

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[418] Ibid., 144
[419] Paul Kohler, 'The Death of Ownership and the Demise of Property,' *Current Legal Problems*, 53 (2003), 237-24.
[420] Penner, *The Bundle of Right's, Picture of Property*, 801.
[421] Paul Metthews, 'The Compatibility of the Trust with the Civil Law Notion of Property' in Lionel Smith (ed), *The Worlds of The Trust* (Cambridge University Press, 2013), 314.

Kevin Gray states, 'the quest for the essential nature of 'property' has beguiled thinkers for many centuries. The essence of property is indeed elusive. That is why in a sense we have tried to catch the concept by surprise by asking not 'what is property' but rather "what is not property?[422]

According to him "Property is the power relation constituted by the state's end horsemen of private claims to regulate the access of strangers to the benefit of particular resources. All legal systems recognise some form of ownership. There are common features of ownership across all legal systems.

According to Honore', "Ownership Comprise the right to use, the right to manage, the right to the income of the thing, the right to the capital, the right to security, the rights of incidents of transmissibility and absence of term, the prohibition of harmful use, liability to execution and the incident of residuary: This makes eleven leading incidents."[423]

With respect to the concept of ownership, Waldorn (Ownership) expresses the abstract idea of an object being correlated with the same of some individuals decision as final when there is any dispute about how the object being correlated with the same of some individuals decision as final when there is any dispute about how the object should be used the owner of an object is a person who has been put in that privileged position.[424] According to Chrisman ownership as a relation that can be characterized as whatever

[422] Gray, *Property in Thin Air*,292.
[423] Ibid.
[424] Waldron, *The Right to Private Property* (Clarendon Press, 1988), 47.

combination of rights society recognizes that gives individuals primary control over, and / or claims to the income from, tangible things.[425]

3.3.1 Trust Ownership

According to Hart "A trust is an obligation imposed either expressly or by implication of law whereby the obligor is bound to deal with property over which he has control for the benefit of certain persons of whom he may himself be one, and any one of whom may enforce the obligation".[426]

A trust is an obligation imposed either expressly or by implication of law whereby the obligor is bound to deal with property over which he has control for the benefit of certain persons of whom he may himself be one and any one of whom may enforce the obligation.

The traditional trust created by a settler transferring money or assets gratuitous usually to trustees is not readily conceptualised with in the law of bargains and nor is the trustee/beneficiary relationship one of mutual benefit conferral where the trustee are unpaid. Furthermore, the settler who declares himself or herself a trustee makes no contract with any one. A trust exists where a person (trustee) holds or has vested in the person or is deemed to hold or have vested in the person property (of which the person is not the owner in the person's own right:

a) For the benefit of any person (known as beneficiary) whether or not yet ascertained or in existence.

b) For any purpose which is not for the benefit only of the trustee; or

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[425] John Christman, *The Myth of Property, toward an Egalitarian Theory of Ownership* (Oxford University Press 1994), 16.

[426] Walter G. Hart, 'What ia a Trust?' *Law Quarterly Review*, 15 (1899), 301.

c) For such benefit as it is mentioned in sub-paragraph (a) and also for any such purpose as is mentioned in sub-paragraph. (b)[427]

Not all academic agree that the trustee is a legal owner of the trustee is a legal owner of the trust property. According to Hart 'The trustee is not necessarily the legal owner of the trust property.

Gretton holds that trusts do not have to be understood within the framework of English Law. The trust, 'he adds, 'presupposes neither equity nor divided ownership. He describes trusts as patrimony, a civil law concept, plus office.[428]

Lepaulle characterise the trust as an appropriation of property, it is a notion different from the idea of private ownership, but which is, so to speak, on the same level. According to him common law countries have 'two different regimes for property: Individual ownership and trusts.[429]

Parkinson concludes that viewing the trust as a split of legal and equitable ownership is 'incorrect', the core idea of the private express trust lies in the notion of equitable obligation in relation to property.[430]

Edelman believes that terms such as 'equitable ownership' and "equitable proprietary right' have made the concept of trust more difficult to grasp and must be "avoided altogether". He says that the nature of the beneficiary's equitable right is different from a property right in Common Law. His views are similar to McFarlane.[431]

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[427] Trusts (Jersey) Law 1984.
[428] George Gretton, 'Trusts without Equity,' *International and Comparative Law Quarterly*, 49 (2000). 599- 601.
[429] Ibid.
[430] Patrick Parkinson, 'Reconceptualising the Express Trust,' *Cambridge Law Journal*, 61. (2002). 659.
[431] McFlarane and Stevens, The Nature of Equitable Property, 3.

The common Law property right is in relation to the res, i.e. the land or the chattels themselves. The equitable "Property" interest is one step removed. It is an interest which relates to the trustee's rights including the trustee's rights to those tangible things as well as to intangible things.

Traditionally, trusts are seen as a separation of ownership into legal and equitable ownership, the trustee holding legal ownership and the beneficiary holding equitable ownership. The conventional views are in compatible; in a rust legal ownership rests in the trustee while in waqf Allah is the deemed legal owner, a metaphysical concept that necessitates faith to accept-put differently in a waqf legal ownership disappears from the realism of the material world altogether, it no longer exists before our eyes. Conversely, not accepting the idea of legal ownership in English law might make it difficult to accommodate other English theories which require the concept of legal ownership.

It is concluded as although there are variations in the interpretation of waqf in different schools of thought, however, most have accepted that a *waqf* is a philanthropic tool. This chapter had showcased the *Sharī'ah* perspective of *waqf* and, in addition, discussed the detailed background of how the *waqf* institution operates. It has also explored the various conditions and elements in the creation of waqf, discussing the aspect of the assets and the creator.

It also elaborated the English law of trust briefly. By contrasting the two concepts of philanthrophy it became apparent that though there are some similarities in both concepts regarding inalienability and usufruct. But there is some difference regarding the concept of perpetuity and ownership. The relation between these concepts is very complex but it can be understandable in the context that how British Judges deal with

family waqf during their colonial rule in sub-continent. The next chapter provides a factual analysis of waqf related cases decided by the Privy Council especially related to family waqf. It shows that the Privy Council decisions of invalidating family awqāf in 1894 were based on the English rule against perpetuities. However, this was never explicitly stated and a majority of English judges pretended to have interpreted Islamic law in reaching their decisions on this point. This leads to the question of why it was that the judiciary and not the legislature was so keen to apply the policy based rule against perpetuities.

Chapter No. 3

Analysis of the Case Law on Family *Waqf* in Sub-Continent

Chapter No. 3:

Analysis of the Case Law on Family *Waqf* in Sub-Continent[432]

The courts of the East India Company were working since seventeenth century, whereas the British assumed control of Bengal in the last quarter of the eighteenth century. The hierarchical judicial system in various provinces of India was established only in 1862.[433] This judicial system includes High Court also known as the Court of Judicature as the highest court of appeal at the provincial level while lower courts were established at District and sub-District levels. Since the Federal Court was not established at the central level until during the last days of British rule in India, an appeal from a decision of the High Court could be made directly to the Privy Council in London.[434] In pre-colonial India, Hindus and Muslims followed their personal laws in family affairs. The British political scheme replaced this system and applied the personal laws of various religious communities along with new laws based on English legal principles.[435]

This chapter aimed at exploring the historical origin and background of *awqāf* in India. Attempts were made to identify and examine the historical developmental stages of *waqf* in the sub-continent, and diligent endeavours were made to trace back the periods of its considerable expansion and augmentation. This chapter also explores the legal

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[432] The cases on family waqf in sub-continent are taken from Muhammad Zubair Abbasi, *Sharī'a under the English legal system in British India: Awqāf (endowments) in the making of Anglo-Muhammadan law*, (Phd Dissertation: Oxford University, 2013).
[433] Henry Herbert Dodwell, *The Cambridge History of India*, Vol 6 (The Indian Empire 1858-1918) (CUP 1932), 379-81.
[434] Mahabir Prashad Jain, *Outline of Indian Legal History* (2nd edn N. M. Tripathi, 1966), 4-5.
[435] Motilal Chimanlal Setalvad, *The Common Law in India* (Stevens & Sons Limited, 1960), 16.

contribution of the Privy Council in the evolution of law of *waqf*, which cut across various branches of law such as Property law, Family law and Administrative law. The close resemblance of the *waqf* with the English trust makes it a perfect subject in order to explore the interaction between Islamic law and English law during the nineteenth and early twentieth century. Cases on *waqf* law came to the Privy Council from all over the Muslim populated territories occupied by the British Empire. However, the number of cases from India was the highest. After 1915 a separate division in the Privy Council was established to hear appeals from India.[436] In the period between 1840 and 1968, the Privy Council decided sixty-nine cases in which the dispute involved a *waqf*. Out of these cases, fifty-eight originated from India.

1. Waqf Management in Pre-Colonial India

Waqf in India is believed to be as an old phenomenon as Islam itself, to the country. Though, there is no such documentary evidence available that may suggest exactly to the earliest *waqf* deed in the country, some scholars have attempted to pin point the one with the help of historical chronology of Islamic monuments, identified as the products of earliest Waqf deeds.[437] The first known *waqf* in Indian sub-continent was rendered by the Gaurid Sulatan in 1185-95 and were in the form of two properties dedicated in the favour of the Jamia Masjid of Multan.[438] Nonetheless, some scholars have asserted that one of the highly probable earliest *waqf* establishments in the sub-continent is the famous monumental tomb, Quṭub Mīnar, built by Sultan Quṭub-al-Dīn Aibak in 1193.[439]

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[436] MP Jain, *Outline of Indian Legal History*, 459.
[437] Murat Cizakca, "Cash Waqfs of Bursa: 1555- 1823", *Journal of the Economic and Social History of the Orient*, 38, no 3 (1995), 319.
[438] Ahmad Hassanuddin and Khan Ahmadullah, *Strategies to develop Waqf Administration in India*, (Jeddah, IRTI. 1998), 31-36.
[439] Ibid.

Waqf in India enormously developed with the advent and dominance of Muslim rulers in the country and got great momentum in Mughal era starting from 1526.[440] Mughal Emperors created huge endowments in favour of Mosques, *madrasās*, Sufi shrines, graveyards, bridges and shelters for homeless. Historical accounts reveal that the Mughal emperors were very generous, and out of their generosity towards the masses, they used to provide them with the financial patronages in different modes of endowments and philanthropy. In this regard, Muslims and non-Muslims were treated equally by them.[441]

Instead of using *waqf*, Mughals liked to use the concept of "*Madad i-M'aāsh*" (support for the sustenance), a less religious but a similar concept as that of *waqf*. Mughals used this concept for distributing a variety of grants for revenue free land (*in'ām*) "or of some portion of the government revenue in a particular District as *Madad i-M'aāsh (support for the sustenance).*" However, descendants and holders sometimes claimed that these grants were actually *awqāf*. During colonial period this usage of synonym created a troubled position of British officials. British revenue officers puzzled by the terminology as many of them understood *awqāf* as only related with religious and pious purposes.

The mechanism of *waqf* management in India during the medieval period was generally structured and adopted on individual basis and had no specific documented or official model. In those periods, most often, the deed of *waqf* were performed by the verbal pronouncement of the founder to the selected gathering of the noble individuals.[442]

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[440] Ibid.
[441] Ansari Azhar Mohammad,: *Social Life of the Mughal Emperors: 1526-1707* (Delhi: Shanti Prakashan, 1974), 181-85.
[442] Ahmad Hassanuddin and Khan Ahmadullah, *Strategies to develop Waqf Administration in India*, 34.

However, it is believed that some pertinent leading clues of their management systems have been traced in the forms of related historical *wāqfnāmās* written by the *wāqifs* to express their will of charity in the name of Allah through potential *mutawalī*. Some of the similar *waqf* documents reveal that in that era, while on the higher level, a special kind of *waqf* by a Muslim Sultan or by an individual having similar status would be managed and administrated by the specially appointed *qāḍī*. Also, it used to depend totally on the *mutawalī*'s discretion that how to put the property into most productive way and how to distribute the underlying incurring revenues among the beneficiaries.[443].

From the sixteenth century onwards, when Mughals established their Empire in the sub-continent, the proportion and magnitude of creation of *waqf* expanded enormously. Later on, in the Mughal era, the *'Ulamā* or religious scholars rose up to handle the reigns of all *Sharī'ah* related affairs. To this effect, the department of *waqf* too, fell under their supervision, as they were the only authority to administer and manage them in the *Sharī'ah* prescribed way. Highlighting this point, Pearson vividly explains: "The *'Ulamā* were directly involved in the administration as advisers in the court and as jurists. The *waqf* management in that time was normally subjected to a hierarchy of grass root to the orderly ascending higher level of administrative entities.

At the very ground level, *Imām* of a village was entrusted with the administration of the *waqf* from the related locality, and was accountable to the regional *qāḍī* in a disputed matter. The regional *qāḍī*, who were the only resort in all *Sharī'ah*-related affairs and matters of the people, were required to report the functions and administration of the regional waqf to the provincial *Sadar*. These *Sadar*'s were finally entrusted to supervise and advise the functionality of the provincial *awqāf* and were directed to report the *Sadar*

[443] Ibid.

al Sudūr, the highest religious authority of the state.[444] Thus, in this method of administration, *waqf* properties were in the hands of the high standard *mutawalīs*, who, along with being pious and honest, were well versed with the Islamic Law of *awqāf* and were deemed as the most eligible in terms of operating the functionalities of this religiously-motivated pious philanthropic institution.[445]

It is also evident with the practical application of Islamic Law of *waqf* that, *awqāf* were put into most efficient ways of production and their corpuses were highly protected from all sorts of decay, dilapidation, encroachments, misuse and abusive exploitations. As a rippling effect, this, generally, would provide the confidence and moral encouragements for the future founders of *waqf* and potential endowers.

2. Waqf Management Practices in Colonial India

The majority of *awqāf* in India were created in the pre-colonial India. Successive Muslim Sultans and Mughal emperors had shown enormous support to this Islamic way of philanthropic foundation and may be rightly considered as the major source of overall *waqf* augmentation in the country.[446] In the aftermath of Mughal emperor's fragmentation and their consequent collapse in the early eighteen century, the reigns of the country fell into the hands of the outsiders, the British rulers. In practical terms, the British political ascendancy to the power in the country, after all, meant a new era of governance and

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[444] Murat Cizakca, "Cash Waqfs of Bursa: 1555- 1823", *Journal of the Economic and Social History of the Orient*, 313-354.

[445] Lane Jan-Erick and Hamadi Redissi, *Religion and politics: Islam andMuslim civilization*, (Birlington, USA: Ashghat Publishing Company, 2009),10.

[446] Syed Khalid Rasid, *Waqf Administration in India from 1947 to 1997: AnAppraisal and Critique*, (New Delhi: Radiance, 1997), 34.

more than that heralded the implementation of strange sets of regulations for both the religious and secular masses of the country.[447]

Though, at the initial stage, there seemed no political will on the part of the newly set up government to tamper with the religious laws of either Hindus or Muslims in explicit terms, however, in a gradual but consistent manner their involvement in this personal domain of the indigenous citizens became inevitable. The constitutional management of *awqāf* can be found to the time 1765. This time saw the boom of colonial power in sub-continent. In early years British made the strategy that they would not interfere in the personal rules and regulations of people living in India. They continued this policy until the year of 1810. But in 1810, they enacted the "Regulation III" of the Bengal Code in order to stop the misuse of produces of endowments against the intentions of the benefactor. So according to this Act together with Regulation VI of the Madras Code the authority of supervising of endowments was given to the Boards of Revenue. So the things regarding endowments become more complicated after the enactment of this Act. The fear of frauds and mischeves were developed. People were dissatisfied from these kinds of regulations of government and they demanded to amend the Act of 1863.In 1876 the British government accepted this fact that the Act of 1863 hadcreated a mess regarding the administration of *awqāf.*

Charitable Endowments Act was enacted in 1890 for the management of public endowments. The Act provided for the management of trusts can be given to the trustee.[448]

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[447]Jones Justin, *Shi'a Islam in Colonial India: Religion, Community and Sectarianism* (England: Cambridge University Press, 2011), 25.

Though, later in 1895 the British management separated itself from every obligation of supervising the indeginous endowments. Because they came to realise that the regulations about the personal laws of Muslims specifically in case of *awqāf* are very clear. The British power considered it suitable to give an identical and neutral protection of law without creating new provisions. As a result The Religious Endowments Act 1863 was enacted. So the properties concerning to the places of worship and other religious endowments were transferred to trustees or supervisors and the powers were vested to the native committees of the board of revenue. The Act of 1863 was only applied to public endowments. But this did not work. Because the English Government appointed English judges in courts where personal conflicts were resolved and abolished the positions of *qāḍīs*.This created so much mess "that it is seldom that we come across a decision on a disputed question of Mohammedan law which is consistent with the instincts of Mohammedan law".[449] In the words of Dr Khalid Rashid "the malady was too deep rooted to be cured by such superficial treatment, a deeper cut was required but the Government was hesitant to take such a *risky* operation".

Then Code of Civil Procedure was enacted in 1906. Regulations were made to stop the mismanagement of *awqāf*. But it did not work again. Agitation against the laws of the government started from every part of the territory. Furthermore, in the late nineteenth century, due to the high emphasis of British courts on land privitisation, they found it necessary to implement the Islamic law of inheritance among Muslims in the

[448]Syed Khalid Rashid, Waqf Administration in India, 1978, 11. Proceeding of the International Conference on Masjid, Zakat and Waqf (IMAF 2014) (e-ISBN 978-967-13087-1-4). 1-2 December 2014. Kuala Lumpur, Malaysia,7.

[449]Moulvi Mohammed Yusuf, *Review of the Mohammedan Law* (Calcutta, 1906), 113.

country in letter and spirit, and any obstacle hindering this process was to be finally removed.[450]

From the perspectives of this policy, the concept of family waqf appeared to them as one of the major impediments in the way of private ownership of land, and henceforth was discarded by the Privy Council in 1894.[451] Importantly, according to some scholars, since the idea of family *waqf* has been approved and been in practice since the prophetic era,[452] the official invalidation of this practice hugely enraged the Muslims at that time, and they expressed their related concerns and grievances in the strongest manner. Finally, the growing agitation and reactionary sentiments among the Muslim community impelled the court to reconsider its decision and, at last, this culminated into the introduction of the Musalman Waqf Validating Act of 1913.

The management and administration of *waqf* with reference to the Act of 1913, was left fully vested with the nominated *mutawalīs*, and in lieu of the act there was scope for gathering official data pertaining to the functionality and efficiency of the *waqf* system. However, this caused difficulty in extracting the related information for a potential *wāqif* or for someone who might have been sceptical of malfunctioning with regard to a specific *waqf*. In 1920, with a view to bridge this vacuum the Charitable and Religious Trust Act was introduced to supersede the previous Act of 1913. Although this act did not provide for any administrative machinery to exercise supervisions over the

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[450] Iqbal Ali Khan, Administration of Waqf's Properties in India: Rehtoric or Realities, Proceeding of the International Conference on Masjid, Zakat and Waqf (IMAF 2014) (e-ISBN 978-967-13087-1-4). 1-2 December 2014, Kuala Lumpur, Malaysia, 8.

[451] Diwan Paras, *Law of Endowments, Waqfs and Trusts* (Allahabad: Wadhwa & CO: 1992).

[452] Fyzee, *Outlines of Muhammadan Law in India*, (Bombay: Oxford University Press, 1964), 34.

waqfs, any interested person could apply to the court of district judge to seek information, from the trustee regarding value, conditions, management, nature and object of *waqf*.[453] Finally at a later stage, as deemed necessary, in 1923, the Musalaman Waqf Act was passed necessitating the trustee of every *waqf* to furnish all sorts of pertinent information by default to the District judge. Importantly, in the acts of both the 1920 and 1923 there was nothing mentioned in respect to family *waqf* as this was regarded by the court as private deeds made by individuals to the benefits of their own descendents.[454]

3. Judgements on Awqāf in Anglo-Indian Courts

Hindu and Muslims resolved their personal affairs through religious personal law. British replaced that system with uniform Legal Structure base mainly on custom and usages of the community and introduced the concept of deciding the matter in the light of equity, justice and good-conscience, which started in the amalgamation of religious personal laws and English legal practices. Due to the huge amount of appeals coming from all India, separate division in Privy Council was created. Privy Council decided total of 58 cases involving private *waqf* originating from India. In addition, twelve cases include Hindu endowment.

Decisions of the British Privy Council paved the way for legal development in that subject of law.[455] Though the ratio of cases went to Privy Council for decision was very low in average, comparing the number of cases filed in India's Adalat *Diwanī*. Out

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[453] Ahmad Hassanuddin and Khan Ahmadullah, *Strategies to develop Waqf Administration in India*, 43.
[454] Latifi Denial, *Law of Family Waqf: Need for Reconsideration. IslamicLaw in Modern India.* (New Delhi, 1978), 229-30.
[455] Kozlowski .C. Gregory, *Muslims Endowments and Society in British India*, (New York: Cambridge University Press, 1985).

of nine hundred and four cases on different subject initiated in India, only one hundred and one cases were assailed in Privy Council means every ninth case goes to Privy Council.[456] A total of 58 cases involving Private *Waqf* was decided by Privy council. Twenty two cases involved substantive dedication to mosques, Imām Bargha, public roads, graveyards, shrines, tombs and khānqah.[457] The creation of private *waqf* from 1850 to 1900 in India had increased mainly for two reasons;

1. Strict operation of Islamic inheritance law on moveable and immoveable property in Bengal.
2. Introduction of private property law and their enforcement.[458]

Creation of private *waqf* was inclined subsequently because of development of *waqf* law which denied recognising private *waqf* until 1913,[459] when Waqf Validating Act was introduced. The Act 1913 was prospective in nature till 1930 when it was given retrospective effect. In many cases the court first has to decide the nature of *waqf* that, whether it is public or private and in many cases where the substantive portion was dedicated to mosque, the salary of *mutawalī* consume major portion of income. No separate rules were present for these two types of *awqāf*. On the basis of prevalent laws and the decisions of the court, *waqf* can be divided into following categories.

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[456] Barada d'As Bose, A Digest of Indian Law Cases containing High Court Reports, 1862-1909: and Privy Council reports of Appeals from India, 1836-1909 (3 of 6 vols, Superintendent Government Printing, India 1912), 7887-7920.

[457]Kozlowski works on 40 waqf deeds and 25 law suits, including questions of inheritance on public and family waqf decided by Privy Council. Cases are limited because of pecuniary jurisdiction of Privy Council and financial restraints of parties contesting the cases. In quantitative analysis of cases, judicial record is the best source of study in the area of waqf and inheritance. Kozlowski .C. Gregory, *Muslims Endowments and Society in British India*, 33.

[458] David Stephan Powers, The Islamic Inheritance System: A Socio-Historical Approach (1993) 8 *Arab Law Quarterly*, 13.

[459] Kozlowski .C. Gregory, *Muslims Endowments and Society in British India*, 51.

Pure private in whom *wāqif* family is primary beneficiary of the *waqf* generations after generations and ultimately the whole benefit goes to public purpose. Substantially Private Partly Public in which *waqf* was created for religious purpose but major beneficiary is *wāqif*'s family or nominated person. Pure public *waqf* in which *waqīf* does not hold any interest in the subject of waqf. Substantially public partly private in which substantial portion of income was given for public purpose. Customary *waqf* which was a type of assistance for subsistence given by Muslim rulers in the form of landed property for maintenance of Madāris, Ulamā or particular family which were also known as "grants".[460] Sham *waqf* was also created with a purpose of avoiding inheritance and the debts of money lenders.

When British took over Bengal in 1772, Waqf was one of the 39 grants in financial division of Bangal. 25% of the total land holdings of state were transferred in the form of grants as waqf. Waqf Act 1923, Waqf Acts in Bangal, United Provinces Waqf Act and Bombay Waqf Act, did not recognise grant as valid Waqf. Grants were recognised as Waqf in Waqf Act in 1954.

Bengal has biggest number of *waqfs* than any other region of India. There are four reasons for larger number of *waqfs* in Bengal.

1. Larger Muslim population.
2. First area that felt in Britain colony.

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[460] The Endowment of Nazir Dost Mahomed Khan for a mosque and madrassa; the Endowment of Meer Ehya for a mosque, madrassa, students and beggars; the Bohra Endowment; the Sasseram Endowment for the maintenance of a khānqāh in the Report of the Muhammadan Educational Endowments Committee (n 19) xviii, xx-xxii. in Muhammad Zubair Abbasi, *Sharī'a under the English legal system in British India: Awqāf (endowments) in the making of Anglo-Muhammadan law*. (Phd Dissertation: Oxford University, 2013).

3. Majority of people pledged their properties in lieu of debts taken from Sikh and Hindus money lenders.
4. Strict implementation of inheritance law.[461]

After invasion East India Company confiscated all public *awqāf*[462] created before 1772 in Bengal, and unrest was created among Muslims after losing religious and educational Institutions which was maintained through grants. Political will, played a role parallel to the development of law in creation of different *awqāf*.

While in case of Punjab family *awqāf* were established in order to circumvent Islamic inheritance. Reasons for absence of family endowment in Punjab were:

1. Prevalence of customary law in inheritance.
2. Despite Muslims majority Sikhs were mostly the rulers of Punjab. In pre-colonial India and Muslim *waqf*'s property was also subject to disputes like issue of Shaheed Ganj Mosque in Lahore.[463]
3. Indebtedness of agriculturist.
4. Introduction of following property laws.
    a. Punjab Alienation of land act 1900.
    b. Restitution of Mortgaged land 1938.
    c. Registration of Money Lender Act 1938.
    d. Punjab Alienation of Land (Second Amendment Act) 1938.[464]

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[461] Kozlowski .C. Gregory, *Muslims Endowments and Society in British India*, (New York: Cambridge University Press, 1985).

[462]Two Awqaf one for Khanqah established in 1717 and second for Mosque established in 1772 was maintained from official grant. Nawab. Bankey Bihari Misra, *The Central Administration of the East India Company, 1773-1834* (Manchester University Press, 1959) 108-10.

[463] Kozlowski .C. Gregory, *Muslims Endowments and Society in British India*, 42.

[464] Matthew J Nelson, *In the Shadow of Shari'ah: Islam, Islamic Law and Democracy in Pakistan* (Hurst & Company 2011), 108, 314.

All these laws protected land from permanent confiscation and attachment of land to money lenders and confiscation of period of mortgage up to 20 years.[465]

3.1 Judgements on Private *Awqāf*

Decision of Privy Council invalidating Private *Awqāf* creates unrest among Muslims in early twentieth century. They feel it and attack on Muslim Law which resulted in enactment of statute in 1913. But it seems that invalidation of Private *Waqf* does not have any impact on creation of private *waqf* during intervening period because six private *waqf*s have been created during the period of 1894 to 1913. Later on Muslmman Waqf Validating Act was enacted in 1913 which has no retrospectivety till 1930 legislation.[466]

In 1909 a family *waqf* was created in NWFP[467] in a very ingenious manner by dedicating substantive part of that *waqf* for charitable purposes and to avoid land fall in hands of two uncles of settlers by inheritance and ensures the benefit of two wives, daughter, a niece and one cousin's sons. The conflicting goal was achieved by first leasing the property on nominal rates in the name of beneficiaries and then the *waqf* is created.[468] In *Kunwar Muhammad Abdul Jalil Khan v. Khan Bahadur Muhammad Obaid Ullah Khan* case family *waqf* was created in 1882 in favour of *Imām* Bargah and Mosque with huge income given to *mutawalī* "Wife of Wāqif", which was modified in 1897 and 1907 subsequently to the extent that Mutawalli forgo her salary and the name of

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[465]The Public Waqf in Punjab is double than Private Waqfs. One is for the Mosque, two for shrine, one for Graveyard, One for right of way, and one for graveyard, one for right of way, and one for Khanqha. Out of 59 total Awqaf in colonial India only 3 are family Waqf from Punjab which include urban Area. Kozlowski .C. Gregory, *Muslims Endowments and Society in British India*, 44. Muhammad Zubair Abbasi. *Sharī'a under the English legal system in British India: Awqāf (endowments) in the making of Anglo-Muhammadan law*, (Phd Dissertation: Oxford University, 2013).

[466] Fyzee, A.A. Asaf, *Outlines of Muhammadan Law in India*, 228.

[467] This abbreviation stands for North-West Frontier Province which located in the northwestern region of sub continent. After independence this area becomes the part of Pakistan. It was officially known as North-West Frontier Province (NWFP) until 2010, Now it is named as Khyber Pakhtunkhwa.

[468] Kunwar Muhammad Abdul Jalil Khan v Khan Bahadur Muhammad Obaid Ullah Khan (Allahabad) [1929] UKPC 61

successor *mutawalī* was changed, but still she used the income to perform Hajj and for other purposes.[469]

In *Balla Mal v. Ata Ullah Khan* case *waqf* was created to protect property in order to circumvent inheritance of a son who was of bad character. But, it was also substantially made for public purpose.[470] In 1908 the case of *Hafiz Mohammed Fateh v Sir Swarup Chand Hukum Chand* was presented before Privy Council, in which *waqf* was created as a family tradition for welfare of relatives of wāqif but it proves to give property to certain people after the death of wāqif.[471]

In *Mirza Fida Rasul v Mirza Yaqub Beg*'s case, *waqf* was created in 1911 by issueless man to protect his property from inheritance from his two younger brothers in favour of his nephew with the major amount of it goes to Mosque. It is clear from study of these cases that during period of invalidation, Muslims were well aware of legal development in the field of *waqf*.[472]

In *Rai Bahadur Sahu Har Prasad v Shaikh Fazal Ahmad* case before privacy council to protect the property from succession, dying son, before three days of his death, sold his property to his mother by getting Rs. 10,000/- earnest money and instructed her to create *waqf* of the remaining amount of Rs. 190,000/- by appointing herself and deceased's three uncles as *mutawallī*.[473]

In *Syed Ali Zamin v Syed Akbar Ali Khan* Syed Akbar Ali Khan created *waqf* to protect property from going into inheritance to his younger brother after his death and

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[469] Abadi Begum v. Bibi Kaniz Zainab (Patna) [1926] UKPC 92, 54 IA 33.
[470] Balla Mal v Ata Ullah Khan (Lahore) [1927] UKPC 61.
[471] Hafiz Mohammed Fateh v Sir Swarup Chand Hukum Chand a firm (Bengal) [1947] UKPC 84, AIR1948 PC 76.
[472] Mirza Fida Rasul v Mirza Yaqub Beg (Oudh) [1925] UKPC 89, AIR 1925 PC 101.
[473] Rai Bahadur Sahu Har Prasad v Shaikh Fazal Ahmad (Allahabad) [1933] UKPC 5.

made his friend as Mutawalli for Rs. 5000/- consideration due to bad relationship with brothers.[474]

The above mentioned cases were a few simple examples of circumventing Islamic inheritance law through the use of a *waqf*.[475]

The family waqf was attacked before the Indian Courts for its conflict with Islamic inheritance law. As early as 1867, their Lordships at the Privy Council did not find any illegality in the family *waqf* on the ground that it was used to change the inheritance law: "The design to alter, and so in one sense to defeat, the disposition of property, is simply a design to conform to the law, whilst working out an unforbidden design. On moral grounds the transaction cannot be impeached. It seems to have proceeded simply from... a desire to maintain the dignity of the eldest branch of the family; neither can the policy of the law be invoked... the policy of the law is to be collected from its whole body, and not from a detached portion of it; so that if the law suffers a father by an act inter vivos to alter his succession, his exercise of that power cannot be deemed a fraud upon the law."[476]

Under Islamic law *qāḍī* is the supervisor of *awqāf* and *awqāf* properties cannot be leased out for more than three years. But the British courts in India allowed it for longer terms. It opens the gate for Muslims to prevent inheritances and ends limitations on

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[474] Syed Ali Zamin v Syed Akbar Ali Khan (Patna) [1937] UKPC 32, 64 IA 158.

[475] Family waqf provided only one technique to circumvent Islamic inheritance law. Other techniquesto achieve the same end included: fictitious gifts; transfer of property to a wife as dower-debt; ismfurzee (fictitious title); benami (property held in the name of a person other than the real owner). LCarroll, 'Life Interests and Inter-Generational Transfer of Property Avoiding the Law of Succession'(2001) 8 Islamic Law and Society 245; L Carroll, 'The Ḥanafī Law of Intestate Succession: A Simplified Approach' (1983) 17 Modern Asian Studies 629; L Carroll, 'The Ithna Ashari Law ofIntestate Succession: An Introduction to Shia Law Applicable in South Asia' *Modern Asian Studies*, 19 (1985), 85; L Carroll, 'Daughter's Right of Inheritance in India: A Perspective on the Problem of Dowry' *Modern Asian Studies*, 25 (1991), 791.

[476] Nawab Umjad Ally Khan v Mohumdee Begum (Oudh) [1867] UKPC 41, 11 MIA 517.

testamentary powers imposed by Islamic Law. There is no supervisory authority to control revocation of family *waqf*. Two cases are the best interpretation of this argument.

In *Beli Ram & Brothers v Chaudri Mohammad Afzal* case Chaudhary Muhammad Afzal revoked the family waqf because he came to the conclusion that his family friends created misunderstanding between him and his children and thus on the settlement he revoked family waqf.[477]

In another case a person created a waqf to prevent payment of dower-debt amounting to Rs. 2,51,000/- into his two wives from his property. His wives died in few years. He revoked the waqf by writing it in awqaf deed as just a paper transaction to protect his family property. According to Islamic law, waqf is irrevocable and can be created orally. It creates future legal complications.

In Hafiz Muhammad Fateh case first *waqf* was created by two deeds in 1876, in 1880 by father in favour of a son and a daughter. In 1908 son executed third *waqf* deed but after son's death, daughter succeeded in taking a decree of court, against these waqfs and property was divided among legal heirs in 1912. In 1915 one of the sons' legal heirs and four members of community challenged the cancellation of waqf but they failed. In 1921 nephew of *wāqif* who created *waqf* in 1908 upon attaining majority seeks declaration that *waqf* created by Abdul Fateh was valid. Until that time the subject of *waqf* was sold to bonafide purchaser. Trial court decided in nephew's favour by declaring the decree of 1912 as fraud. Case for possession between *mutawallī* and purchaser was fought till Privy Council adjudication, who declares it a case of adverse possession. But the question arises that whether subsequent conduct of *wāqif* invalidates the waqf which

[477] Beli Ram & Brothers v Chaudri Mohammad Afzal (Lahore) [1948] UKPC 35.

is decided in negative by Privacy Council. Though it hits on the rights of bonefide purchasers.[478]

As Islamic law did not require the waqf to be in writing, an irrevocable waqf could be created orally. Moreover, once created the waqf was to last forever. In *Mahabir Prasad v Syed Mustafa Husain* case, sister rescued her brothers when the property was attached for payments of debts. On the ground that her share in inheritance was not given to her, Privy Council dismissed the claim with cost held the whole property was a valid waqf.[479]

[478] Zafrul Hasan v Farid-Ud-Din (Allahabad) [1944] UKPC 19, AIR 1946 PC 177.
[479] Mahabir Prasad v Syed Mustafa Husain (Lucknow) [1937] UKPC 45.

3.2 Legal Problems under English Legal System

The amalgamation of Islamic and English Law faces four major problems.

1. *Waqf* property was permanently excluded from circulation. It cannot be alienated by way of sale, inheritance, confiscation, gift, attachment.
2. *Waqf* cannot be exclusively divided into public and private type and it was continuously abused for defrauding credits.[480]
3. Administration of religious *awqāf* like shrines and tombs face problems both Muslims as well as Hindu religion because huge properties were attached with them and Britishers did not let them go unattended.
4. Islamic *waqf* were not suited in modern situations as it developed in 9th and 11th century. Judges faced the problem in practicing Muslim personnel law in courts in *awqāf* matters. Therefore Britain feels to nationalize *waqf* with legal system of India for better governance of resources.[481]

Islamic law does not allow family *waqf* to be used as a tool to defraud creditors.

Islamic law does not allow insolvent to create waqf because once the *waqf* is created, property cannot be redeemed. Section 3 of waqf validating act allowed family *waqf* within an object to clean debt of *wāqif*. From the profits of subjects of *waqf* founder of this *waqf* loses the right to alienate the property in any way but save it from attachment or confiscation.

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[480] Abdul Ganne Kasam v Hussen Miya [1873] 10 BHC 7; Fatima Bibi v The Adv. Gen. [1882] ILR 6 Bom 42.

[481] JA Schoenblum, 'The Role of Legal Doctrine in the Decline of the Islamic Waqf: A Comparison with the Trust, *Vanderbilt Journal of Transnational Law* 32 (1999), 1191.

In *Zafrul Hasan v Farid-Ud-Din*, Privy Council held that it will bind the *wāqif* or his heir to pay the debt even if it was intended by them to defraud the money lender.[482]

At first, these circumstances lead the court to consider private *waqf* as a form of gift to circumvent inheritance law and then they also were hesitant to consider it at par with public *waqf* to the extent where *wāqif* claim the property to be in the name of Allah. Court came across many cases where *wāqif* was claiming to protect property from attachment and court was not hesitant to decline the claim.

It was decided by Privy Council in 1894 while deciding Abdul Fata case that the title of adverse possession can be established against *waqf* property. These circumstances in courts resulted into a judicial nationalization of *waqf* law and a most controversial decision in 1894 which impacted far reaching consequences on legal and political face of British India. Effect of judgments declared in Ahsanullah case in 1889 and Abdul Fateh case in 1894 and deliberation of half a decade help in reaching the conclusion.

First case deciding family waqf as valid was reported back in 1840[483] but later on family *waqf* was decelerated void in 1894. The intervening period originated the insight of Islamic, English Law and new system of Anglo-Muhammadan law was forwarded. Various factors resulted in Abul Fata case but most commonly are:

1. Misunderstanding of nature and operation of Islamic law by Privy Council whereas Justice Ameer Ali forwarded his arguments on the issue. It is due to the rigidity of precedent followed in English legal system.

[482] Zafrul Hasan v Farid-Ud-Din (Allahabad) [1944] UKPC 19, AIR 1946 PC 177.

[483] Jewun Doss Sahoo v Shah Kubeer-ood-Deen (Bengal) [1840] UKPC 20, 2 MIA 390.

2. It is by Ahsan Ullah case and the decision given by Bombay High Court in 1873 in Bikani Miya case through Privy Council was not bound to follow High court judgment.
3. Muslim elite abuses Islamic law for their benefits and English law court decided that it was against public policy and against the right of money lenders who were deprived from their recovery. In context, that the project is subject to family *waqf*. It also ends the alienation of property perpetually. *Waqf* law could not fulfil the requirement of time, especially with fair envision and creditors issue.

Initially the British court allowed family private *waqf*, but this was not the case in the long run. The courts changed their view and the ground that trusties and beneficiaries started to treat *waqf* property as their personal estate not subject to some trust. It is therefore, the court itself impugned the varises of family Awqaf and not the parties practicing the law. Privy Council declared family *waqf* invalid in Ahsanullah case because no substantive portion of that *waqf* was decided for public purpose.[484]

English Judges equipped with English legal traditions found difficulty in validating perpetual nature of *waqf* where it was not solely benefiting the society in its entirety. But British Government promised to the colonial people that they apply native personal law in matters of their religious affairs, and *waqf* is the religious affairs of Muslims.[485]

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[484] Ibid.

[485] Wilson, *A Digest of Anglo-Muhammadan Law* ed. 1st (W. Thacker & Co 1895), 283.

4. Family Awqāf and English Legal System

None of the parties in litigation ever challenged the validity of prevalent private Waqf due to its non-conformity with Islamic law. *Dewānī 'Adālat* of Bengal gives advantage to English Judges in order to understand Waqf disputes. Judges were assisted by Muslim law officers and other than that majority of lawyers were Muslims. Out of 25 cases about *waqf* in *Dewānī 'Adālat* Bengal, 7 related to private *waqf* between 1798-1958. Three different conclusions were drawn from these decisions.

1. First category was "legalistic" in which decision was announced by applying Islamic texts and *waqf* was declared valid.
2. Second category was "realistic" in which *waqf* was declared invalid because beneficiary and *mutawallī* considered subject of *waqf* as their personal property.
3. Third category was 'synthetic' where property was held personal with some portion of it was spent on certain charitable purpose.[486]

4.1. "Legalistic" Approach of Judges by Validating Family Waqf

Syed Ahmad Khan a District Judge and member of Imperial Legislative Council in 19th century proposed a bill favouring family Waqf in order to protect prestige of Muslim community and for protecting properties of Muslim elite, from division due to inheritance and implication of new property laws which allowed transfer of land to pay the debts of money lender. He presented a detailed method of creation and management

[486] Syed Rashid Khalid, *Wakf Administration in India: A Socio-Legal Study* (Vikas Publishing House 1978), 129-30. in Muhammad Zubair Abbasi, *Sharī'a under the English legal system in British India Awqāf (endowments) in the making of Anglo-Muhammadan law*, (Phd Dissertation: Oxford University, 2013).

of private *waqf* but his efforts faced objections due to its perpetual nature and it does not offer limitation of time for settlement.

English Judges came across the glaring contradictions between English concept of perpetuity and private *waqf*. They were unable to understand the nature of family *waqf*. In 1873, for the first time High Court of Bombay in Adalt Ganne Kasam[487] case decided the varies of family Waqf. When, family *waqf* was challenged by the grandson of *wāqif* due to family dispute. The case was heard by division bench and concluded that *waqf* of the house created by mother and her 3 sons in favour of her children by appointing herself a *mutawallī* and her elder son after that makes the house permanently not transferable. It creates perpetuity of worst description and at same time it makes the living of beneficiaries, impossible. It is also not worthy that no portion of income is for public charity. Judge decided that this type of *waqf* is against public policy and relied upon Ḥanafī school of thought, according to them *waqf* can only be created if the subject of *waqf* is solely dedicated to religious and charitable purposes. Though this judgment was not of authoritative type, yet Calcutta High Court followed it in following cases.

Justice Morris in *Mahomd Hamidulla Khan v Lotful Huq's* case while deciding the case where 1/4th share of *waqf* property was dedicated to daughter and it became incapable of attachment in execution, proceeding pending against her because of perpetuity of *waqf*, he assumed the conflict of views on *waqf* between Baillies's digest on Muhammadan law and Hamilton's translation.[488] Justice Morris interpreted Baillies view as the poor would not get benefit so long as the descendents of settlers survive, and

[487] Abdul Ganne Kasam v Hussen Miya [1873] 10 BHC 7.
[488] Mahomd Hamidulla Khan v Lotful Huq [1881] ILR 6 Cal 744, 8 CLR 164.

according to Imām Abu Ḥanīfah as quoted in Hidāyah *waqf* must be for some charitable purpose.[489]

Meanwhile Justice Wilson of Bombay High Court in *Fatima Bibee v Ariff Ismailjee Bham's* case declared family *waqf* as invalid because it lacks the charitable object of Waqf and only benefits the descendents of *wāqif*.[490] But, where ultimate beneficiary was poor it does not cause validity of *waqf* invalid. In this case cancellation of family *waqf* was sort, when waqf was created by 14 years old girl in favour of herself and her descendants but her child and husband did not survive.

Next year in Culcutta High Court Justice Tottenham reconciled the conflicting views taken in of Abdul Ghani case followed in Muhammad Hameedullah Khan's case with the judgment assailed before him, given by Muhammadan judge with good knowledge on the point that in Amir Alam case object of waqf was religious and involved charity for the poor.[491] Justice Ameer Ali in his law lectures at Tagore in 1884 declares "Doctrine of Perpetuity" in English legal system and its use in Abdul Ghani case against Islamic waqf law.

In Amrat Lal Kalida's case in 1887, Justice Farran Bombay High court relied on Fatima Bibi's case and decided in favour of family *waqf* on the issue framed by him that whether interpretation given by Baillie in the matter of grants is correct or not? But, he observed that family *waqf* can only be valid when its purpose was charitable and court cannot validate perpetuity in the benefit of settler's children. This resulted, in a view that, family *waqf* was valid only in cases where the main object and substantial purpose of the *waqf* is charity for the poor.

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[489] Hamilton, *The Hidāyah, or Guide: A Commentary on the Mussulman Laws* (T. Bensley, 1791) lxxiii.
[490] Fatima Bibee v Ariff Ismailjee Bham [1881] 9 CLR 66.
[491] Luchmiput Singh v Amir Alum [1883] ILR 9 Cal 176.

The view declared by High court in *Fatima Bibi and Amrat Lal* case was followed by Justice Parson in *Nizammud-din Ghulam v Abdul Ghafoor*[492] case and invalidated *waqf* on the ground that it did not expressly declare charitable or religious object and dissented with the Juristic interpretation of Imam Abu Yusuf on family *waqf* in which ultimate beneficiary was not nominated after extinction of settler's family.[493]

4.2 "Realistic" Approach of Judges by Invalidating Family Waqf

While deciding Ahsanullah case, Privy Council in 1898 declared waqf for "Self-aggrandizement of the family" of *wāqif*, as "Invalid", based on the statements of *waqfnama* which indicates that the waqf is in favour of mosque and Madrassa, but in the reality that waqf statement is a 'veil' on real object of waqf. In fact substantial portion of that waqf was enjoyed by the family of settler.[494]

Facts of the case were that a son of *waqf* claim himself as *mutwallī*, objected execution proceeding to his brothers by decree holder. Involving waqf property which was rejected by the executing Court. High Court of Calcutta also open the decision by declaring waqf as invalid and malafide.

Privy Council in this judgment laid down two tests for waqf to be valid.

1. Substantial dedication of property at some period of time to charitable purpose.
2. Waqf not for "aggrandizement of family.[495]

It is noteworthy that words "charitable purpose" and "period of time" used in first test was not expressed in the judgment that whether they are provided according to English law or Muhammadan Law.

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[492] [1888] ILR 13 Bom 264.
[493] Al-Shaykh Niẓām, Fatāwā al-'Ālamgīriyya, VOL. 2 (Nawal Kishawr 1865), 960.
[494] Ahsanullah Chowdhry v Amarchand Kundu (Bengal) [1889] UKPC 56, 17 IA 28.
[495] [1889] 17 IA 28, 39.

This happened in Bikani Mia case[496] where Justice Ameer Ali rejected this view and held that it is impossible to specify time in *waqf* cases and another point is that there is no concept of future *waqf* in Islamic law except in cases of will.

The second test was as classical example of introducing English Law to Muhammdan law because it includes permittivity concept of English legal system. Privy Council thus refrain itself to make any authoritative order in Ahsanullah case and it proves to be mere obita dictum.

But on the basis of principle set in Ahsanullah case by Privy Council, High Court of Allahabad declared family waqf to protect family estate for the generations of *wāqif* without any express share for charity as invalid in, *Murtazai Bibi v Jumna Bibi.*[497]

Abdul Fata case was also proved to be a setback in the judicial evolution of family waqf. Fact of the case were that, a family *waqf* was created by two brothers Muhammad Abdul Rehman and Abdul Qadir through registered waqfnama, on 21 December, 1868, for the purpose of perpetration of names of their ancestors in favour of their generations and if they become extinct at some point of time waqf income will be paid to beggers, orphans, widows and poor.

They made Muhammad Adul Rehman as first *mutawallī* and after him elder male issue of the family and in situation where no male descendent remains their relatives will hold *waqf*. *Mutawallī* has power to use the subject as Ijara or securities and beneficiary has no power to alienate or attach the interest and call for accounts. In 1894 by reason of their necessity, they revoked the *waqf* keeping in view Ḥanafī school of thought which

[496] Bikani Mia v Shuklal Parsad ILR 20 Cal 116, 170.
[497] [1890] 13 ILR (All) 261.

provides a way that whenever settler becomes poor he can apply to *qāḍī* for cancellation of *waqf*.[498]

On 11th September, 1881 in the light of two judgments of Calcultta High Court, invalidating family Waqf, settlor of waqf, divided waqf property between them on the ground that waqfnama does not include word *ṣadaqa* or charity and was against Islamic law.

Abdur Rehman sold parts of that property; his son Abdul Fata along with his minor brother filed a suit for removing *mutawallī* and cancelling the alienation of subject property.

Two questions arose before the court for decision.

(a) Whether creation of *waqf* by fraud is valid and

(b) Whether that subsequent cancellation has any impact

Court declared it a valid *waqf* and subsequent alienation of property as illegal. Attorney General Charles Paul, defended the validity of *waqf* under Muhammadan Law, based on religious books. He admitted waqf as "a device" and reiterated the English law was full of these devices." *Waqf* actually is a device, to fill a lacuna in inheritance to give rights to orphan children of predecessor son of their grandfather.[499]

Justice Tottenham and Trevelyan refused to accept them as valid after considering judgments in Fatima Bibi and Amrat Lal cases, Ameer Ali lectures in Tagore (in favour of waqf), relied upon conduct of Wāqif, judgment of Privy council in Ahsanullah case and the interpretation of waqf given in Hidaya, declared that waqf as invalid and held

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[498] Al-Shaykh Niẓām, *Fatāwā al-'Ālamgīriyyah*, 1045.

[499] Sunnī inheritance law does not accept the rule of representation in inheritance. Thus the orphan children do not get a share in their grandfather's estate. L Carroll, 'The Hanafi Law of Intestate Succession: A Simplified Approach' (1983) 17 Modern Asian Studies 629.

that; they cannot believe that Muhammadan law intended that in the God's name Muslim can use waqf as a device to protect their property from division and deprive bonafide purchases from their property for which they have paid price.[500]

Before the appeal was heard, Privy Council declared the waqf invalid in Abdul Gafoor and Ahsanullah[501] cases. Muslim Justices Ameer Ali and Syed Mahmood regarded it as a faulty decision but in Abdul Cadar[502] case Justice Badr ud-din Tyabji declared family settlement as invalid because possession of property is not transferred as needed by Indian trust Act 1882 and there was portion of charity in it.

In High Court in 1892 in Meer Muhammad Ismail Khan[503] case Justice Ameer Ali and Justice O'Kinealy declared family Waqf valid on the ground that:

1. Privy Council did not lay down any criteria for establishing family waqf and restrained itself in issuing an authoritative judgment.
2. Law and religion in Islam have almost the same meaning.
3. English judges failed to acknowledge the difference of Islamic law and English law rather they interpreted every thing in English legal perspective.

Meanwhile in the same year Cheif Justice of Allahabad High Court Sir John Edge also rejected the invalidate family waqf in "*Desoki Prasad v Inait-ullah*" case and held that there is no illegality in creating waqf in favour of descendants who might be in great need of its support with surplus of income of subject property to charity or public purpose.[504]

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[500] *Abul Fata Mahomed Ishak v. Rasamaya Dhur Chowdhuri* [1891] ILR 18 Cal 399, 413.
[501] [1892] 19 IA 170.
[502] *Abdul Cadar v. Tajoodin* [1904] 6 BLR 263.
[503] *Meer Mahomed Israil Khan v. Sashti Churn Ghose* [1892] ILR 19 Cal 412.
[504] [1892] ILR 24 All 375.

Calcutta High Court became the centre of gravity in 1882 regarding family waqf when the case of *Bikani Mia v Shukal Parsad* was presented before Chief Justice W. Comer Petheram and Justice Hill. Both the justices noticed the conflict judgment on the subject, so a Full Bench comprising of five judges was constituted. Facts of the case were that, a Bengali old Muslim Bikani Mia created *waqf* in favour of his children and wife for generations and if by the will of Allah they remain no more the beneficiary will be beggars, and poor of Decca. He makes himself a *mutawallī*.

Trial Court on the basis of evidence declare that waqf was created when Bikani Mia was solvent, he makes himself a *mutawallī*, Trial Court on the basis of evidence declare that *waqf* was created when Bikani Mia was solvent, He was an old man and just before going to pilgrim he created that *waqf* not with the intention to defraud the creditors. But Trial Court declared the *waqf* deed invalid on the ground that no direct benefit was going to poor or charity; rather it was contingent to the extinction of family of wāqif with no limit of generation or time.[505]

District court imposed Rs. 75 on property for religions purposes. James Tisdall Woodroffee argued the cause from other side, who are Hindu Money lenders. His arguments were:

1. The case should be decided on justice, equity and good-conscience as other party was non-Muslim.
2. Transfer of Property Act Section 53 does not allow such transaction and family settlement is just to avoid inheritance. He argued that every Muhamadan Law principle cannot be implemented by court.

[505] [1892] ILR 20 Cal 116.

judgment gives the idea of inconsistency between Islamic concept of gift and family waqf.[511]

Judge even did not recognise family waqf in Islamic law like in Bikani Mia case, judges conceded to the concept of family waqf in Islamic Law but found it contrary to practice under in English legal dispensation.

He blamed the exponents of Islamic Law for misinterpretation of the concepts of Islamic Law and considers family waqf as a tool to take refuge from the creditors and implementation of Muslim Law of inheritance.

The real question of law in that case was "whether the cancellation of waqf by settler is valid a not". Remain unattended because the case did not pass through the question of validity of family waqf itself. Ameer Ali criticised the judgments through its treatise by distinguishing the gift as an absolute transfer of property for the donor's benefit from family waqf in which ownership of property was to God Almighty for the benefit of mankind. He also propounded that Britain have to apply family waqf in India because this law is accepted by all Muslim through Britain's declare it inconsistent with gift. Wilson in his treatise principally agrees with Ameer Ali for validity of family waqf but differ on the point of public policy.[512]

Decision of Privy Council in Abdul Feta's case, set high standards to check the validity of waqf. The court started adhering a test of "substantial dedication of proceeds to charity or religious purpose", strictly in creation of waqf, which according to Privy Council's decisions should not only be limited to words.

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[511] Abul Fata v Russomoy Dhur (Bengal) [1894] UKPC 64, 22 IA 76, 89.
[512] Ibid.

After series of judgment passed in Calcutta, Allahabad and Bombay High Courts and Privy Council in Abdul Fata, Nawab Ahsan Ullah and Bikani Mia filed case against the validity of family *waqf*, eminent landlord of Bengal went to Viceroy and requested for new legislation to protect their family names and titles.

Consequently in 1893 Indian Perpetuities Bill was proposed but it was not enacted. It suggested the family settlement with trustee "as administrator" and perpetual succession.

Landlords persuaded people in order to mount pressure on government for validation of family *waqf*. The issue was also discussed in house of Lords.

English judges like Justice Petterson and Justice Raymand also regard family *waqf* a part of Islamic Law. Abdul Majid, head of London *waqf* committee, delivered a research paper on private *waqf*. On the invitation of Reynard West Roland Wilson agreed with Majid to the extent of validity of family *waqf* in Islamic law but dissented with his views on policy consideration and by acknowledging conflict of English concept of perpetuities with family *waqf* and suggested a moderate solution that benefit to family, might be extended to two or three generations.[515]

These Anglo Muhammadan solutions appeared on Oudh Settled Estate Act 1900, Madras Impartible Estates Act 1902 and Bengal Settled Estate Act 1904 which reflects the exceptions in favour of landed elite by the British Rulers.

Due to Act of Bengal 1904, Landowner was set at liberty to create permanent trust in favour of their family, which saved their land from division in inheritance, and any actions of court for sale and attachment, but with strict criteria which includes;

1. Govt permission

[515] SA Majid, 'Historical Study of Mohammedan Law' (1911) 27 LQR 28.

2. 25% of the annual income of property as stamp duty.
3. In case of default in payment of taxes, court of ward can take over the property and recover deficits.
4. Have to give details of property along with details of total income of the trustee.
5. And unlike family *waqf*, its provision can only be altered with the permission of government.

Only 2 estates in 5 years got registered under this Act mainly because lengthy procedure was involved, land owners fear from government power or they might hoped for a special bill which provides them any immunity from inheritance law.[516]

Many other small enactments have been passed like Cutchi Memons Act 1920, Murshidabad Estate Act or Bombay Hereditary Offices Act 1874 which were in no way parallel to the benefit extended by family *waqf*. Apart from the inconsistency of family *waqf* with English concept Britishers fear that Muslims would misuse that law to defraud creditors.

Therefore Mr. Jinnah proposed a 12 sections draft Bill for Validation of family *waqf* which requires:

1. Written Wakfnama, to be signed by *wāqif* and two witnesses.
2. Registration of *waqf* within 4 months.
3. Where such *waqf* was created by will, which will require to be registered.
4. Detail of *waqf* properties and detail of encumbrance on these properties must be attached.
5. Detail of properties owned by *wāqif* and their value.

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[516] AWB Simpson, *A History of the Land Law* ed. 2nd (Clarendon Press 1986), 234-40.

Above all it is also a salient feature of the bill that if registrar thinks that the charge on *wāqif* is more than the value of property and *wāqif* has no other means to satisfy it, he can refuse *waqf*. Penalties provided in registration Act 1908, can also be imposed. Islamic law does not require waqf to be in writing but written deed was not only suggested by M.A Jinnah, it also required registration. The Bill got support of Justice Ameer Ali under whose guidance National Muhammadan Association of India, proposed another Bill, requiring registration along with supervision of *qāḍī*.

Government thinks that there was a divide among Muslims on family *waqf*. Some *'Ulamā* feared that family *waqf* may be used to circumvent succession and they regarded any *waqf* as (Makruh) disappeared which is solely created for protection of estate and not for attainment of spiritual merit. Maulāna Shiblī N'umānī organised a meeting of Lawyers and *'Ulamā* of Sunni and *Shī'a* sect in 1908, for developing consensus of opinion on the issue. Shibilī wrote an article containing the reasons provided in judgments of Privy Council.[517]

In 1913 the bill was presented in front of 15 member selection committee. Hindu members objected the bill on creditor's protection whereas, Muslim members found registration of *waqf* against Islamic injunction. Despite protests, the decision of the judicial committee remained a binding legal precedent until 1913 when Waqf Act of 1913 or Mussalman Waqf Validating Act, was approved.[518]

This act in effect, reverses the position of the High Court and the Judicial Committee and restore the Islamic Law of family *waqf*. Addressing this issue which created doubts regarding the validity of family *waqf*, raised by judicial decisions, the law stated that "no

[517] Fyzee, A.A. Asaf, *Outlines of Muhammadan Law in India*, 289.
[518] Ibid.

such *waqf* (i.e., family *waqf*) shall be deemed to be invalid, merely because the benefit reserved therein, for the poor or other religious, pious or charitable purpose of a permanent nature is postponed until after the extinction of the family, children or decedents of the person creating the *waqf*."[519]

Thus, through legislative intervention, the Muslim Law of family *waqf* was restored but the saga of *waqf* legislation continues even further. In 1922, in the case of Khajeh Solehman v. Slaimullah Bahadur, the Privy Council ruled that, the act of 1913 had not been retrospective and therefore was inoperative regarding all waqfs created prior to March, 1913. Again, in order to over right judicial legal interpretation, legislative recourse was taken in the passage of the Waqf Validating Act, XXXII of 1930 which declare that the Waqf Act of 1913 was retrospective to *awqāf* created prior to March 7th 1913.

5. Family Waqf in Pakistani Law

Pakistan after independence had also adopted Musslaman Waqf Validating Act 1913, among many other Laws. First development in law of private *waqf* was enforced on 3rd March 1959 by promulgation of West Pakistan Land Reforms Regulation commonly known as Martial law Regulation No. 64. In pursuance to that Regulation, Chief Administrator *Awqāf* takes over all landed property of *waqf*. The major change brought in private *waqf* by this regulation was that Land which is subject of private *waqf* created under section 3 of Waqf Validating Act (VI) of 1913 cease to form part of such *waqf* and subject land was reverted to the donor if he was alive or in other case to the beneficiaries or legal heir according to their share in succession.

[519] Act No. VI (Musalmaan Waqf Validating Act, 1913, Section 4).

In *Syed Abdul Fazal v Syeda Khaton*'s case,[524] Dhaka High Court decided the question whether due to remoteness and illusionary dedication to charity, *waqf 'alal aulād* can become invalid. Perusal of the waqf deed reveals that waqf was created for maintenance of waqif's descendents with 3/5 share to his 3 sons, and 1/5 share to his 12 daughter and Rs.242/- has been reserved for charitable purpose. Dhaka High Court held that, mere provision of certain sum for public charity without specifying the property thereto did not make the *waqf* invalid. But nomination of family indeed which might include Distant kindred, who cannot be called as descendent as beneficiary, fails the criteria of creating family *waqf* as mentioned in section 3 of Act III 1913.

Since independence, the only major legislation in Pakistan affecting *waqf* has been the West Pakistan Land Reforms Regulation of 1959. Within the land reform legislation there was a provision that declared all lands not specifically dedicated for religious or charitable purposes shall cease to form part of a *waqf*. Otherwise the law of *waqf* remains substantially unchanged.

The family *waqf* could have been regarded as a settlement. An assertion was made in many cases that the family *waqf* should be regarded as a settlement of life estate for the beneficiaries. However, this proposition faced a problem. The Privy Council in its decision in 1872 held that life estates were not recognised under Muhammadan law.[525]Several laws were enacted regarding endowments like "Regulation III" of the Bengal Code 1810, Religious Endowment Act 1863, Charitable Endowments Act 1890, Punjab Alienation of Land Act 1900, the Code of Civil Procedure 1908, Musalman Waqf

[524] 1963 PLD 343 Dhaka High Court.
[525] Mussamut Humeeda v Mussamut Budlun (Bengal) [1872] UKPC 33, 17 Cal WR Civ Rul 525.

Validating Act of 1913, Restitution of Mortgaged Land 1938, Registration of Money Lander Act 1938 and Punjab Alienation of Land (Second amendment Act) 1938 to the treatment of private *awqāf* under English legal system. But the treatment of private *awqāf* under the English legal system presents a phenomenal example of the clash between Islamic and English legal traditions. From the perspective of convergence, it was a missed opportunity to transplant the policy considerations of English law into Islamic law. It is easy to depict this story as a conflict between the values of religious-based 'static' Islamic law and 'flexible' policy oriented English law. However, underneath this conflict lay such diverse factors as material interests, personal inclinations, ideologies and politics. It was not hard to deal with the problems posed by family *awqāf* within the parameters of Islamic law by clarifying the rules against their fraudulent use and by requiring their registration and supervision by courts. Sir Roland Wilson was amongst the first oriental legal commentators to point out the issue of *waqfs* evading inheritance.[526] The idea that Islamic estates Law solely comprises inheritance must be replaced by the true account of Islamic estate law that comprises four compartments that are not necessarily always in conflict; inheritance, wills, gifts and family *waqfs*, the last two are being valid life time means of setting aside inheritance provisions.[527] According to David Powers family *waqfs* are the most important components of the Islamic inheritance system.[528]

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[526] Roland K. Wilson, *Anglo Muhammadan Law: A Digest Proceeded by a Historical and Descriptive Introduction of the Special Rules Now Applicable to Muhammadans as Such the Civil Courts of British India, With Full Reference to Modern and Ancient Authorities* (W, Thacker & Co, 1921), 67-68.
[527] Ian Edge, 'Method of avoidance of the fixed heir ship rules in Islamic Law: the Islamic Trust', *Trusts and Trustees*, 14 (2008), 475, 461.
[528] David Powers, 'The Mālikī Family Endowment: Legal norms and social Practices' (1993) 25 International Journal of Middle Eastern Studies 379.

These mechanisms had worked throughout the history of *awqāf* all over the Muslim world. But the *waqf* did not fit within the English legal system. In fact, no such attempt was actually made due to the scepticism of many Muslim judges on the one hand and the arrogance of some British judges on the other. Muslim jurists such as Ameer Ali and Tyabji were infused with the superiority of Fiqh, which they considered had attained a level of maturity such that it provided solutions to all problems and could still respond to modern challenges under the doctrines of *istiḥsān* (juristic preference), *maslaḥa* (public interest/good) and *ḍarūra* (expediency or necessity). Interestingly, none of these principles was invoked in this particular debate because they could support the policy consideration behind the rule against perpetuities. It was under these principles that family *awqāf* were restricted to two generations or sixty years from the date of the founder's death in Egypt in 1946 and were eventually abolished in 1952. The family waqf controversy brought the issue of Islamic law and *awqāf* to the mainstream of public debate. This had an impact on the governance structure of public *awqāf*. Not only did the Wakf Validating Act, 1913 become one of the primary sources of *waqf* law, it also opened up the way for further legislation. This time for the better management and supervision of public awqāf; later private awqāf were also included in the mandatory supervisory structure because notionally a charitable element could be found in every family waqf. Secondly, the Wakf Validating Act politicised Islamic law. Muslim politicians grabbed the opportunity to unite the divergent groups of Muslims on one platform. Finally, the passing of this Act gave the Muslims of India a new confidence and paved the way for the passing of further legislation favourable to Islamic law. For instance, the Muslim Personal Law (Shariat) Application Act 1937 abolished customs,

especially those that deprived females of their share in inheritance. Under this Act, Islamic inheritance law regulated succession, but the Act did not apply to agricultural lands because only provincial by their 'moral delinquencies, bring discredit not merely on the endowment but on the community itself'. In Pakistan substantially the law of *waqf* remains unchanged.

Chapter No. 4

Basic Rules of Islamic Law of Inheritance

Chapter No. 4:

Basic Rules of Islamic Law of Inheritance

The laws of succession are generally divided into two categories: testamentary and intestate. Most modern systems of successions rest firmly upon the freedom of the individual to determine the devolution of his property upon his death. These are testamentary systems of succession. Where the law imposes compulsory rules of succession of general application requiring that property should on the death of its owner by transmitted in a successions.[529]

The Islamic foreseeable way to best entitled to it, the system of succession is known as intestate law of inheritance is one of the most comprehensive systems of intestate succession. It is exhaustive enough to meet most of the situation that might arise. It pays ample attention in the interests of all those who from time to time hold a natural place in the first rank of the affections of the deceased. It is difficult to find any other system of intestate succession containing such kind of equitable rules.

The Islamic law of inheritance has its origin in the pre-Islamic days In Arabia. The *Qur'ānic* injunction brought radical changes in the principles of succession that existed before the advent of Islam by eliminating all that was unjust and equitable principles, the Muslim jurists further streamlined the rules of succession, scientifically to make them readily applicable to actual situations.[530]

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[529] N.J.Coulson, *Succession in the Muslim Family* (Cambridge: Cambridge University Press, 1971), 1.
[530] W.H. Macnaghten, *Principles and Precedents of Mohammadan Law* (Lahore: Law Publishing Company, 1870), V.

1. The Pre-Islamic Rules of Inheritance

It would therefore be relevant to briefly examine the pre-Islamic law of inheritance in Arabia which was later reformed by the Islamic law. The root ideas of the pre-Islamic law of inheritance were as follows:

a) That individual members of the family formed the wealth and strength of the united family.

b) That females could neither inherit nor dispose of property.

c) That females were themselves property to be bought and sold in marriage, to be assigned in payment of debt and to be owned and inherited by their males.

Thus the laws of Arabia in pre-Islamic days were patriarchal despotism unqualified. However, there was no distinction between ancestral and self-acquired property and sons acquired a vested interest at birth in their father's property. In these circumstances the following rules of succession were commonly applicable:[531]

a) Females and cognates were excluded from inheritance. In certain cases, women constituted part of the state. A stepson or brother took possession of a dead man's widow or widows along with his goods and chattels. The male minors who were unable to carry arms were deprived of any share in the estate. The tradition has it that some people disputed as much the prophet's ruling to give a girl half of the estate of her father while she did not ride a horse of fight against the enemy as his ruling to give a boy a share of inheritance while he was not available in wars.

[531] Ibid.

b) The nearest adult male agnate or agnates succeeded to the entire estate of deceased. Male agnates, who were equally distant to porosities, shared together the estate per capita.

c) Descendants were preferred to ascendants, which in turn, were preferred to collaterals[532].

d) The adopted son had the same right to the estate as the real son if he was able to carry arms.

e) Mutual inheritance between two men was recognised through a contrail of alliance. The famous formula was for one of them to say to the other:

"*My blood is your blood, my destruction is your destruction, you inherit me and I inherit you, you pursue my blood feud and I pursue yours.*"[533]

So the Islamic law of inheritance introduced radical changes into the pre-Islamic law. The doctrine of shares becomes understandable once it is realised that the shares consist of those who were not entitled to succeed under the customary law in the circumstances in which they are granted the right to take their respective shares.

2. THE SUNNI LAW OF INHERITANCE

The devolution of one's property on death in favor of another as a successor is called inheritance.[534]

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[532] N.J.Coulson, *Succession in the Muslim Family* (Cambridge: Cambridge University Press, 1971), 6.
[533] Qurā'n, 33:6.
[534] Abdullah Ibn. Maḥmūd b. Mawdud, *al-Ikhtīyār lī t'alīl al-Mukhtār*, vol v (Cairo: Maṭb'a Muṣṭafā al-Bābī 1951), 85.

2.1 Constituents of Inheritance

There are three constituents of inheritance:

1) Deceased

The first constituent of inheritance is the owner – deceased. The right to inheritance is created only when the owner's actual death or assumed death by law has taken place.[535]

2) Heir

The second constituent of inheritance is the heir (*wārith*). The word *wārith* is derived from the world *irth*. The literal meaning of the word is remainder.[536] The Prophet (SAW) has said you have inherited that faith which your father Prophet Abraham has left behind him.[537] The heir is called heir because he remains alive after the death of his successor of the ancestor in respect of the ancestral property.[538]

3) Estate:

The third factor in the law of inheritance is the estate (subject of inheritance left by the deceased) which is called *tarikah*. The word *tarikah* is derived from the word *Tark* and is in the meaning of "Matrūk" which literally means property left.[539]

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[535] Actual death is the one in which the relationship with real life has in fact snapped. That is to say, the soul has with certainty departed from his body, or life is actually extinct. Assumed death: is the one where in presuming the deceased as alive his actual death is assumed to have occurred thereafter. For instance, the child from the womb of his mother is removed offensively and separated from the body of the mother, and is actually dead. Death by Lawn is te case where the relationship with the real life is held to have snapped under presumption of law. For instance, a court passes a verdict of death against a person of unknown, where about or an apostate is held to be dead from the time of his turning as apostate.

[536] Majd al-Dīn Muḥammad al-Feroz 'Ābādī, *Al-Qāmūs al-Muḥīṭ* (Egypt: Maṭb'a Muṣṭafā al-Bābī, 1952) vol. 1, 167.

[537] 'Abdullab ibn Maḥmūd ibn Mawdud, *Al-Ikhtīyār lī t'alīl al-Mukhtār*, vol v, 85.

[538] Ibid.

[539] Louis Malūf, *Al-Munjid*, 1927, 59.

Tarikah technically, in the Law of Inheritance, is that property which the deceased (ancestor) leaves behind him as his lawful property; *Tarikah* has been defined as that property which the deceased leaves behind him and there is no right of another particular person attached with that property.[540] It means that a property with which the right of some other person is attached shall not form part of the estate of the deceased, according to the Ḥanafīs, is interpreted to mean that property of the deceased over which there is no right of a stranger. Hence, the property over which there exists a right of stranger, for instance, mortgage etc. shall not be included in the estate until the mortgage money is paid or it has been realized from the property itself.[541]

According to Mālikī jurists as well, the right of some other person in the estate of the deceased attached to the property itself shall be considered as having excluded the said property from the definition of the estate.[542] According to Shāfi'ī jurists, everything that belongs to man in his life and what he leaves behind after death whether it is the properties or rights shall be called his estate. According to the Shāfi'ī, if a stranger's right is attached with the estate, for instance, it is under mortgage, that property shall not be termed as estate of the deceased till the stranger's right does not lapse or it is not paid up. [543] Same is the case with Ḥanbalī jurists. According to them as well the estate is that property of proprietary right which the deceased leaves behind after him. That is why it is called *wirthā.*[544] The definition of *tarikah* represents on the whole two points of view:

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[540]Zayn al-Dīn Aḥmad ibn Ibrāhīm ibn al-Nujaīm, *Baḥr al-Rā'iq,* vol.8(Egypt:Dār al-Kutub al-'Arabīyah,1334A.H), 489.

[541] Ibid.

[542] 'Abd al-Sam'i lī abī Ṣāleh, *Jawāhar al-'Akīl Sharḥ al-Mukhtaṣar al-Khalīl,* vol. 2 (Cairo: Maṭba Muṣṭafā al-Bābī, 1366 A.H), 327.

[543] Sheikh Muḥammad al-Khaṭīb al-Sharbīnī, *Mughni al-MuḥtājSharḥ al-Minhāj,* vol.3 (Egypt: Maṭbūah Muṣṭafā al-Bābī, 1377A.H), 6.

[544] Muḥammad Yusuf Mūsā, *Al-Tairkā wa al-Mīrāth* (Egypt:Dār al-Kutub al-Arabi, 1960), 72.

One is that "the estate of the deceased is constituted of "properties" and the second is that "properties and rights" both are included in the estate of the deceased. The Mālkī', Shāfi'ī and Ḥanbalī jurists have included both properties and right sin the definition of legacy and in support of their practice they rely on the Prophet's (SAW) tradition, "One who leaves a property or a right behind him, it is for his heirs". But the Ḥanafī jurists maintain that the word "right" is this tradition has not come down to them and thus it cannot be the proof of the contention that rights are also included in the inheritance.

2.2 Conditions of Inheritance

There are four conditions for the right of inheritance. The first condition is that the ancestor must be factually or legally dead. The second one is that the heir at the time of death of the ancestor must be alive, factually or legally. Third condition is that the heir at the time of death of the ancestor must be alive, factually or legally and fourthly, that the relationship between the heir and the deceased be known so as to establish entitlement, that there be property for inheritance but the right to inheritance can be enforced only after the burial of the deceased, payment of debts and the execution of a valid will, if any to the extent of one-third of the estate.[545]

2.3 Cause of Inheritance

There are basically two grounds of inheritance under Islamic Law:

(i) Lineage

(ii) Marriage

(iii) Association or friendship

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[545] 'Abdullab b. Maḥmūd b. Mawdud, *Al-Ikhtīyār lī t'alīl al-Mukhtār*, vol v, 85.

By Linage: Lineage means that relationship of full blood which by descent exists between the ancestor and the heir, although that relationship may have been established by the acknowledgement. There are three kinds of relationships by linage.

a) That which originates from the deceased. That is to say, the progeny of deceased howsoever in low degree.

b) That from which the deceased originated, that is to say, the progenitor of the deceased (parents, grandparents) howsoever high in degree.

c) That besides the progeny and the progenitor, all other relatives i.e. the relative by blood (sister, brother, uncle).[546]

By Marriage: The relationship by marriage is established in Islam directly between the spouses through a valid marriage contract, provided the cause (married state) as fully established and be existing at the time of death of the spouses (husband or wife). The inheritance does not involve in case of invalid or void marriage.[547] Likewise, the relationship with the "in laws" is no cause of inheritance. That is to say, the relationship through husband or wife cannot be the cause of inheritance, except that there be any other relationship by "*nasab*" between them which may otherwise entitle them to inheritance.

BY ASSOCIATION OF FRIENDSHIP (*Walā*)

This is further divided into two by Ḥanafī jurists:

a) *Walā al-'Itāq* (master of the manumitted slave)

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[546] Ibn-e-Rushd, *Bidāyat al-Mujtāhid wā Nihāyah al Muqtaṣid*, vol. 2 (Maṭba' al-Muṣṭafa al-Bābi, 1960) 355.

[547] Dāmād 'Āfandī, *Majma' al Anhur*, vol. 2 (Cairo: Maṭba' al-Amīrīyah, 1319A.H), 747.

b)*Walā al- Maūlā* (inheritor/successor by contract). A heir may have more than one causes of inheritance, e.g. husband who inherit fixed share and may also be an agnatic cousin.[548]

3. Order of Entitlement of Inheritance

The order in which the persons shall be entitled to inheritance is as under:

1. *Dhawī al Furūḍ* (Sharers)
2. *'Aṣbāt* (Residaries)
3. *Radd 'Alā Dhawī al Furūḍ* (Return to shares, if there is no *'Aṣbah*)
4. *Dhawī al-Arḥām* (Distant Kindred)

There is some disagreement among the different schools of Islamic Law about the persons and the order in which they are entitled to inherit the property left by deceased Muslim.[549]

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[548] Ibid.

[549] According to Ḥanafīs, there are ten group of persons entitled to inheritance. There order is as under: *Dhawī al Furūḍ, 'Aṣbāt Nasabī, 'Aṣbāt Sabat, 'Aṣbāt* of *maūlā al- 'Itāqah, Radd 'alaDhawī al Furūḍ* (Return of the residue to *Dhawī al Furūd* according to there is no *'Aṣbah, Dhawī al-Arḥām, Maulā al-Muwalāt, Muqīr lahu bil Naṣab* i.e. person whose paternity is admitted by the deceased and his lineage is not proved from someone else and the deceased has remained firm on such admission till his death. *Muṣā lahu bi Jami'a al māl*, i.e. legate for the entire property, bequeathed by the deceased through will, when there is no heir at all and *Bait al-Māl*, (Public Treasury). According to Mālikī jurists the order of entitlement to estate is as under: *Dhawī al Furūḍ, 'Aṣbāt Nasabī, 'Aṣbāt Sababī* i.e. *Maūlā al-'Itāqah*, Male *'Aṣbāt of Maūlā al- 'Itāqah, Raad 'alāDhawī al Furūḍ*, i.e. Return of the remainder estate to *Dhawī al Furūḍ*, if there is no *'Aṣbah, Bait al-Māl* (on condition of proper management), *Dhawī al-Arḥām* (when the management of Bai al-Māl is not proper. According to Shāfi'ī jurists the order of entitlement to inheritance is under, *Dhawī al Furūḍ* (Sharers), *'Aṣbāt Nasabī, 'Aṣbāt Sababī* i.e. *Maūlā al-'Itāqah, 'Aṣbāt of Maūlāal-'Itāqah, Bait-al-Māl, Dhawī al-Arḥām* (when *Bait al- Māl* is not properly managed). According to Ḥanbalī School, the order of entitlement to the estate of the deceased is under, *Dhawī al Furūḍ , 'AṣbātNasabī, 'Aṣbāt Sababī, Maūlā al-Mawalāt, Radd 'alā Dhawī al-Furūḍ, Dhawī al-Arḥām, Bait al-Māl*. Dāmād 'Āfandī, *Majma' al Anhur*, vol. 2, 747; Muḥammad Amīn Ibn 'Ābdīn, *Radd al-Muḥtār 'alā al-Dur al- Mukhtār Sharḥ Tanvīr al- Abṣār*, vol. 6 (Egypt: Maṭba' Muṣṭafā al-Bābī , 1983) 810; 'Abd al-Sam'i līabī Ṣāleh, *Jawāhar al-Akīl Sharḥ Mukhtaṣar Khalīl* , vol. 2, 328-32; Majd al-Dīn 'Abd al-Barkat, *Al-Muḥarrar fi al-Fiqh*, vol.1 (Cairo: Maṭba' Muṣṭafā al-Bābī), 294-97.

Inheritance by Husband

There are two situations in which the husband[552] inherits the estate from his decreased wife, one is that there is son (of howsoever low in degree) or a daughter of the deceased wife.The husband shall then get one- fourth of her estate. In the other case, if there is no son (howsoever low in degree) or a daughter, the husband shall then get half of the estate. The basis of this rule is the verse where in Allah has said:

وَلَكُمْ نِصْفُ مَا تَرَكَ أَزْوَٰجُكُمْ إِن لَّمْ يَكُن لَّهُنَّ وَلَدٌ ۚ فَإِن كَانَ لَهُنَّ وَلَدٌ فَلَكُمُ ٱلرُّبُعُ مِمَّا تَرَكْنَ مِنۢ بَعْدِ وَصِيَّةٍ يُوصِينَ بِهَآ أَوْ دَيْنٍ ۚ وَلَهُنَّ ٱلرُّبُعُ مِمَّا تَرَكْتُمْ إِن لَّمْ يَكُن لَّكُمْ وَلَدٌ ۚ فَإِن كَانَ لَكُمْ وَلَدٌ فَلَهُنَّ ٱلثُّمُنُ مِمَّا تَرَكْتُم مِّنۢ بَعْدِ وَصِيَّةٍ تُوصُونَ بِهَآ أَوْ دَيْنٍ ۗ وَإِن كَانَ رَجُلٌ يُورَثُ كَلَٰلَةً أَوِ ٱمْرَأَةٌ وَلَهُۥٓ أَخٌ أَوْ أُخْتٌ فَلِكُلِّ وَٰحِدٍ مِّنْهُمَا ٱلسُّدُسُ ۚ فَإِن كَانُوٓا۟ أَكْثَرَ مِن ذَٰلِكَ فَهُمْ شُرَكَآءُ فِى ٱلثُّلُثِ ۚ مِنۢ بَعْدِ وَصِيَّةٍ يُوصَىٰ بِهَآ أَوْ دَيْنٍ ۙ غَيْرَ مُضَآرٍّ ۚ وَصِيَّةً مِّنَ ٱللَّهِ ۗ وَٱللَّهُ عَلِيمٌ حَلِيمٌ[553]

"And unto you belongeth a half of that which your wives leave, if they have no child; but if they have a child then unto you the fourth of that which they leave, after any legacy they may have bequeathed, or debt (they may have contracted, hath been paid). And unto them belongeth the fourth of that which ye leave if ye have no child, but if ye have a childthen the eighth of that which ye leave, after any legacy ye may have bequeathed, or debt (ye may have contracted, hath been paid). And if a man or a woman have a distant heir (having left neither parent nor child), and he (or she) have a brother or a sister (only on the mother's side) then to each of them twain (the brother and the sister) the sixth, and if they be more than two, then they shall be sharers in the third, after any legacy that may have been bequeathed or debt(contracted) not injuring (the heirs by willing away more than a third of the heritage) hath been paid. A commandment from Allah. Allah is Knower, Indulgent.'

The rights of the husband and wife never lapse entirely, But it there be issues (sharer or residuary) their shares get reduced to half of the fixed one. The word a *walad*', here does not include the issue of the daughter, (whether they are male or female).[554]

Inheritance by Wife

Like that of the husband there are two situations of wife's right of inheritance as well:

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[552] By husband is meant the husband of the decreased.

[553] Qurā'n, 4:12.

[554] Abū Bakr al-Razi, Al Jaṣāṣ, *Aḥkhām al Qur'ān*, vol. 2 (Cario: n.d), 84.

In the first case, the wife is entitled to one-fourth of the estate, whereas in the second case she is entitled to one – eighth of the estate.[555] If there are two or more wives the aforesaid share shall be divided equally among them. The principle is that where the fixation of shares is on the basis of relationship only and the number of heirs has not been specified, the heirs of the same relationship, even where their number is more than one, totally share together in the inheritance allowed or fixed for one. Thus if the widows of the deceased are more than one, all of them, as explained above, shall be co-sharers in the one fourth or the one-eighth of estate as the case may be[556].If the son (of the deceased) is murderer or is a non- Muslim or has turned an apostate, in that case, he shall be considered under law to be nonexistent and the share of the husband or the write (as the case may be) shall not get reduced. [557]

b) Sharers by Lineage

These are those whose relationship with the deceased exists by lineage. Sharers by lineage are ten (1) Father (2) Mother (3) Daughter (but not son), (4) Son's daughter, (5) Full sister (6) Consanguine sister (7) Uterine sister (8) Uterine brother (9) Grandfather (10) True grandmother (no female intervening).

Inheritance of Father

From father is meant the real and not step father (of the deceased) from whom the deceased is begotten. The step father would rather be called the husband of the mother

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[555] Buhūtī, Manṣūr ibn Yūnus ibn Ṣalāḥ al-Dīn, Kashshāf al-Qinā' 'an Matn al-Iqn ā' vol.4 (Cairo: 1968). 450; Muḥammad al-Sharbīnī, Mughnī al-Muḥtāj, vol.3 (Beirut: Dār al-Turāth al-'Arabī, n.d), 39; Syed Sharīf Jurjāni, *Al-Sharīfīyah Sharḥ al-Sirājīyah*, 17.

[556] Aḥmad Mḥuammad Salāmah Ṭaḥāwī, *Mukhtaṣar al- Ṭaḥāwī*, (Dakan:Dāira al-Ma'ārif, 1370A.H), 143; Abū 'Abd Allāh ibn Muḥammad ibn Aḥmad al-Anṣārī al-Qurṭabī, *Al-Jām' al-Aḥkām al-Qur'ān*, vol 1. (Cairo: Maṭbū'āt Dār al-Kutub al-'Ilmiyah,1301), 239.

[557] Syed Sharīf Jurjāni, *Al-Sharīfīyah Sharḥ al-Sirājīyah* (Karachi:Qur'ān Mahal), 8-11; Abū al-Barakāt Aḥmad bin Muḥammad al-Dardīr, *Al-Sharḥ al-Saghīr*, vol. 4 (Egypt: Dār al-M'āfif, 1396), 633; Ibn Qudāmah al-Maqdasī, Al-Mughnī, vol. 6, 215-228.

and not the father of the deceased. Allah has specified the share of the father in the *Qurā'n.*[558]

وَلِأَبَوَيْهِ لِكُلِّ وَٰحِدٍ مِّنْهُمَا ٱلسُّدُسُ مِمَّا تَرَكَ إِن كَانَ لَهُۥ وَلَدٌ ۚ فَإِن لَّمْ يَكُن لَّهُۥ وَلَدٌ وَوَرِثَهُۥٓ أَبَوَاهُ فَلِأُمِّهِ ٱلثُّلُثُ ۚ فَإِن كَانَ لَهُۥٓ إِخْوَةٌ فَلِأُمِّهِ ٱلسُّدُسُ ۚ مِنۢ بَعْدِ وَصِيَّةٍ يُوصِى بِهَآ أَوْ دَيْنٍ

And to his parents a sixth of the inheritance, if he have a son; and if he have no son and his parents are his heirs, then to his mother appertaineth the third; and if he have brethren, then to his mother appertaineth sixth, after any legacy he may have bequeathed, or debt (hath been paid).

If the deceased has left an issue, the father and the mother each shall get one-sixth of the estate as mentioned in the above verse. If the deceased has left no issue, his parents shall get the inheritance in the proportion that the mother will be given on third and the father shall get the residue according to the same verse of the *Qurā'n.*

The jurists have described three situations of the father inheriting from his issue as under:[559]

a) Being only Sharer

b) Being Sharer and residue both at one and the same time

c) Being only the residuary

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[558] Qurā'n, 4:11.

[559] Alā' al-dīn Ḥaskafī, *Dur al-Mukhtār ḥāshīā Rad al-Mukhtār*, vol. 3 (Egypt, 1256), 375; Kāsānī, Abū Bakr ibn Mas'ūd, *Kitāb Badā'i' al-Ṣanā'i' fī Tartīb al-Sharā'i'* vol. 5, 242; Zayla'ī, , *Tabyīn al-Ḥaqāiq: Sharḥ Kanz al-Daqā'iq* vol.6, 639;; Sarakhsī, *Kitāb al-Mabsūt*, vol. 12, 216; al-Dardīr, *Al-Sharḥ al-Saghīr*, vol. 4, 641; Al-Sharbīnī, Mughnī al-Muḥtāj, vol. 3(Beirut: Dār al-Turāth al-'Arabī, n.d)131 ; Ibn-e-Rushd, *Bidāyat al-Mujtāhid wā Nihāyah al Muqtaṣid*, Vol. 2, 352; Qāḍī Khān, Fakhr al-Dīn al-Ḥassan ibn Manṣūr al- Uzjānī al-Farghānī, *Fatāwā Qāḍī Khān* vol. 2 (Būlāq, 1310), 321.

As Sharer: The first situation is the capacity of being only the sharer. Hence according to *jamhūr* the father in the capacity of sharer shall get one sixth of the estate was fixed in the *Qurā'n*. When the deceased has left his son or grandson of howsoever low in degree, as the *Qurā'n* itself states.

As Sharer and Residuary: The second situation is that the father gets the inheritance in both the capacities, sharer and residurer. Thus if the deceased, besides his father, leaves behind him such heirs who are only the sharer, the father and all the other sharers shall get their fixed shares and the remainder shall be given to the father does not inherit as residuary. That is there is a son or the grandson. For example, the deceased leaves behind him his father, daughter or son's daughter. In such a case the father shall get one sixth share as sharer and after being given one-half to the daughter and one-sixth the son's daughter, the one-sixth residue shall as well be given to the father residuary.[560]

The basis of the law is the Prophet's tradition. Narrated Ibn 'Abbās: The Prophet (SAW) said, "Give the *Farāiḍ* (the shares of the inheritance that are prescribed in the *Qurā'n*) to those who are entitled to receive it. Then whatever remains, should be given to the closest male relative of the deceased."[561]

As Residuary Only: In the third situation, the father inherits only as residuary. For instance, the deceased leaves no heir except his father. In such a case the father as residuary shall be entitled to the entire estate. The reason whereof is to be found in the

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[560] Ibn Qudāmah al-Maqdasī, Al-Mughnī, vol. 6, 215-228; Abū al-Barakāt Aḥmad bin Muḥammad al-Dardīr, *Al-Sharḥ al-Saghīr*, vol. 4, 97; Al-Sharbīnī, Mughnī al-Muḥtāj, vol. 3 (Beirut: Dār al-Turāth al-'Arabī, n.d)21-23; Zayla'ī, , *Tabyīn al-Ḥaqāiq: Sharḥ Kanz al-Daqā'iq* vol. 6, 660; Ibn-e-Rushd, *Bidāyat al-Mujtāhid wā Nihāyah al Muqtaṣid*, Vol. 2, 352.

[561] Muḥammad ibn Ismā'īl al-Bukhārī,t. Muḥammad Muḥsin Khān, *al-Jāmi' al-Saḥīḥ*, Kitāb al-Farāiḍ, (Kazi Publications, 1979), Ḥadīth: 723.

Qur'ānic verse, that where the deceased has no issue, his parents shall get the (whole) estate wherein one-third of the mother and the entire residence is of the father.[562]

Inheritance of Mother

Mother means the true mother of the deceased. The step mother of the deceased is not entitled to his inheritance because there is neither relationship by lineage nor the relationship by affinity between them.

There are three situations of the mother of getting the inheritance from her son or the daughter:

1. When there are the daughters or the sons of the son's issues or two brothers and sisters of any sort of the deceased the mother shall get one sixth shares.
2. When there is none of the person stated above, the mother shall be entitled to one third of the entire state.
3. When the wife or the husband of the deceased (as the case may be) is there, the mother after their shares shall get one third of the remaining state.[563]

The rule laid down by Abdullah Ibn 'Abbās differs from the rule of conduct stated in case No. 1 above. According to him in the event of there being two brothers or sisters the mother shall be entitled to one-third share shall be held to be entitled to one-sixth share. Ibn 'Abbās in support of his view relies on the verse four of *al-Nisā* he contends that word "*Ikhwa*" used in this verse is particularly for the brothers and sisters as Allah in the Qur'ān says: وَإِن كَانُوٓاْ إِخۡوَةٗ رِّجَالٗا وَنِسَآءٗ In this verse the word "*Ikhwah*" is for both the males and females, not that it covers the male (brothers) only. Relying on the verse four

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[562] Abu Zahra, *Aḥkām al-Tarkāt wal Mawārīth*, (Cairo:Dār al-Fikr al-Arabī,), 175

[563] Zayla'ī, , *Tabyīn al-Ḥaqāiq: Sharḥ Kanz al-Daqā'iq* vol.6, 631; Ibn Qudāmah al-Maqdasī, Al-Mughnī, vol. 6, 212; al-Dardīr, *Al-Sharḥ al-Saghīr*, vol. 4, 625; Al-Sharbīnī, Mughnī al-Muḥtāj, vol. 3(Beirut: Dār al-Turāth al-'Arabī, n.d)16 ; Ibn-e-Rushd, *Bidāyat al-Mujtāhid wā Nihāyah al Muqtaṣid*, Vol. 2, 352.

of *al-Nisā*, Ibn 'Abbās argues that in case only my sister and my brother are alive, the mother gets the share that has been stated in the Holy *Qur'ān* to the one-third of them 'Ali (R.A) has the same opinion.[564] He also argues from the said verse, that as per *Qurā'nic* text a share of one-third is mandatory for the mother. It is only when the son or the daughter of the deceased is alive or his three or more than three brothers are alive, the mother's share will be reduced form one third to one sixth.[565]

In the event of wife's or husband's death: According to the rule of conduct of the jurists in general, if a woman dies leaving behind her husband, father and mother, half the share goes to the husband, one third of the residue shall be given to the mother and the rest shall be given to the father. Similarly when the husband dies leaving behind his wife and his parents, one-fourth. Share goes to the wife and one third of the residue shall be given to the mother and the rest shall pass to the father. If, however, in place of the father the deceased leaves his grandfather, the mother shall get one third of the whole and, after giving husband's or wife's share, the rest shall go to the grandfather. According to Imam Abu Yusuf, however, in the presence of the grandfather as well, after giving away the share of the wife or the husband the mother shall be entitled to one third of the residue and not of the whole property. [566]

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[564] Abū 'Abd Allāh ibn Muḥammad ibn Aḥmad al-Anṣārī al-Qurṭabī, *Al-Jām'al-Aḥkām al-Qur'ān*, vol 1. (Cairo: Maṭbū'āt Dār al-Kutub al-'Ilmiyah, 1301), 259.

[565] Ibn-e-Rushd, *Bidāyat al-Mujtāhid wā Nihāyah al Muqtaṣid*, Vol. 2, 352; Zayla'ī, , *Tabyīn al-Ḥaqāiq: Sharḥ Kanz al-Daqā'iq* vol.6, 631; Ibn Qudāmah al-Maqdasī, Al-Mughnī, vol. 6, 212; al-Dardīr, *Al-Sharḥ al-Saghīr*, vol. 4, 625; Al-Sharbīnī, Mughnī al-Muḥtāj, vol. 3(Beirut: Dār al-Turāth al-'Arabī, n.d)16.

[566] Syed Sharīf Jurjāni, *Al-Sharīfīyah Sharḥ al-Sirājīyah*, 8-11; Zayla'ī, , *Tabyīn al-Ḥaqāiq: Sharḥ Kanz al-Daqā'iq* vol.6, 631; Ibn Qudāmah al-Maqdasī, Al-Mughnī, vol. 6, 212; al-Dardīr, *Al-Sharḥ al-Saghīr*, vol. 4, 625; Al-Sharbīnī, Mughnī al-Muḥtāj, vol. 3(Beirut: Dār al-Turāth al-'Arabī, n.d)16 ; Ibn-e-Rushd, *Bidāyat al-Mujtāhid wā Nihāyah al Muqtaṣid*, Vol. 2, 352.

Inheritance by Daughter

The daughter is one of the sharers. By a daughter is meant the one who a true daughter of the father or the mother begotten directly in legal wedlock if the deceased is male and he from his legitimate wife has a daughter she shall be called his true daughter. Likewise if the deceased is a female, the daughter begotten by her shall be her true daughter. Her share is also fixed in the *Qurā'n* as Allāh says in eleventh verse of *al-Nisā*,

يُوصِيكُمُ ٱللَّهُ فِيٓ أَوۡلَٰدِكُمۡۖ لِلذَّكَرِ مِثۡلُ حَظِّ ٱلۡأُنثَيَيۡنِۚ فَإِن كُنَّ نِسَآءٗ فَوۡقَ ٱثۡنَتَيۡنِ فَلَهُنَّ ثُلُثَا مَا تَرَكَۖ وَإِن كَانَتۡ وَٰحِدَةٗ فَلَهَا ٱلنِّصۡفُۚ[567]

"*'Allah chargeth you concerning (the provision for) your children: to the male the equivalent of the portion of two females, if there be women more than two, then theirs is two-thirds of the inheritance, and if there be one (only)then the half*".

Inheritance by Daughter under Different Schools of Thought

The real daughters of the deceased, when the inherit occupy according to the four imams, one of the three situations are as under:

1) If she is alone, she is entitled to half of the estate.[568]

So if the deceased left behind only one daughter and on true brother. According to all Sunni Imams as also the Zāhirīyyah[569], the daughter as sharer shall get half the estate and the brother (of the deceased) as residuary the other half. On the contrary shall be entitled to the entire estate.The Sunni rule of conduct is in accord with the *Qur'ān* and the *Sunnah.*

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[567] Qurā'n, 4:11.

[568] Al-Qurṭabī, *Al-Jām' al-Aḥkām al-Qur'ān*, vol 1, 251; Zayla'ī, . *Tabyīn al-Ḥaqāiq*: *Sharḥ Kanz al-Daqā'iq* vol.6, 631; Ibn Qudāmah al-Maqdasī, Al-Mughnī, vol. 6, 212; al-Dardīr, *Al-Sharḥ al-Saghīr*, vol. 4, 625; Al-Sharbīnī, Mughnī al-Muḥtāj, vol. 3(Beirut: Dār al-Turāth al-'Arabī, n.d)16 ; Ibn-e-Rushd, *Bidāyat al-Mujtāhid wā Nihāyah al Muqtaṣid*, Vol. 2, 352.

[569] Najam al-Dīn Jafar al-Ḥillī, *Sharā'i al- Islām*, vol. 4 (Cairo: Maṭba' Muṣṭafā al-Bābī), 183-184.

2) In the case of two daughters and no son, there is difference of opinion as to how much estate is total shall the two daughters get there is however, no difference of opinion if in the above case daughters are more than two. If there are two daughters and no son the two daughters, according to the assertion of Prophet's (SAW) companions in general, shall divide among themselves two third of the estate. According to the assertion of *ḥadīth* Ibn-'Abbās, however, these two daughters shall share in the half as is the half fixed for one daughter. He is in support of his contention, puts forward the *Qurā'nic* verse.[570] Arguing that Allāh has made the mandate of two third estate being shared among the daughters dependent on more than two, and that what is made dependent on a condition cannot be implemented unless that condition come into existence. Hence, the entitlement of the daughters, to two-third of the estate shall not be given effect to unless they are more than two. But the opinion of majority of *Ṣiḥābah* and *jumhūr* is that the daughters, whether two or more than two, shall share in two-third of the estate where there is no son, which stands proved by the Prophet' tradition as narrated by Jābir b. 'Abdullah that he along with the Prophet (SAW) was proceeding towards the market when a woman with her two daughters appeared and said, "O Prophet these are two daughters of Sa'ad bin Rabī' who while fighting on your side got billed in the battle of 'Uhad at the hands of infidels, and the uncle of these two daughters (according to the then prevailing practice among the Arabs when the daughters used to be is inherited) took possession of the whole property of the deceased and left nothing for them. O' Prophet do not see that men do not (is a respectable society) marry the girls who do not possess property and riches." The Prophet (SAW) told the woman "Allah shall soon decide the matter." The widow of Sa'ad bin Rabī', after waiting for some days, came weeping in his

[570] Qur'ān, 4:11.

presence again. Her tears became the cause of blessings from Allah and the last and final degree regarding inheritance got revealed where in the shares of wives, daughters have been fixed. The Prophet (S.A.W) sent words to the brother of Sa'ad *"of the property left by your brother give its two-third to the two daughters and one-eighth to the widow and whatever remains thereafter is yours."*[571]

According the direction issued by the Prophet (S.A.W) explained the revelation that Allāh's saying "فَإِن كُنَّ نِسَآءً فَوْقَ ٱثْنَتَيْنِ" means two or more than two.

The argument of Ibn'Abbās may be answered thus: In the Allāh says"لِلذَّكَرِ مِثْلُ حَظِّ ٱلْأُنثَيَيْنِ" the reference is clearly to the combination of a son and a daughter, in which case it is unanimously held that the son shall got two-third and the daughter shall get one-third in the estate. It indicates that a son is equal to two daughters. Thus, the two-third of the estate for two daughters, when there is no son along with them, gets proved.

Irrespective of the argument stated above, the view reported form Ibn 'Abbās is not free from doubt. It is said that this report from Ibn 'Abbās that "for two daughters the inheritance is half" is *munkar*, rather the correct position is that Ibn 'Abbās too, agreeing with the other companions, was convinced of two-third share for the two daughters.[572]

Inheritance by Son's Daughter

The son's daughter in the absence of daughter of the deceased is like his daughter in three situations.[573] In the event of there being no son or these being one daughter or there being no daughter or son, the son's daughter inherit like the daughter.

According to the four Sunni schools of thought there are in all six situations in which, son's daughter gets the inheritance:[574]

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[571] Hāshim b. Ma'sūd al-Farrā, al-Baghwī, *Mishkāt ai-Masābīḥ* (Karachi: n.d.), 264.
[572] Shamsuddīn al-Sarakhsī, *Al-Mabsūt*, vol.xxix (Cairo: Maṭba' al-Sa'adah, 1324A.H), 136.
[573] Syed Sharīf Jurjāni, *Al-Sharīfīyah Sharḥ al-Sirājīyah*, 20.

1. Where there is no son or daughter and there is son's daughter, she shall get half of the estate.

ii) Where there is no son or daughter and there are two or more than two son's daughters, they shall get two third share in the estate.

iii) Where there is no son and there is a daughter besides one or more than one son's daughter, the daughter shall get half share in the estate and the son's daughter, shall get the one-sixth share. That is to say, in the presence of one daughter the grand daughters, even more than one, shall get one-sixth share, which shall be divided equally between them. Same is the assertion of Ḥaḍrat 'Abdullah Ibn Mas'ūd.[575] The some rule laid down by Ibn-e-Ḥazm.[576]

iv) When there are two daughters and one or more than one grand-daughter shall not inherit, because the daughters, in accordance with the Qurā'n and Prophet's (SAW) tradition, shall receive their two-third share in the estate.

Regarding this question Ibn 'Abbas says that the directive regarding two daughters is the same as regards one daughter. Hence the tow daughters shall get half and (therefore) the grand –daughter' shall get the remainder one-sixth. But this view does not seem to be correct or authentic as already discounted in the foregoing section regarding the daughter's inheritance.

v) Where along with the son's daughter there is a grandson of the deceased and there is no son of the deceased the grandson shall make the son's daughter into a residuary and

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[574] Zayla'ī, , *Tabyīn al-Ḥaqāiq*: *Sharḥ Kanz al-Daqā'iq* vol.6, 63; Ibn Qudāmah al-Maqdasī, Al-Mughnī, vol. 6, 212; al-Dardīr, *Al-Sharḥ al-Saghīr*, vol. 4, 625; Al-Sharbīnī, Mughnī al-Muḥtāj, vol. 3 (Beirut: Dār al-Turāth al-'Arabī, n.d)16; Ibn-e-Rushd, *Bidāyat al-Mujtāhid wā Nihāyah al Muqtaṣid*, Vol. 2, 352.

[575] Ibid.

[576] Abu Muḥammad Ibn Ḥazam al-Ẓāhirī, *Al-Muḥallā*, vol.2 (Cairo: Maṭbah al-Imām, 1352A.H), 231.

the estate shall be divided between them on the principle of *"for made twice that for a female."* If the deceased had left two daughters and one grandson and one grand-daughter, in that even, after giving two-third to the daughters of the deceased, the remaining, on the principle of a male's equal to two females, shall be divided between the grand-daughter and the grandson.[577]

Ibn Mas'ūd however, differs on this question. According to him, in the presence of two daughters of the deceased, the grandson shall not make the grand-daughter into residuary, rather than the grandson shall get the entire state.

vi) Where the son of the deceased is present, the son's daughters do not inherit at all.

The son being the residuary take the entire estate because the one remote stands excluded in presence of the one closer. As against this (in the event of there being no son) a grand daughter's right in presence of a daughter does not lapse, because the daughter being sharer takes her due share, and for completing the two third for the females the grand-daughter is held entitled to the one-sixth share. Thus, the two-third fixed for the daughters (including the granddaughter) gets completed in accordance with the *Qur'ān* and the Prophet (SAW) traditions.[578]

Inheritance by Full Sister

The sister is called the full true or real sister whose parents and the parents of the deceased are the same.

A full sister's right to inheritance arises in the following situations:

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[577] Zayla'ī, , *Tabyīn al-Ḥaqāiq: Sharḥ Kanz al-Daqā'iq* vol.6, 631; Ibn Qudāmah al-Maqdasī, Al-Mughnī. vol. 6, 212; al-Dardīr, *Al-Sharḥ al-Saghīr*, vol. 4, 625; Al-Sharbīnī, Mughnī al-Muḥtāj, vol. 3(Beirut: Dār al-Turāth al-'Arabī, n.d)16 ; Ibn-e-Rushd, *Bidāyat al-Mujtāhid wā Nihāyah al Muqtaṣid*, Vol. 2, 352.

[578] Syed Sharīf Jurjāni, *Al-Sharīfīyah Sharḥ al-Sirājīyah*, 23; Abu Zahra, *Aḥkām al-Tarkāt wal Mawārīth* (Cairo: Dār al-Fikr al-'Arabī,), 39.

i) If there is no so (of however low degree) nor the father of the deceased, and only two sisters are his heirs, both of them shall get two-third share in the estate as stated in the Qur'ān:

يَسْتَفْتُونَكَ قُلِ ٱللَّهُ يُفْتِيكُمْ فِي ٱلْكَلَٰلَةِ إِنِ ٱمْرُؤٌا هَلَكَ لَيْسَ لَهُۥ وَلَدٌ وَلَهُۥٓ أُخْتٌ فَلَهَا نِصْفُ مَا تَرَكَ وَهُوَ يَرِثُهَآ إِن لَّمْ يَكُن لَّهَا وَلَدٌ فَإِن كَانَتَا ٱثْنَتَيْنِ فَلَهُمَا ٱلثُّلُثَانِ مِمَّا تَرَكَ وَإِن كَانُوٓا۟ إِخْوَةً رِّجَالًا وَنِسَآءً فَلِلذَّكَرِ مِثْلُ حَظِّ ٱلْأُنثَيَيْنِ يُبَيِّنُ ٱللَّهُ لَكُمْ أَن تَضِلُّوا۟ وَٱللَّهُ بِكُلِّ شَىْءٍ عَلِيمٌ[579]

"They ask you for a legal decision. Say: Allāh directs you concerning a 'kalālah' relation. Should a man die without a 'walad' but have a sister then for her there is one-half of the inheritance, and he would inherit from her should she die without a 'walad'. And if there are two sisters they shall have two-thirds of the inheritance (between them): and if there are brothers with sisters then for the males there is a share of two females"

The same provision shall apply to more than two sisters.

ii) The sister becomes residuary with her full brother and she shall then, get her share in accordance with the rule "male shall get the double compared to the female."

iii) If a son or the father of the deceased is not present and among the heirs there is present a sister, she shall get half of the state as provided in that of the *Qur'ān*.[580]

Here, sister means both the full as well as consanguine sister in as much as the deceased is the male.

iv) If there is a full sister along with the daughter or granddaughter, then after giving the share to the daughter or grand-daughter, the sister shall get the residue." In this connection, two different views are given below:[581]

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[579] Qur'ān, 4:176.

[580] Ibid.

[581] Zayla'ī, , *Tabyīn al-Ḥaqāiq*: *Sharḥ Kanz al-Daqā'iq* vol.6, 631; Ibn Qudāmah al-Maqdasī, Al-Mughnī, vol. 6, 212; al-Dardīr, *Al-Sharḥ al-Saghīr*, vol. 4, 625; Al-Sharbīnī, Mughnī al-Muḥtāj, vol. 3(Beirut: Dār al-Turāth al-'Arabī, n.d)16 ; Ibn-e-Rushd, *Bidāyat al-Mujtāhid wā Nihāyah al Muqtaṣid*, Vol. 2, 352.

a) The first point of view is that sisters, along with, daughters shall become residuary after the daughter and granddaughter get their shares; the sister shall take it whatever shall be the residue.

This is the view of Abdulllah bin Mas'ūd and Zaid bin Thābit. Same is the practice adopted by the four Imams.

b) The second point of view is that after giving away the share to the daughter or grand-daughter, the residue is for the made residuary only, such as (brother, nephew, uncle, uncle's son and others).

Thus, in the presence of daughter or grand-daughter the sister is absolutely no heir in the same way as in the presence of a son the sister does not get anything.[582]

The jurists who are convinced that the daughter is a residuary along with sister, base their argument on the tradition reported by Ibn Mas'ūd. "Narrated Huzaīl bin Shuraḥbīl: Abū Mūsā was asked regarding (the inheritance of) a daughter, a son's daughter, and a sister. He said, "The daughter will take one-half and the sister will take one-half. If you go to Ibn Mas'ūd, he will tell you the same." Ibn Mas'ūd was asked and was told of Abū Mūsā's verdict. Ibn Mas'ūd then said, "If I give the same verdict, I would go astray and would not be rightly-guided. The verdict I will give in this case will be the same as the Prophet did, i.e. one-half is for daughter, and one-sixth for the son's daughter, i.e. both shares make two-third of the total property; and the rest is for the sister." Afterwards we came to Abū Mūsā and informed him of Ibn Mas'ūd's verdict, whereupon he said, "So,

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[582] Kāsānī, Abū Bakr ibn Mas'ūd, *Kitāb Badā'i' al-Ṣanā'i' fī Tartīb al-Sharā'i'* vol. 5, 236; Zayla'ī, *Tabyīn al-Ḥaqāiq: Sharḥ Kanz al-Daqā'iq* vol.6, 631; Ibn Qudāmah al-Maqdasī, Al-Mughnī, vol. 6, 212; Sarakhsī, *Kitāb al-Mabsūt*, vol. 12, 216; al-Dardīr, *Al-Sharḥ al-Saghīr*, vol. 4, 625; Al-Sharbīnī, Mughnī al-Muḥtāj, vol. 3(Beirut: Dār al-Turāth al-'Arabī, n.d)16 ; Ibn-e-Rushd, *Bidāyat al-Mujtāhid wā Nihāyah al Muqtasid*, Vol. 2, 352.

do not ask me for verdicts, as long as this learned man is among you."Hence my decision shall be according to what the Prophet (SAW) has said, half is for the grand-daughter, so that the two–third may get completed, and the residue is for the sister."[583] In *Qur'ān* Allah says, "for the male is double that for a female." Thus it stands proved from this verse that Allah, in the presence of brother, not specifically states the share for the sisters, nor of brothers she becomes residue as in relationship to the deceased, they stand equal.

It is said that the brother with the sister, on the basis of the tradition narrated by Ibn 'Abbās being held as residuary will exclude the sisters. In answer to this, on behalf of the jurists in general, the Prophet's (S.A.W) tradition اجعلو الاخوات مع البنات عصبه and the above stated tradition narrated by Huzaīl bin Shuraḥbīl may be put forward, wherein sisters with daughters being held as residue have been recognised as heirs.

The unanimous view which has continuously remained in vogue is that the sister with the daughter is held to be the heir as Asbah provided the deceased is "*kalālah*" i.e. he has no son or the father existing. In case there are sister and brother, both shall inherit on the principle of "A male to get twice the share for female."[584]

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[583]Muḥammad ibn Ismā'īl ukhārī, *Saḥīḥ al-Bukhārī* (Muḥammad Muḥsin Khān (trans.), Kitāb al-Waṣāyā, vol. 4(Kazi Publications, 1979), 732.

[584] Syed Sharīf Jurjāni, *Al-Sharīfiyah Sharḥ al-Sirājīyah*, 23 ;Wahbah al-Zuḥaylī, *Al-Fiqh al-Islāmī wa Adillatuhu*, vol. 8, ed. 3rd (Damascus: Dār al-Fikr, 1989), 309; Kāsānī, Abū Bakr ibn Mas'ūd, *Kitāb Badā'i' al-Ṣanā'i' fī Tartīb al-Sharā'i'* vol. 5, 236; Zayla'ī, , *Tabyīn al-Ḥaqāiq: Sharḥ Kanz al-Daqā'iq* vol.6, 631; Ibn Qudāmah al-Maqdasī, Al-Mughnī, vol. 6, 212; Sarakhsī. *Kitāb al-Mabsūt*, vol. 12, 216; al-Dardīr, *Al-Sharḥ al-Saghīr*, vol. 4, 625; Al-Sharbīnī, Mughnī al-Muḥtāj, vol. 3(Beirut: Dār al-Turāth al-'Arabī, n.d)16; Ibn-e-Rushd, *Bidāyat al-Mujtāhid wā Nihāyah al Muqtaṣid*, Vol. 2, 352.

Inheritance by Consanguine *('Allātī)* Sister

Consanguine sister is the one who is related form father's side. The directive regarding consanguine sister of the deceased is to be found in the *Qur'ān*[585] thus, as a rule is applicable to the inheritance of full sister of the deceased so shall it be applicable to the consanguine sister of the deceased. Indeed, in the matter of inheritance the full sister have precedence over the consanguine sister; because the full sister compared to consanguine sister is more closely related to the deceased and under the principle of "nearer excludes the remote excludes the consanguine sister."

There are seven situations of consanguine sisters getting the inheritance. The five situations are the same that have been stated regarding the full sister, but two situations are in addition to those five. See these seven situations are summarized as under:

1) If the deceased left only one consanguine sister she shall get a half.[586]

2) Where no full sister of the deceased exists but there are two or more consanguine sisters, they shall be given the two-third. All the consanguine sisters shall divide thus two-third share among him. This directive is under the *Qur'ānic* permission which has already been stated regarding the full sister, which equally applies to consanguine sister.

3) The consanguine sister with two full sisters not be the heir as the full sisters take the complete two-third which is the right of the sisters; thereafter no share shall remain for the consanguine sister.

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[585] Qur'ān, 4:176.

[586] Kāsānī, Abū Bakr ibn Mas'ūd, *Kitāb Badā'i' al-Ṣanā'i' fī Tartīb al-Sharā'i'* vol. 5, 239; Zayla'ī, , *Tabyīn al-Ḥaqāiq: Sharḥ Kanz al-Daqā'iq* vol.6, 636; Ibn Qudāmah al-Maqdasī, Al-Mughnī, vol. 6, 212; Sarakhsī, *Kitāb al-Mabsūt*, vol. 12, 243; al-Dardīr, *Al-Sharḥ al-Saghīr*, vol. 4, 665; Al-Sharbīnī, Mughnī al-Muḥtāj, vol. 3(Beirut: Dār al-Turāth al-'Arabī, n.d)126; Ibn-e-Rushd, *Bidāyat al-Mujtāhid wā Nihāyah al Muqtaṣid*, Vol. 2, 376.

4) In the existence of one full sister the consanguine sister shall get one-sixth, so that the two-third may get completed. As two and more than two sisters together get two-third and the full sister having already taken her half share, the one-sixth being the residue, shall be given to the consanguine sister, so that the two third may thus be completed:

5) If, with the consanguine sister, there exists, the consanguine brother, the brother shall make her sister residue after the full sisters take their two-third the estate that is left, the consanguine brother and sister divide it between themselves on the principle of "the male having twice the share of the female".

6) In the existence of the daughter or grand-daughter of the deceased, the consanguine sisters shall become the residuary. Hence, after the daughter or granddaughter takes her share, the residue shall be taken by the consanguine sister as residuary. This is the view of the companions in general. Indeed, Ibn 'Abbās does not hold the sisters along with the daughter or grand-daughter as residuary as has already been discussed in connection with the inheritance of full sister.[587]

7) The consanguine sister like the full sister, in the existence of the son or grand-son or the father of the deceased, shall stand excluded from the inheritance. According to Imam Abu Ḥanīfah the same shall be the rule when the grandfather of the deceased exists. Besides, the consanguine sisters as well are excluded in the existence of the full brother of the deceased.[588]

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[587] Ibid.

[588] Syed Sharīf Jurjāni, *Al-Sharīfīyah Sharḥ al-Sirājīyah*, 27-28. Kāsānī, Abū Bakr ibn Mas'ūd, *Kitāb Badā'i' al-Ṣanā'i' fī Tartīb al-Sharā'i'* vol. 5, 238; Zayla'ī, , *Tabyīn al-Ḥaqāiq: Sharḥ Kanz al-Daqā'iq* vol.6, 631; Ibn Qudāmah al-Maqdasī, Al-Mughnī, vol. 6, 217; Sarakhsī, *Kitāb al-Mabsūt*, vol. 12, 218: al-Dardīr, *Al-Sharḥ al-Saghīr*, vol. 4, 625; Al-Sharbīnī, Mughnī al-Muḥtāj, vol. 3(Beirut: Dār al-Turāth al-'Arabī, n.d)16 ; Ibn-e-Rushd, *Bidāyat al-Mujtāhid wā Nihāyah al Muqtaṣid*, Vol. 2, 355.

Inheritance of Uterine (*Akhyāfī*) Brother and Sister

Uterine brothers or sisters are the brothers and sisters who are related to the deceased through the mother and not through the father. Uterine brother and sister are also include in sharer, because their shares as well are fixed in the *Qur'ān* (iv: 12)

There are four situations of uterine brother or sister getting the inheritance as under:

1) Where the issues of the deceased or the issues of his son are not there, neither is there the father nor the grand-father, but there is one uterine brother or sisters his or her share shall be the one–sixth of the estate of the deceased.

2) Where two or more uterine brothers or sisters are there, for all of them, in total, is the one-third share in the estate, which shall be divided equally among them.

3) When one uterine brother and one uterine sister is there, each of them shall get the one-sixth share (both of them shall be the equal sharers in one- third).

4) Where the uterine sister is also there with the uterine brothers, all of them shall be entitled equally in the one-third share. No distinction shall be made in the shores of male and female, as in the *Qur'ān* provided that there is no son, daughter, the son's issues or the father or grandfather of the deceased.[589]

Inheritance by Grandfather

"*Jadd*" means the real grand-father (*Jadd ḥaqīqī*) i.e., the real grandfather means that grandfather who is the father of the father of the deceased and in referring him to the

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[589] Kāsānī, Abū Bakr ibn Mas'ūd, *Kitāb Badā'i' al-Ṣanā'i' fī Tartīb al-Sharā'i'* vol. 5, 236; Zayla'ī, , *Tabyīn al-Ḥaqāiq*: *Sharḥ Kanz al-Daqā'iq* vol.6, 631; Ibn Qudāmah al-Maqdasī, Al-Mughnī, vol. 6, 212; Sarakhsī, *Kitāb al-Mabsūt*, vol. 12, 216; al-Dardīr, *Al-Sharḥ al-Saghīr*, vol. 4, 625; Al-Sharbīnī, Mughnī al-Muḥtāj, vol. 3(Beirut: Dār al-Turāth al-'Arabī, n.d)16 ; Ibn-e-Rushd, *Bidāyat al-Mujtāhid wā Nihāyah al Muqtaṣid*, Vol. 2, 352.

deceased the mother does not intervene, the grandfather is the unreal one. The unreal grandfather is not included in sharer there are situations of grandfather's inheritance.

1. Being merely the sharer
2. Being sharer and the residuary
3. Being merely the residuary

As a sharer the grandfather only shall get one-sixth share, when with him there is alive the male issue of the male issue deceased.

As sharer, shall get the one-sixth share and as residue after the shares have been given to all other sharers, shall get the residue when with him there is alive only the female issue of the deceased. That is, if some male issue of the deceased is alive, the grand-father shall not inherit as residuary.[590]

As residuary only: when no issue of the deceased exist or such issues of the issues exist or such issues of the issues exist who because of not being sharer or residuary cannot be the heir such as daughter or her daughter or are otherwise disinherited, the grand-father, then being the sole residuary shall inherit the entire estate.[591]

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[590]Ibn al-Humām al-Dīn 'Abd al-Waḥīd ibn 'Abd al-Ḥamīd, *Sharḥ Fathal-Qadīr 'alā al-Hidāya* ('Abd al-Razzāq Ghālib Mahdī (ed.), vol. 6, 298;'Alā' al-dīn Ḥaskafī, *Dur al-Mukhtār ḥāshīā Rad al-Mukhtār*, vol. 3 (Egypt, 1256), 369; Kāsānī. Abū Bakr ibn Mas'ūd, *Kitāb Badā'i' al-Ṣanā'i' fī Tartīb al-Sharā'i'* vol. 5. 236; Zayla'ī, , *Tabyīn al-Ḥaqāiq*: *Sharḥ Kanz al-Daqā'iq* vol.6, 631; Ibn Qudāmah al-Maqdasī. Al-Mughnī, vol. 6, 212; Sarakhsī. *Kitāb al-Mabsūt*, vol. 12, 216; al-Dardīr, *Al-Sharḥ al-Saghīr*, vol. 4, 625; Al-Sharbīnī, Mughnī al-Muḥtāj, vol. 3(Beirut: Dār al-Turāth al-'Arabī, n.d)16 ; Ibn-e-Rushd, *Bidāyat al-Mujtāhid wā Nihāyah al Muqtaṣid*, Vol. 2, 352.

[591] Shaikh al-Niẓām, Fatāwā 'Alamgīrī: vol. 4, 403.

Inheritance by Grand-Mother

In Arabic the word *Jaddah* (grand-mother) is spoken for both the paternal grandmother and the maternal grandmother; of howsoever high in degree may be. They are included in sharer. There are three situations of grand-mother's inheritance.

1) Maternal grand-mother and paternal grand-mother shall get one-sixth of the estate either they be one or several provided they shall be true and belong to the same degree.

2) In the existence of the mother all grand-mother of every kind shall stand excluded.

3) Maternal grand-mother shall get excluded by the father and so by the grand-father. Indeed, the father's mother shall not be excluded and shall get the inheritance with the grandfather.[592]

The Doctrine of *'Awl*

The literal meaning of *'Awl* is leaning towards tyranny and excesses. In the law of Inheritance the doctrine of 'awl applies when, after the allocation of shares (*aṣḥāb al-furūḍ)*, the total sum of the fixed *Qur'ānic* shares is greater than one. All the shares are decreased proportionately. The doctrine of *'awl* involves increasing the common denominator of all the fractional shares to the same value as the sum of all the numerators. The numerators are left unaltered. Thus the total sum of the fractional shares is now one and each share has been proportionally reduced.[593]

The doctrine of *'awl* was established during the Caliphate of 'Umar ibn al-Khaṭṭāb. During his time it so happened that in one case the shares of inheritance of *aṣḥāb al-farāiḍ* were exceeding the unit of the estate. He consulted the companions. Ḥaḍrat 'Abbās

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[592] Al-Sarakhsī, *Al-Mabsūt*, vol.12, 165.
[593] Al Jurjāni, p.54, Al Haskafī, (Cairo, 1327A.H.) vol. v. p. 555.

bin 'Abd al- Muṭṭalib advised that the shares be increased. All other companions agreed with him and none of them objected.[594] Ibn Qudāmah in his al-Mughnī writes, "The opinion of applying 'awl has been adopted by all Muslim scholars except Ibn 'Abbās and a small group that held another opinion..."[595] We do not know at the present time anyone who adopts the opinion of Ibn 'Abbās. We do not know of any disagreements among the jurists of the Islāmic states regarding applying *'awl*. All perfect praise to Allāh."[596]

Imām Sarakhsī said, "All these heirs *Dhawī al-furūḍ* are in their capacity of entitlement, equal in degree. Thus, it is essential to observe equality among them. If the estate is sufficient to meet their respective rights, all of them shall be given their full shares, the method of 'Awl shall be adopted. A reduction in the shares of all of them, proportionate to their shares, shall be effected. No one shall be totally deprived.[597]

Ḥaḍrat ibn 'Abbās, who after the death of Ḥaḍrat 'Umar, differed on the question of 'increase', takes the stand in support of his point of view that the *Ṣāḥib al farḍ* who is ordered by the *Qur'ānic* text to be given a share, in any case whether a large one or in other circumstances a reduced one, is a preferential *Ṣāḥib al farḍ*. Allāh thus gives him the precedence. Then that *Ṣāḥib al farḍ* who, after being provided with the fixed share is, under the *Qur'ānic* text in other circumstances, left to receive an unfixed share, if any, is a weak *Ṣāḥib al farḍ* and is not given any precedence in inheritance. For instance, the husbands or the wives in the event of there being an issue have their shares reduced from one-half and one-fourth to one-fourth and one-eighth, that is, they are not totally deprived of their fixed shares. Hence, the latter ones shall be regulated in the division of the estate.

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[594] Yūsuf Mūsā, 320.
[595] Muḥammad bin 'Alī Ibn Abi Ṭālib, 'Alī bin al-Ḥassan, Zain al 'Ābidīn and 'Aṭā ibn Abi Rabāḥ support him.
[596] Ibn Qudāmah al-Maqdasī, Al-Mughnī, vol. 6, 239.
[597] Al- Sarakhsī, Al-Mabsūṭ, vol. 12, 161-163.

Thus, according to the assertion of Ibn 'Abbās, the *Dhawī al-furūḍ*, whose shares, because of the presence of other heirs, get reduced from fixed shares to another fixed shares, shall be given the precedence, such as husband and wife, father and mother. The *Dhawī al-furūḍ* who, in some circumstances, are deprived of their fixed shares and left to inherit unfixed shares of, those who stand totally deprived of their shares, shall be relegated such as daughters, sisters, etc., because they are *Ṣāḥib al farḍ* in some circumstances and 'Aṣbāt in others. Hence the first kind of *Dhawī al-furūḍ*, shall be given their fixed shares, and the shares of the other kind of *Dhawī al-furūḍ*, shall be reduced in as much as the *Dhawī al-furūḍ* are always given precedence over the 'Aṣbāt.[598] Ibn Ḥazm has also followed the view of Ibn 'Abbās.[599]

The Ḥanafīs opine that the above contention say that all *Dhawī al-furūḍ* of whatever category or degree are equal in their entitlement i.e. the *Farḍīyat* capacity. One has no preference over the other because the rights of all of them have been ordained through the Qur'ān. Hence, all of them shall have equal rights and everyone of them shall get his full share, if possible. If the shares of *Dhawī al-furūḍ*, as ordained cannot be fully met from the estate, the shares of all of them shall be proportionately reduced. To prove the futility if the difference between *Dhawī al-furūḍ* and 'Aṣbāt by ibn 'Abbās, the Ḥanafīs advance the contention that 'Aṣbāt is the strongest basis of inheritance. Thus, putting one into loss or depriving him on this basis when he is also *Ṣāḥib al farḍ* cannot be valid. Rather, the loss that is occasioned due to the insufficiency of the estate ought to be borne, in

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[598]Kāsānī, Abū Bakr ibn Mas'ūd, *Kitāb Badā'i' al-Ṣanā'i' fī Tartīb al-Sharā'i'* vol. 5, 242; Zayla'ī, *Tabyīn al-Ḥaqāiq: Sharḥ Kanz al-Daqā'iq* vol.6, 639;; Sarakhsī, *Kitāb al-Mabsūt*, vol. 12, 216; al-Dardīr, *Al-Sharḥ al-Saghīr*, vol. 4, 641; Al-Sharbīnī, Mughnī al-Muḥtāj. vol. 3(Beirut: Dār al-Turāth al-'Arabī, n.d)131 ; Ibn-e-Rushd, *Bidāyat al-Mujtāhid wā Nihāyah al Muqtaṣid*, Vol. 2, 352; Qāḍī Khān, Fakhr al-Dīn al-Ḥassan ibn Manṣūr al- Uzjānī al-Farghānī, *Fatāwā Qāḍī Khān* vol. 2 (Būlāq, 1310), 321.

[599] Ibn Ḥazm, Al-Muḥallā, vol.12, 33.

proportion, by all the entitled ones through the doctrine of 'Awl. This is what appears to be just and proper. It is only the inheritance of the *Dhawī al-furūḍ* wherein the question of 'Awl arises, because 'Aṣbāt inherit only after *Dhawī al-furūḍ* have been given their shares. The necessity of 'awl arises because the estate does not suffice for the *Dhawī al-furūḍ* entirely. In such situation, the question of giving any share to 'Aṣbāt does not arise all.[600]

In a nutshell the opinion of ibn 'Abbās, apparently from the juristic point of view, deserves attention. He believes in giving preferential treatment to some of the *Dhawī al-furūḍ,* in accordance with a principle enunciated by him. But, the method of determining the stronger and the weaker among the *Dhawī al-furūḍ* as described by ibn 'Abbās or as stated by ibn Ḥazm, gets no support from the *Qur'ān* and the Sunnah.

3.2 Dhawī al 'Aṣbah (Residuaries)

The literal meaning of *'Aṣbah* is encircling an object by another object form every side: it also means 'back'. As a man's semen is supposed to be grown form near the back bone that relative is technically called *'Aṣbah* who in directly related through a male with the deceased and who after giving away the defined shares to the sharers, is entitled to the residue of the estate in the law of inheritance'.[601]

3.2.1 *'Aṣbah* Nasabī

There are three kinds of *'Aṣbah* Nasabī as detailed below:

1. *'Aṣbah bi Nafsihī*

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[600]Kāsānī, Abū Bakr ibn Mas'ūd, *Kitāb Badā'i' al-Ṣanā'i' fī Tartīb al-Sharā'i'* vol. 5, 242; Zayla'ī, , *Tabyīn al-Ḥaqāiq: Sharḥ Kanz al-Daqā'iq* vol.6, 639;; Sarakhsī, *Kitāb al-Mabsūt,* vol. 12, 216; al-Dardīr, *Al-Sharḥ al-Saghīr,* vol. 4, 641; Al-Sharbīnī, Mughnī al-Muḥtāj, vol. 3(Beirut: Dār al-Turāth al-'Arabī, n.d)131 ; Ibn-e-Rushd, *Bidāyat al-Mujtāhid wā Nihāyah al Muqtaṣid,* Vol. 2, 352; Qāḍī Khān, Fakhr al-Dīn al-Ḥassan ibn Manṣūr al- Uzjānī al-Farghānī, *Fatāwā Qāḍī Khān* vol. 2 (Būlāq, 1310), 321.

[601]W. Al-Zuḥaylī, *Al-Fiqh al-Islāmī wa Adillatuhu,* 319.

'Aṣbah in his own right is that relative who is male and whose relationship with the deceased is without an intervening female. i.e., his relationship is not through a woman, such as the deceased's son or father because their residue stands established directly with the deceased on account of their relationship. Relatives of four degrees are included in *Aṣbah bi Nafsihī* of whom some have preference over the others. Serially they are as under:[602]

i. The persons who themselves are the offsprings of the deceased sons, grandsons, great grandsons, one after the other, of howsoever low in degree.

ii. The persons of whom the deceased himself is the offspring father, grand-father, great grand-father, one above the other, of howsoever high in degree.

iii. The persons who are the offsprings of the grandfather of the deceased the true uncle, consanguine uncle, the son of the true uncle, one after the other of howsoever low in degree.

The above agreement or order is in accordance with their entitlement according to the point of view of Abū Ḥanīfah. According to his disciples Abu Yūsuf and Shaiybānī however, there is a difference in the aforesaid arrangement or order, that is, in case the residuary are of the second category as stated above but instead of the father of the deceased.' Rather, in the presence of the brothers and sisters of the deceased the grandfather gets the share equal to that of a brother of the deceased. In other words,

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[602]Ibn al-Humām al-Dīn 'Abd al-Waḥīd ibn 'Abd al-Ḥamīd, *Sharḥ Fathal-Qadīr 'alā al-Hidāya* ('Abd al-Razzāq Ghālib Mahdī (ed.), vol. 6. 298;'Alā' al-dīn Ḥaskafī, *Dur al-Mukhtār hāshīā Rad al-Mukhtār*, vol. 3 (Egypt, 1256), 369; Kāsānī, Abū Bakr ibn Mas'ūd, *Kitāb Badā'i' al-Ṣanā'i' fī Tartīb al-Sharā'i'* vol. 5. 236; Zayla'ī, , *Tabyīn al-Ḥaqāiq: Sharḥ Kanz al-Daqā'iq* vol.6, 631; Ibn Qudāmah al-Maqdasī, Al-Mughnī, vol. 6, 212; Sarakhsī, *Kitāb al-Mabsūt*, vol. 12, 216; al-Dardīr, *Al-Sharḥ al-Saghīr*, vol. 4. 625; Al-Sharbīnī, Mughnī al-Muḥtāj, vol. 3(Beirut: Dār al-Turāth al-'Arabī, n.d)16; Ibn-e-Rushd, *Bidāyat al-Mujtāhid wā Nihāyah al Muqtaṣid*, Vol. 2, 352.

according to Shaiybānī the heirs of the second and third degree become the heirs together in the presence of the grandfather.[603]

The estate that is left over after giving the fixed shares to the sharers, the above stated four grades of heirs with the above exception shall be the heirs of deceased respectively.

If any of the aforestated three degrees of heirs is not present the true uncle of the father, the consanguine uncle of father, the son of the true uncle of the father, the son of the consanguine uncle of the father, of howsoever low in degree, shall in that order be the heirs, if they also are not present, the true uncle of the grand-father and their male issues, of the grand-father and their male issues of howsoever low in degree shall in that order be included in the order be included in the first category of *'Aṣbāt, Aṣbah bi Nafsihī.*

The principle is that the heir who is closest to the deceased shall get priority in getting the estate, as the son over the father or the grandfather of the heirs the one, whether male or female, who has two relationships with the deceased, shall get preference over the heirs who have only one relationship with deceased. Thus, the consanguine brother the true uncle shall get preference over the consanguine uncle. The same rule shall be followed in case of the uncle of the father and the uncle of grandfather.[604]

'Aṣbah bil Ghaīr

He is that relative who because of the presence of another heir, because the *'Aṣbah* technically, in the law of inheritance *'Aṣbah bil Ghaīr'* is a female who assumes the capacity of residuary and that another residuary is her partner. The females who become the residuary because of a male partner are four in number.

i. Daughter

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[603] Syed Sharīf Jurjāni, *Al-Sharīfīyah Sharḥ al-Sirājīyah* (Karachi: Qur'ān Mahal), 32; Ibn 'Ābidīn, *Radd al-Muḥtār 'alā al-Durr al-Mukhtār Sharḥ Tanwīr al-Abṣār*. vol. 6 (Dār al-Kutub al-'Ilmiyya, 2003), 517.
[604] Al-Zuḥaylī, *Al-Fiqh al-Islāmī wa Adillatuhu*, vol. 8. 319.

ii. Son's Daughter

iii. Sister

iv. Consanguine sister, if there is none to turn them into residuary, these females get their shares as sharers. As Allāh says in *Qur'ān* (iv:ii) prove that the said last two (real sister and consanguine sister) to be the residuary. Excepting them, no other female can become a residuary.

3.2.2 'Aṣbah Ma'al - Ghaīr

She is that female relative, who becomes the residuary only along with other female relative, who is, however, not her partner. Thus, the true or consanguine sister of the deceased becomes a residuary only with the daughter or son's daughter of the deceased, whether they are one or more.[605] The difference between *'Aṣbah ma'al Ghair'* and the *'Aṣbah bil Ghaīr'* is that in *'Aṣbah bil Ghair'* another ghair is himself and *'Aṣbah bi Nafsihī'*. That is why, the 'Aṣbāt passes or extends to the women, in 'Aṣbah ma'al Ghaīr another (*Ghaīr*) is not himself an *'Aṣbah bi Nafsihī*; rather the *'Aṣbat'* is created in her being joined with the other.[606]

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[605] Shamsuddīn al-Sarakhsī, *Al-Mabsūt*, vol.xxix, 151-158.

[606] Ibn al-Humām al-Dīn 'Abd al-Waḥīd ibn 'Abd al-Ḥamīd, *Sharḥ Fatḥal-Qadīr 'alā al-Hidāya* ('Abd al-Razzāq Ghālib Mahdī (ed.), vol. 6, 298;'Alā' al-dīn Ḥaskafī, *Dur al-Mukhtār ḥāshīā Rad al-Mukhtār*, vol, 3 (Egypt, 1256), 369; Kāsānī, Abū Bakr ibn Mas'ūd, *Kitāb Badā'i' al-Ṣanā'i' fī Tartīb al-Sharā'i'* vol. 5. 236; Zayla'ī, , *Tabyīn al-Ḥaqāiq: Sharḥ Kanz al-Daqā'iq* vol.6, 631: Ibn Qudāmah al-Maqdasī, Al-Mughnī, vol. 6, 212; Sarakhsī, *Kitāb al-Mabsūt*, vol. 12, 216; al-Dardīr, *Al-Sharḥ al-Saghīr*, vol. 4, 625; Al-Sharbīnī, Mughnī al-Muḥtāj, vol. 3(Beirut: Dār al-Turāth al-'Arabī, n.d)16 ; Ibn-e-Rushd, *Bidāyat al-Mujtāhid wā Nihāyah al Muqtaṣid*, Vol. 2, 352.

3.2.3 General Rules of Succession of Residuary

After giving the fixed shares to sharers, the estate that is left over shall belong to the *'Aṣbat*. The prophet's saying is that the estate left over, after giving to sharers, their shares is for the male-relatives closer to the deceased.[607]

a) Closer has Preference over the Remote

From among the residuary the one who in relationship is closer to the deceased, shall have, in the matter of inheritance, precedence over all. Thus, in the above-stated four grades, foremost precedence is given to those who are the offsprings of the deceased i.e. his son, daughter his son's son and daughter of whosoever low in degree. Thereafter is the grade of the root of the deceased, such as his father who, in the presence of the daughter (and in the absence of the son), is the residuary as well as the sharer. After the father, according to Imam Abu Ḥanīfah, the true paternal grand-father is the substitute of the father. Thereafter is the consanguine brother, then is the son of the true brother and then is the son of consanguine brother, of howsoever low in degree". Grading the brothers later than the father's father is in accordance with the opinion of Imam Abu Ḥanīfah, whereas the Sāhibaīn placing the grand-father as co-shares with the brother. Same is the rule of conduct of Imam Shāfiī'. The last grade, in accordance with the arrangement or order of inheritance, on the basis of residuaries, is of the offspring of the father's father, as the true uncle, then the consanguine uncle thereafter the son of the true uncle, then the son of the consanguine uncle, of however low in degree, thereafter the

[607]Muslim ibn al-Ḥujjāj al-Qushayrī, t. 'Abd al-Mu'ṭī Amīn Qal'ajī *Sahīh Muslim*, Kitāb al-Farāiḍ (Dār al-Ghad al-'Arabī, 1988) Ḥadīth: 3928.

uncle of the father, then his son, thereafter the uncle of the father's father, then his son and so on.

As has been stated above, the son respecting his rights in the estate has preference over the father on the basis of residuaries. The reason being that the son is the offspring, the branch (*far'*) and the father is the root (*aṣl*) of the deceased. The relation of the "branch" with the deceased is stronger than that of the 'root'. The issues of the son have preference over the father in as much as the basis of their right as well is the same the son having preference over the father, has in principle the same preference as the 'son' having preference over the "grandson".[608]

Thus the abovestated grades, if any of the residuaries of the first grade is present of however low in degree he may be, no residuary of the second grade shall get any inheritance from the deceased. Likewise, if there is any residuary of the second grade shall get any inheritance from the deceased. Likewise, if there is any residuary of the second grade shall get any inheritance from the deceased.[609] Likewise, if there is any residuary of the second grade of howsoever high in degree he may be excluded from all the residuaries of the third grade and so on. Here it should be borne in mind that the said arrangement or order is based on residuary of the heirs, who are mentioned in the above gradation, if any one of them is sharer as well, e.g the father of the deceased his right as

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[608]'Alā' al-Dīn al-Ḥaṣkafī, Al-Dur al-Muntaqā, vol. 4, 564.

[609]Ibn al-Humām al-Dīn 'Abd al-Waḥīd ibn 'Abd al-Ḥamīd, *Sharḥ Fatḥal-Qadīr 'alā al-Hidāya* ('Abd al-Razzāq Ghālib Mahdī (ed.), vol. 6, 298;'Alā' al-dīn Ḥaskafī, *Dur al-Mukhtār ḥāshīā Rad al-Mukhtār*, vol, 3 (Egypt, 1256), 369; Kāsānī, Abū Bakr ibn Mas'ūd, *Kitāb Badā'i' al-Ṣanā'i' fī Tartīb al-Sharā'i'* vol. 5, 236; Zayla'ī, , *Tabyīn al-Ḥaqāiq: Sharḥ Kanz al-Daqā'iq* vol.6, 631; Ibn Qudāmah al-Maqdasī, Al-Mughnī, vol. 6, 212; Sarakhsī, *Kitāb al-Mabsūt*, vol. 12, 216; al-Dardīr, *Al-Sharḥ al-Saghīr*, vol. 4, 625: Al-Sharbīnī, Mughnī al-Muḥtāj, vol. 3(Beirut: Dār al-Turāth al-'Arabī, n.d)16; Ibn-e-Rushd, *Bidāyat al-Mujtāhid wā Nihāyah al Muqtaṣid*, Vol. 2, 352.

sharer is superior, district and separate by itself. However where a sharer is entitled to get the estate as residuaries his right is determined in the third grade assume with grandfather the states of heirs mention in the second grade.[610]

b) **Preference to Stronger in Relationship**

Those of *'Aṣbāt* who are of equal grade the one who has stronger relationship shall be entitled to the estate the rest shall be included. For instance, the true and the consanguine brother has preferential entitlement over the son of the true brother in as much as the consanguine brother is closed to the deceased compared to the son of the true brother. Similarly, the son of the true brother is of higher rank. Than that of the son of consanguine brother because he has two relationships though in grade both are equal. Similarly the true uncle of the deceased has preference over the consanguine uncle.[611]

c) **Presence among Several Kinds of *'Aṣbāt***

If several kinds of residuary are present at the same time, some of whom are *'Aṣbāt binafsihī*, some are *'Aṣbāt bil ghaīr* and some are *'Aṣbāt ma'al Ghair*, the preference shall be given to that 'Aṣbāt who is user to the deceased. For instance a person leaves behind his daughter, a true sister, and a son of consanguine brother; the daughter shall get the other half and the son of the consanguine brother shall be excluded, because the sister

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[610]Al-Zuḥaylī, *Al-Fiqh al-Islāmī wa Adillatuhu*, vol. 8, 320.

[611]Ibn Qudāmah al-Maqdasī, Al-Mughnī, vol. 6, 224; Ibn al-Humām al-Dīn 'Abd al-Waḥīd ibn 'Abd al-Ḥamīd, *Sharḥ Fatḥal-Qadīr 'alā al-Hidāya* ('Abd al-Razzāq Ghālib Mahdī (ed.), vol. 6, 312;'Alā' al-dīn Ḥaskafī, *Dur al-Mukhtār ḥāshīā Rad al-Mukhtār*, vol, 3 (Egypt, 1256), 375; Kāsānī, Abū Bakr ibn Mas'ūd, *Kitāb Badā'i' al-Ṣanā'i' fī Tartīb al-Sharā'i'* vol. 5, 242; Zayla'ī, , *Tabyīn al-Ḥaqāiq: Sharḥ Kanz al-Daqā'iq* vol.6, 639; Sarakhsī, *Kitāb al-Mabsūt*, vol. 12, 216; al-Dardīr, *Al-Sharḥ al-Saghīr*, vol. 4, 641; Al-Sharbīnī, Mughnī al-Muḥtāj, vol. 3(Beirut: Dār al-Turāth al-'Arabī, n.d)131;Ibn-e-Rushd, *Bidāyat al-Mujtāhid wā Nihāyah al Muqtaṣid*, Vol. 2, 352; Qāḍī Khān, Fakhr al-Dīn al-Ḥassan ibn Manṣūr al- Uzjānī al-Farghānī, *Fatāwā Qāḍī Khān* vol. 2 (Būlāq, 1310), 321.

is closer to the deceased than the son of the consanguine brother likewise, if there is a son of the brother and the uncle, the son of the brother shall get the entire estate and the uncle shall be excluded on the basis of the rule "Nearer excluded the remote."

3.2.4 Rule of Distribution among Residuaries

If residuaries group is made up of individuals of the same status, the members of the group shall get the estate per capital and not per strip (per head not per root). For instance, a person dies and leaves behind one son from one brother and ten sons from one brother and ten sons from another brother. The estate shall be divided into eleven equal shares and one share be given to each of the nephews. The principle of representation shall not be followed and the estate shall not be followed and the estate shall not be divided into two: One half being given to the son of one brother and other half equally divided among the ten sons of other brother. This is the rule and practice followed by all the Sunnī schools.[612]

Basis of the Doctrine

According to the Ḥanafī jurists, in the non-existence of *'Aṣbah Nasabī* and in the event of these being some property of the deceased left out as the residue after giving the fixed shares to sharers, the same shall be divided proportionately among the sharer except the spouse. If, however, there is only the husband or the wife as sharer he or she, as the case

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[612] Ibn Qudāmah al-Maqdasī, Al-Mughnī, vol. 6, 224; Ibn al-Humām al-Dīn 'Abd al-Waḥīd ibn 'Abd al-Ḥamīd, *Sharḥ Fatḥal-Qadīr 'alā al-Hidāya* ('Abd al-Razzāq Ghālib Mahdī (ed.), vol. 6, 312;'Alā' al-dīn Ḥaskafī, *Dur al-Mukhtār ḥāshīā Rad al-Mukhtār*, vol, 3 (Egypt, 1256), 375; Kāsānī, Abū Bakr ibn Mas'ūd, *Kitāb Badā'i' al-Ṣanā'i' fī Tartīb al-Sharā'i'* vol. 5, 242; Zayla'ī, , *Tabyīn al-Ḥaqāiq: Sharḥ Kanz al-Daqā'iq* vol.6, 639;; Sarakhsī, *Kitāb al-Mabsūt*, vol. 12, 216; al-Dardīr, *Al-Sharḥ al-Saghīr*, vol. 4, 641; Al-Sharbīnī, Mughnī al-Muḥtāj, vol. 3(Beirut: Dār al-Turāth al-'Arabī, n.d)131 ; Ibn-e-Rushd, *Bidāyat al-Mujtāhid wā Nihāyah al Muqtaṣid*, Vol. 2, 352; Qāḍī Khān, Fakhr al-Dīn al-Ḥassan ibn Manṣūr al- Uzjānī al-Farghānī, *Fatāwā Qāḍī Khān* vol. 2 (Būlāq, 1310), 321.

may be, shall get the said residue of the case may be, shall be made applicable to them, provided there is none of the sharers residuaries or distant kindred. According to the Ḥanafīs, the doctrine of Return is applied only to *Dhawī al Furūḍ Nasabī* and not to *Dhawī al Furūḍ* Sababī (i.e., husband and wife) because they, after taking other share of property, except when none exists even from amongst the distant kindred.[613] This is the opinion of Ḥaḍrat 'Ali indeed, according to Ḥaḍrat Zaid bin Thābit, after giving to the sharer, their fixed Qur'ānic shares the residue of the estate shall not be returned to them (the sharer). It shall, according to him belongs to the Public Treasury.

'Urwah, Imām Zuhrī, Imām Mālik and Imām Shafiī'; too in pursuance of the assertion of Zaid bin Thābit, do not approve of the doctrine of Radd.[614] However, to most of the Shafiī' the rule is that if the public treasury is not properly managed, the residue of the estate is to be returned to sharer. Proportionate to their shares. It is stated from Ḥaḍrat 'Abdullah Ibn 'Abbās that no 'Return' shall be made to the husband and the wife and to the grandmother. But, according to Ḥaḍrat Uthmān the 'Return' shall be made to the husband and the wife as well. According to him its basis is (with increase there is the decrease)''. That is, as there is decrease through *'Awl* in the shares of the husband and the wife in the same manner they are entitled to the increase as well. Same is the assertion of Jabir b. Yazid'.

Argument opposed to the "Doctrine of Radd", advance the argument in support of their contention that God has expressly fixed shares of sharer in the Qur'ān. No one therefore,

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[613] Syed Sharīf Jurjāni, *Al-Sharīfiyah Sharḥ al-Sirājīyah*, 74; 'Abdullab b. Maḥmūd b. Mawdud, *Al-Ikhtīyār lī t'alīl al-Mukhtār*, 99;.Ibn 'Ābidīn, *Radd al-Muḥtār 'alā al-Durr al-Mukhtār Sharḥ Tanwīr al-Abṣār* , vol. 6, 517.

[614] Al-Dardīr, *Al-Sharḥ al-Saghīr*, vol. 4, 641; Al-Sharbīnī, Mughnī al-Muḥtāj, vol. 3(Beirut: Dār al-Turāth al-'Arabī, n.d)131 ; Ibn-e-Rushd, *Bidāyat al-Mujtāhid wā Nihāyah al Muqtaṣid*, Vol. 2. 352;

has the right to increase their shares and, thus, after giving them their fixed shares they cannot be held to be entitled to the residue of the estate, which shall belong to the public treasury, as it happens in the case where a man dies without leaving any heir, the entire estate becomes the property of the Public Treasury. As the rule applies to a 'whole', they assert, it shall equally apply to a 'part'. That is, whatever is the dictate for the whole; the same shall be the dictate for the part.[615]

Argument supporting the doctrine those who favor "the doctrine of Radd" argue both from the *Qur'ānic* verse and the prophet's tradition. In the *Qur'ānic* verse (VIII: 75) Allah says, "***But kindred by blood hare prior the right against each other.***" It proves the right of taking the inheritance by the kindred by blood. The verses of inheritance (IV: 11, 12) also prove for some specified kindred by blood their fixed shares in the estate of the deceased. Hence, as far as possible, both the verses shall be acted upon, in as much as that, at first, according to the verses of inheritance, their fixed share are given to them and in the event of there being no other kindred by blood they, on the basis of the other verse, be held entitled to the remainder estate. That is why; no return is made to the husband or wife because there is no relationship by blood between them. Besides, those who approve of the doctrine of 'Return' also argue from the tradition of the Holy Prophet stated by 'Umr Ibn Shu'aib". A woman who had been imprecated by her husband (and thus be predated by *lī'ān* gave birth to a son whose pedigree got established from the mother

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[615]Ibn al-Humām al-Dīn 'Abd al-Waḥīd ibn 'Abd al-Ḥamīd, *Sharḥ Fatḥal-Qadīr 'alā al-Hidāya* ('Abd al-Razzāq Ghālib Mahdī (ed.), vol. 6, 312;'Alā' al-dīn Ḥaskafī, *Dur al-Mukhtār ḥāshīā Rad al-Mukhtār*, vol. 3 (Egypt, 1256), 375; Kāsānī, Abū Bakr ibn Mas'ūd, *Kitāb Badā'i' al-Ṣanā'i' fī Tartīb al-Sharā'i'* vol. 5, 242; Zayla'ī, *Tabyīn al-Ḥaqāiq: Sharḥ Kanz al-Daqā'iq* vol.6, 639; Sarakhsī, *Kitāb al-Mabsūt*, vol. 12, 216; al-Dardīr, *Al-Sharḥ al-Saghīr*, vol. 4, 641; Al-Sharbīnī, Mughnī al-Muḥtāj, vol. 3 (Beirut: Dār al-Turāth al-'Arabī, n.d)131 ; Qāḍī Khān, Fakhr al-Dīn al-Ḥassan ibn Manṣūr al-Uzjānī al-Farghānī, *Fatāwā Qāḍī Khān* vol. 2 (Būlāq, 1310), 321.

when he (the son) died, he left behind nothing there except his mother. The Prophet held the mother to be entitled to the entire estate left by her son.[616] The directive of the Prophet (SAW) regarding giving away the entire estate to the mother is a proof of the validity of the doctrine of "Return" as the mother's share, in the circumstance, is fixed in the *Qur'ān* as one-third, and she would not have got the residue, except by Radd.[617] Further it is there in the tradition that the Prophet (SAW) said. "The woman shall inherit the entire estate left behind by her *laqīt*, (the child lying on the way having been picked up and maintained by her and *'Atīq*, (the slave who must have been set at liberty by the woman) and the son whose pedigree is denied by the father through imprecation (*lī'ān*).[618] Imām Sarakhsī has discussed these matters quite elaborately. He writes that Ḥaḍrat 'Alī ibn abī Tālib has said that after the fixed shares in the estate have been distributed among the sharers, if there is any residue and no residuary of the deceased exists, leaving out the husband and wife, the residue shall be distributed among the sharers according to their respective shares.[619] It is stated from 'Abdullah bin Mas'ūd that, according to him, excepting the six persons to whom there shall be no 'Return' of the residue.[620]

In Zaid bin Thābit's opinion after sharers have taken away their fixed shares, the residue of the property, in the absence of residuary shall not be divided among them. Rather, the

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[616]Abū Dā'ūd Sulaymān ibn al-Ash'ath al-Sijistānī, t. 'Izzat 'Ubayd Da''ās and 'Ādil Sayyid, *Sunan Abī Dā'ūd* Kitāb al-Waṣāyā, Bāb fī al-Rajul Yūqifu al-Waqf (Dār Ibn Ḥazm, 1997) Ḥadīth: 200.

[617] Shamsuddīn al-Sarakhsī, Al-Mabsūt, vol.xxix, 192.

[618]Abū Dā'ūd Sulaymān ibn al-Ash'ath al-Sijistānī, t. 'Izzat 'Ubayd Da''ās and 'Ādil Sayyid, *Sunan Abī Dā'ūd* Kitāb al- Farāid, Ḥadīth: 200.

[619]Shamsuddīn al-Sarakhsī, *al-Mabsūt*, 193-4; 'Abdullab b. Maḥmūd b. Mawdud, *Al-Ikhtīyār lī t'alīl al-Mukhtār*, 99.

[620] Husband, Wife, The daughter of the deceased when with her there is the grand-daughter, The true sister when with her there is the consanguine (*'allātī*) sister, The mother when with her there are issues. Grandmother when she is with some share. Same is the view of Imām Aḥmad bin Ḥanbal. 'Abdullab b. Maḥmūd b. Mawdud, *Al-Ikhtīyār lī t'alīl al-Mukhtār*, 99.

Public Treasury shall be entitled to it. A narrative, in accordance with the same, is also stated form Ibn 'Abbās, but the accurate assertion of Ibn 'Abbās is that, excepting the husband and wife and the grandmother, the doctrine of Return shall be applied to other sharers.[621]

Ḥanafī's basis of the Doctrine of "Radd" as is evident from the above discussion, the Ḥanafī's base this doctrine the verse[622] and the traditions of the Holy Prophet (SAW), as referred above. Hence those who have no womb relationship is made to them. Consequently, no 'Return' is made to the husband and wife as they have basically through womb. The distant kindred shall therefore, have precedence over the public treasury, likewise the sharer (excepting the husband and the wife), because of womb, shall have precedence over the public. Treasury in the residue of the estate, if there is no residuary.[623] Ḥanbalī's have the same opinion.[624]According to Mālikī's it is not valid. In the event of there being no residuary the residue of the estate shall be the property of the government Treasure, whether the public treasury is managed or unmanaged. Distant kindred shall have no share. However, according to the viewpoint of the post-classic Mālikī jurists, in the event of Public treasury not being managed, it shall be valid to make the return of the residue to sharer.[625]According to Imam Shāfiī' as the estate, in the event of there being no sharer and residuary is held to be the property of Government Treasury, also, in the event of non- existence of residuary and after giving away the fixed shares to sharers, the residue of the estate shall be held to be the property of the public treasury,

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[621]Ibid.
[622] Qur'ān, 8:75.
[623] Al-Sarakhsī, *al-Mabsūt*, 193-4.
[624] 'Abdullab b. Maḥmūd b. Mawdud, *al-Ikhtīyār lī t'alīl al-Mukhtār*, 99.
[625] Ibn-e-Rushd, *Bidāyat al-Mujtāhid wā Nihāyah al Muqtaṣid*. Vol. 2. 352.

provided it is managed properly under the control of a Ruler. If it is not so, according to Shāfiī' group of *Ahl al tanzīl* the principle of 'Return' with the exception of husband and wife, among the *Dhawī al- Furūḍ Nasabī* do no exit at all and there is no residuary too, the same shall be divided among distant kindred in the absence of a properly managed public treasury. But according to Shāfiī' the "Return cannot be made to sharer." The public treasury shall have the right over the residue of the estate (which shall be spent on the general welfare of the Muslims). Even if the Public treasury is not possession of the property so left, he shall himself spend it on the affairs conductive to public good.[626] Those who do not approve of the principle of Radd, inculding Imam Mālik and Imam Shāfiī' their basic argument is that Allāh has fixed in the *Qur'ān* the shares of sharer. As their shares are fixed, any increment there on shall be forbidden as it amounts to going beyond the prescribed limit, for which there is a severe denouement for those who exceed the limits as has been said by Allah himself at the end of the verse (iv: 14), relating to inheritance. But, according to this writer, it shall be wrong to say that giving to sharer the reside of the estate through 'Return' amounts to exceeding the prescribed limit, because the manner in which the fixed shares are decreased through *'Awl* which stands proved from *Ijma'*, in the same manner the fixed shares may also be increased. Besides, the verses of inheritance (iv: 11, 12) fixing the shares of sharers undoubtedly establish the right to a fixed share in the estate for each of them, yet in the event of these being no residuary the dictates of there being no residuary the dictates of the *Qur'ān* are implemented in the manner that the shares under verses[627] and then whatever is left is

[626]Al-Feroz 'Ābādī, *al- Muhadhdhab*, vol. 2 (Cairo: Maṭba Muṣṭafā al-Bābī), 32.
[627] Qur'ān, 4:11-12.

divided between the sharer on the basis of womb relationship, under the verse.[628] The verse[629] may, however, mean that the heir in whose favor the shares have been fixed in the *Qur'ān* should not be deprived of their shares. Hence, after giving the shares to sharers, when there is no residuary to give the residue is not against the intent of the *Qur'ān*, nor can it be said to be going beyond the limits, prescribed by Allāh because the sharers in the non- existence of residuary being closer in womb relationship with the deceased compared to distant kindred are entitled better than the "*Bait al- māl*".[630]

So far as the question of non-application of the doctrine of Radd to husband and wife is concerned according to early Ḥanafīs, the husband and wife are entitled only to their fixed shares, whether the public treasury is managed or not. But the verdict of later Ḥanafī jurists is that if the Public Treasury is not properly managed and there is no other heir including distant kindered the residue of the estate shall be made over to the husband or the wife, whoever is alive.[631]

3.3 Dhawī al –Arḥām (Distant Kindred)

According to Al-Sirrājiyyah, "A Distant kinsman is every relation who is neither a sharer nor a Residuary[42]. Distant Kinsmen are males or females related to the deceased through one or more female links. They are called in Arabic *dhawī-al-arḥām* (relatives) linked by a common womb) [43]. A Distant kinsman is only entitled to succeed to the estate when there is no sharer or residuary. The only exception to this rule is in the case of a spouse, who does no totally exclude. The distant kindred but inherits with them so after assigning

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[628] Qur'ān, 8:75.
[629] Qur'ān, 4:14.
[630] Syed Sharīf Jurjāni, *Al-Sharīfīyah Sharḥ al-Sirājīyah*, 95.
[631] Ibn Qudāmah al-Maqdasī, Al-Mughnī (Matba' al-Salfīyah) vol. 2.p, 424; Muḥammad b. Idrees al-Shāfī'i, Kitāb al-Umm, (Cairo, 1961), vol.4, p.76.

the share to the husband or wife, as the case may be the residue goes to the distant kindred. There had been conflict of opinion among Sunnī jurists over inheritance by Distant Kindred. In a tradition from Prophet (SAW), it is reported that he favored the inheritance to Distant Kinsmen. There seems to be uncertainty about this tradition because, Thābit, the Prophet's (SAW) slave who was later emancipated and became the Prophet's close associate is reported to have said; there is no inheritance for the distant kindred, but the undistributed property is placed in the public treasury[24]. Mālik and Shāfiī' agreed with this view and under Mālikī law, the distant kindred are never admitted to inheritance because tailing the survival of any male agnate relative of the prapositus, the Public Treasury succeeds as a residuary heir. Abu Ḥanīfah, however, did not agree with the view expressed by Zaid, because other companions of the Prophet did not reportedly favor the authenticity of the tradition mentioned above which denied inheritance rights to the distant kindred. In Ḥanafī, Shafiī' and Ḥanbalī (law, rights of inheritance pass to the Distant Kindred but only in the absence of any blood relations belonging to the categories of sharers or residuaries.[632] Since Distant Kindred inherit only in the absence of any agnatic blood relation has ever distant, the prospects of their succession are generally remote two major doctrines exist to regulate cases of distant kindred. The Shāfiī' and Ḥanbalī schools adopt the doctrine of *tanzīl* under which the rights of these relatives are basically determined by reference to the link of the sharers or residuaries through whom they are connected with the prapositus. Therefore, they apply the system of representation. The Ḥanafī School, on the other hand, adopts the principle of *qurbah*, or "relationship" under which rights of the relatives are determined by the

[632] Ibn-e-Rushd, *Bidāyat al-Mujtāhid wā Nihāyah al Muqtaṣid*, Vol. 2, 369.

nature of their own relationship with the prapositus under Ḥanafī doctrine, distant kindred like residuaries are divided into four classes. There are (i) Descendants of the deceased other than sharers or residuaries.[633]

(iv) Ascendants of the deceased other than sharers and residuaries; (iii) Descents of the parents of the deceased other than the sharers and residuaries and (iv) Descendants of the immediate grandparents of the deceased.

The list of Distant Kindred comprised in each of the four classes can be given as follows:

(i) The descendants of the deceased daughter's children and their descendant's children of the son's daughter and their descendants.

(ii) The ascendants of the deceased:

a. False grandfathers

b. False grandmothers

(iii) The descendants of the parents of the deceased:

a. Full brother's daughters and their descendants.

b. Consanguine brother's daughters and their descendants.

c. Uterine brother's children and their descendants.

4. Daughters of the full brother's son and their descendants.

5. Daughters of consanguine brother's son and their descendants.

6. Sisters (full, consanguine) children and their descendants.

(iv) The descendants of the immediate grandparents of the deceased.

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[633] Ibn Qudāmah al-Maqdasī, Al-Mughnī vol. 6, 236.

1. Full paternal uncle's daughters and their descendants.

2. Consanguine paternal uncle's daughters and their descent aunts.

3. Uterine paternal uncle, their children and their descend aunts.

4. Daughters of full paternal uncles' sons and their descendants.

5. Daughters of consanguine paternal uncle's sons and their descendants.

6. Maternal aunts (full, consanguine, uterine) and their children and their descendants.

7. Maternal uncles and aunts and their children and their descendants.

Then comes the descendants of remote ancestors (true or false) and can be laid down in the same order, as given above of the immediate parents.[634]

As regards the rules of exclusion between classes of distant kindred, it can be said that these classes are mutually exclusive of one another and a class of the higher order totally excludes a class of the lower order. So, the rules of exclusion can be summed up as follow:

1. descendant excludes all other heirs.

2. ascendans excludes all heirs except the descendants.

3. descendants of nearer ascendants exclude those of the more remote.[635]

4. Exclusion Deprivation

From the different situations of the heirs mentioned in the foregoing chapter it is apparent that there are some heirs of the deceased who due to some impediment to the inheritance,

[634] Al-Sarakhsī, *Al-Mabsūt*, vol.12, 233.
[635] Al-Zuḥaylī, *Al-Fiqh al-Islāmī wa Adillatuhu*, vol. 10, 7847.

such as the committing in different faith, are disinherited or in other words, are "deprived from inheritance." But there are some relatives who because of the presence of a nearer one "are excluded" and get no share in the property of the deceased. The first situation is generally termed as "*Hirmān*", whereas the second situation is known as "Ḥajab". There is one more difference between the terms "*Maḥrūm*" and *Maḥjūb*", the deprived" and excluded". According to Ḥanafīs, the deprived ones do not prevent others from inheritance, whereas the "excluded ones" unanimously exclude the others.

4.1 Partial Exclusion

Where the heir due to there being another heir is derived from his greater share to a smaller share in his entitlement it is called "partial exclusion". There are six such heirs who do not get totally excluded. Indeed, because of the presence of a *Ḥājib* (who obstructs the other form inheritance), they get diverted from greater share to the lesser one, i.e. they suffer from partial exclusion. The six heirs are (1) Father, (2) Son (3) Husband (4) Wife (5) Mother (6) Daughter

These heirs never get totally excluded from their inheritance except that getting a lesser share, as indicated above. Besides these six heirs, the persons who get excluded totally are governed by the principles of near excludes the remote and stronger in relationship excludes the weak one for instance, the real brother excludes the real brother's son, or the real brothers excludes the consanguine brother.

Some more instances of Exclusion:

1. Son excludes the son's son and the son's daughter; and the son's son excludes the son's son of the lower degree than himself.
2. One son or two daughters exclude the son's daughter.

3. The son or son's son and their male issues and according to Iman Abu Hainfah the grandfather also excludes the brother and sisters of the deceased.
4. The abovementioned relatives and the full brother exclude the step brother.
5. The abovementioned relatives or two or more than two full sisters or one brother exclude the step sisters.
6. The male issues of the deceased and the male issues of their issues and the father and the grandfather exclude the uterine brother.
7. The abovementioned residue heirs exclude the uterine sister.
8. The father excludes the grandfather whether the grandfather is the heir because of residuary or because of being sharer.
9. The mother excludes paternal mother or all the degrees.
10. The mother excludes the maternal grandmother.[636]

4.1.1 Effects of Exclusion on other Heirs

Persons deprived such as the infidel heir or the assassin of the deceased cannot deprive other heirs. On account of the presence of some such deprived person, therefore no heir can be deprived, neither totally nor partially. But the heir who is excluded, he can exclude the other, such as a brother gets excluded (totally) in presence of the father but partially excludes the mother i.e. the mother gets on sixth share instead of one third.

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[636] Kāsānī, Abū Bakr ibn Mas'ūd, *Kitāb Badā'i' al-Ṣanā'i' fī Tartīb al-Sharā'i'* vol. 5, 242; Zayla'ī, *Tabyīn al-Ḥaqāiq: Sharḥ Kanz al-Daqā'iq* vol.6, 639;; Sarakhsī, *Kitāb al-Mabsūt*, vol. 12, 216; al-Dardīr, *Al-Sharḥ al-Saghīr*, vol. 4, 641; Al-Sharbīnī, Mughnī al-Muḥtāj, vol. 3(Beirut: Dār al-Turāth al-'Arabī, n.d)131; Ibn-e-Rushd, *Bidāyat al-Mujtāhid wā Nihāyah al Muqtaṣid*, Vol. 2, 352; Qāḍī Khān, Fakhr al-Dīn al-Ḥassan ibn Manṣūr al- Uzjānī al-Farghānī, *Fatāwā Qāḍī Khān* vol. 2 (Būlāq, 1310), 321.

Due to "Exclusion" being of two kinds, in the first case it excludes the other heir totally and in the second case it does not exclude the heir totally, it only affects him in as much as he gets diverted to a lesser share.

4.1.2 Fundamental Principles of Exclusion

There are as under 3 fundamental principles of exclusion:

1. Excluder having direct relationship with the deceased. Under the first principle, the son of the deceased compared to the grandson has direct relationship with the deceased. Likewise, the father of the deceased compared to the nephew has direct relationship with the deceased. Hence the son excludes the grandson and the brother excludes the nephew.[637]

2. Excluder being close to the deceased: The one closer to the deceased, for whatever ground and qualification is entitled to the inheritance and he shall exclude the remote that is on the same ground and qualification entitled to inheritance. Thus, the mother excludes the grandmother, the daughter excludes the grand-daughter and the real sister excludes the stepsister, as the qualifications and grounds on the basis of which the entitlement to inheritance is created is common between them, their closer relationship with the deceased shall be relied upon if both the heirs – The excluder and the excluded are the residuaries as well, regard shall be had of their closeness of relationship on the principle of closer excludes the remote and no regard shall be had of the unit of the ground and qualification for their entitlement to inheritance. But the heirs who are merely

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[637] Zayla'ī, , *Tabyīn al-Ḥaqāiq*: *Sharḥ Kanz al-Daqā'iq* vol.6, 639;; Sarakhsī, *Kitāb al-Mabsūt*, vol. 12, 216; al-Dardīr, *Al-Sharḥ al-Saghīr*, vol. 4, 641; Al-Sharbīnī, Mughnī al-Muḥtāj, vol. 3(Beirut: Dār al-Turāth al-'Arabī, n.d)131 ; Ibn-e-Rushd, *Bidāyat al-Mujtāhid wā Nihāyah al Muqtaṣid*, Vol. 2, 352; Qāḍī Khān, Fakhr al-Dīn al-Ḥassan ibn Manṣūr al- Uzjānī al-Farghānī, *Fatāwā Qāḍī Khān* vol. 2 (Būlāq, 1310),321.

sharers in their being "closer" or 'remote' regard of the unit of the grounds and qualification of inheritance shall also be had, such as the regard is had of the qualification of ascendency and decadency on the point of priority between the father and the grandfather.

3. Excluder's relationship with the deceased being stronger than that of the excluded one: The heir who in relationship with the deceased is stronger than the excluded one he excludes the one having weaker relationship provided that both belong to the same rank of relationship. Hence, the true brother excludes the step brother and the true brother's son (nephew excludes the stepbrother's son and the true brother of the father excludes the stepbrother of the father and the true sister excludes the step brother.[638]

As the kind of exclusion i.e. the total exclusion and the particular exclusion by reduction of share one common in these three principles, it is proper that they, the excluder and the excluded one for the sake of clarity be stated together.

i. Mother shall exclude the grandmother, closer grandmother shall exclude the remote grandmother, whether they are from mother's side or form father's side.

ii. Father shall exclude all forefathers.

iii. Issues of the deceased shall exclude all the deceased's brothers and sisters as the father excludes all the forefathers.

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[638] Alā' al-dīn Ḥaskafī, *Dur al-Mukhtār ḥāshīā Rad al-Mukhtār*, vol, 3 (Egypt, 1256), 375; Kāsānī, Abū Bakr ibn Mas'ūd, *Kitāb Badā'i' al-Ṣanā'i' fī Tartīb al-Sharā'i'* vol. 5, 242; Zayla'ī, , *Tabyīn al-Ḥaqāiq: Sharḥ Kanz al-Daqā'iq* vol.6, 639;; Sarakhsī, *Kitāb al-Mabsūt*, vol. 12, 216; al-Dardīr, *Al-Sharḥ al-Saghīr*. vol. 4, 641; Al-Sharbīnī, Mughnī al-Muḥtāj, vol. 3(Beirut: Dār al-Turāth al-'Arabī, n.d)131; Ibn-e-Rushd. *Bidāyat al-Mujtāhid wā Nihāyah al Muqtaṣid*, Vol. 2, 352; Qāḍī Khān, Fakhr al-Dīn al-Ḥassan ibn Manṣūr al- Uzjānī al-Farghānī, *Fatāwā Qāḍī Khān* vol. 2 (Būlāq, 1310),321.

iv. Sons and son's son who are higher in rank than the son's daughters shall exclude the son's daughters.

v. Two lineal daughters of the deceased or two such of its granddaughter's (deceased's son's daughter) who are higher in grade than the other grand-daughter (son's daughter) shall exclude such grand-daughter. These two lineal daughters or two true grand-daughters shall also exclude her, provided there is no son to convert the daughters or two true grand-daughters shall also exclude her provided there is no son to convert the daughters or the grand–daughters into those of residuraries.

vi. Son or grandson of howsoever low in degree shall exclude the true brother and sister of the deceased as does the father of the deceased excludes them. The sister of the deceased inherits him only when the deceased is Kalalah, that is when the deceased has left no issue, father or mother, as is stated in the Holy Qur'an[639].

vii. Consanguine sister of the deceased shall, in the precedence of son, grandson, of however low in degree and the father of the deceased stands excluded: and the true sister when becomes Asbah with daughters and son's daughters exclude the consanguine sister. In the like manner, the three abovestated principles shall apply to all the questions of the exclusion.[640]

4.2 Total Exclusion

Under the Islamic law several causes may exclude a person from succeeding to the estate of the praepositus, notwithstanding, that he may stand to the deceased in relation of an

[639] Qur'ān, 4:176.
[640] Syed Sharīf Jurjāni, *Al-Sharīfiyah Sharḥ al-Sirājīyah*, 47.

inheriting kinsman. These are called the legal cases of exclusion. The murderers of the praepositus, a slave or an infidel are the legal subjects of exclusion. The legal causes; which may exclude a person otherwise qualified to inherit as heir, some of them are generally enumerated under the following headings:

a. Homicide

b. Illegitimacy

c. The difference of religion

d. Slavery

a) Homicide

An heir who caused the death of a person from whom he is entitled to inherit, is debarred from inheriting from his victim in other system of law as well, on the principle of public policy, Under the Ḥanafī law, one who has unlawfully killed the deceased, whether intentionally or un-intentionally, has no right to inherit any portion of the deceased's estate.[641] The causing of death must be the direct result of an act of the heir, even if it is by mere negligence or accident.

The rule of exclusion, proof of conviction and sentence for the offence of murder would be sufficient, and it would be necessary to establish the murder through independent evidence in different proceedings, where this ground of exclusion is being pleaded.[642] In order to attract the rule of public policy which excludes a murderer and his descendants form secession, it is necessary that the murder, should have been committed with the

[641] W. Al-Zuḥaylī, *Al-Fiqh al-Islāmī wa Adillatuhu*, vol. 10, 7850.

[642] Zayla'ī, Fakhr al-Dīn 'Uthmān ibn 'Alī ibn Miḥjān al-Barī'ī, *Tabyīn al-Ḥaqāiq: Sharḥ Kanz al-Daqā'iq* vol. 6 (Būlāq: al-Maṭba'ah al-Kubrā al-Amīriyah, 1315), 239.

object of getting the murdered man's property[643] it is contrary to public policy to allow a murderer to derive from his crime the benefit of succeeding to the property which would have come to the hands of the victim but for his murder.[644] From the above discussion, it is clear that for homicide to be an impediment to inheritance.

b) Illegitimacy

A child born without marriage between its parents or as a result of a void marriage of its parents under the Islamic law is an illegitimate child. The rules of presumption of legitimacy under Islamic law may be stated as follows:

a. A child born within less than 6 months after marriage is illegitimate;
b. A child born after 6 months from the date of marriage is presumed to be legitimate, unless the putative father disclaims the child; and
c. A child born within 2 years after termination of the marriage is presumed to be legitimate unless disclaimed by the father in case of separation by divorce. This is the rule of the Ḥanafī law.[645] Under the Ḥanafī law, an illegitimate child is entitled to inherit form his mother and mother's relative but not from the alleged father or his relatives. Conversely, the mother and her relatives are also entitled to inherit from an illegitimate child. An illegitimate person inherits half the estate of

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[643] Muḥammad Amīn al-Shahīr ibn 'Ābdīn al-Shāmī, *Radd al-Muhtār 'alā al-Durr al-Mukhtār Sharḥ Tanwīr al-Abṣār* ('Ādil Aḥmad 'Abd al-Mawjūd and 'Alī Muḥammad Mu'awwaḍ (eds.), vol. 5 (Dār al-Kutub al-'Ilmiyyah, 2003), 541.
[644] Syed Sharīf Jurjāni, *Al-Sharīfīyah Sharḥ al-Sirājīyah*, 95.
[645] Zayla'ī, , *Tabyīn al-Ḥaqāiq: Sharḥ Kanz al-Daqā'iq* vol.6, 639; Sarakhsī, *Kitāb al-Mabsūt*, vol. 12, 216; al-Dardīr, *Al-Sharḥ al-Saghīr*, vol. 4, 641; Al-Sharbīnī, Mughnī al-Muḥtāj, vol. 3 (Beirut: Dār al-Turāth al-'Arabī, n.d)131; Ibn-e-Rushd, *Bidāyat al-Mujtāhid wā Nihāyah al Muqtaṣid*, Vol. 2, 352; Qāḍī Khān, Fakhr al-Dīn al-Ḥassan ibn Manṣūr al- Uzjānī al-Farghānī, *Fatāwā Qāḍī Khān* vol. 2 (Būlāq, 1310), 321.

his mother's sister, a Ḥanafī woman, whose only other surviving relatives was her husband.[646]

c) The Difference of Religion

The difference of faith could result in what is technically called kufr (infidelity) which means the denial of the unit of Allah and the prophethood of Muhammad (SAW), the two coordinal principles on which Islam is founded. Apostasy is understood as conversion from Islam to some other religion. When personalities leaving behind on heir how, by birth or apostasy, is a denier of both the cardinal principles of Islam, he is excluded from succession by another who does accept these principles consequently, those who profess a faith different from Islam have no right to the inheritance of a deceased Muslim," Thus a non-Muslim heir of a Muslim deceased is debarred from inheriting, even though he might be nearest in relationship to the deceased. Under the traditional Muslim Law, the property of an opostate could even be disturbed in his lifetime to his Muslim heirs if the qāḍī so decided that he had migrated into Dār al Ḥarb. However, whatever he had earned since his apostasy was to be kept in Bait al Mal, or the state Treasury, in the view of Abu Ḥanīfa and Shāfī'i. According to his disciples, Abu Yusuf and Imam Muhammad, such acquisition was to give to his Muslim heirs. The inheritance of a Muslim woman apostate does not open in her lifetime because she is not subject to the death. Penalty but is to be imprisoned until she recants. Succession to her estate, therefore, does not open until her actual death, when her Muslim relatives would inherit her property. Whether acquired before or after her apostasy.

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[646] Ibid.

Under the Sunni law a Muslim also does not inherit from non-Muslim but in case of succession to the inheritance of a male apostate Abū Ḥanīfah made a distinction "based on the time when the property was acquired. For example if the property was acquired before apostasy it went to Muslim heirs, but if I was gained subsequent to the apostasy, then it escheated to *Bait-al-māl* (i.e., the government exchequer) or if part of it was acquired before apostasy and part after apostasy, the part which was acquired before went to the Muslim heirs and the part acquired afterwards went to the government treasury.[647]

The view of Imām Abū Yūsuf is followed in most Muslim countries where the *Bait-al-māl* exists for the benefit of the general body of Muslims, Abu Yusuf and Imām Muḥammad differ Imām Abū Ḥanīfah on this point holding that the entire estate of an apostate descends to his Muslim heirs.[42] In case of a female apostate, however, her entire estate, whether acquired before or after apostasy, goes to her Muslim heirs.[648]

d) Slavery

The status of slavery is also treated as a bar to succession under the Sunni law.[649] A slave is not entitled to succeed a free man.[650] If a person dies leaving one heir free and another a slave, the whole inheritance would go to the one who is free, though the other might be nearer to the deceased. If the slave had a child who was free, he would inherit in preference to his parent.[651] As slavery is no longer practiced or permitted in any Muslim

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[647] Al-Zuḥaylī, *Al-Fiqh al-Islāmī wa Adillatuhu*, vol. 10, 7851.
[648] Zayla'ī, *Tabyīn al-Ḥaqāiq: Sharḥ Kanz al-Daqā'iq* vol.6, 639; Sarakhsī, *Kitāb al-Mabsūt*, vol. 12, 216; al-Dardīr, *Al-Sharḥ al-Saghīr*, vol. 4, 641; Al-Sharbīnī, Mughnī al-Muḥtāj, vol. 3(Beirut: Dār al-Turāth al-'Arabī, n.d)131 ; Ibn-e-Rushd, *Bidāyat al-Mujtāhid wā Nihāyah al Muqtaṣid*, Vol. 2, 352; Qāḍī Khān, Fakhr al-Dīn al-Ḥassan ibn Manṣūr al- Uzjānī al-Farghānī, *Fatāwā Qāḍī Khān* vol. 2 (Būlāq, 1310),321.
[649] Muḥammad b. Idrees al-Shāfī'i, Kitāb al-Umm, (Cairo: 1961), vol.4, p.76.
[650] Al-Zuḥaylī, *Al-Fiqh al-Islāmī wa Adillatuhu*, vol. 10, 8002.
[651] Shamsuddīn al-Sarakhsī, Al-Mabsūt (Cairo: Maṭba' al-Sa'adah, 1324A.H)vol.xxx,p.136.

country in the present day world, or in any civilized country of the worlds, this law has only an antiquarian interest and for all practical purposes, is an obsolete law.

5. Special Cases in Islamic Law of Inheritance

There are some special circumstances which are creating problems for the application of the law of inheritance; in order to tackle such difficult situations Muslim jurists have evolved principles for its solution. Such problems primarily occur due to the happening of an event, the occurrence of which raises difficult issues/problems for the law of inheritance. In certain situation, the very status of a particular person can also lead to a problem/issue for its resolution under the law of inheritance. Such cases are discussed under the following categories:

a) Adopted Child

Islāmic law of inheritance does not recognise the concept of adoption, because no line of inheritance under Islam can be established without a blood relationship. Islamic law does not recognise adoption of a child just like his own son; hence such a person is unable to receive anything in inheritance. However a guardian can add him/her in his/her will (which can't exceed one third of estate of the deceased person).

The *Holy Qur'ān* says about adopted child in the following words: *nor has Allah made your adopted sons your real sons. That is but your saying with your mouths. Adopted children can't receive anything in inheritance under the Islamic law.*[652]

b) A Child in the Womb

A child in the womb of a mother at the time of his/her father's death can inherit under Islam and a share in the inheritance at the time of distribution has to be reserved for

[652] Qurā'n, 33:4.

him/her. The presumption of the law is that a child born alive is possessed of the right of inheritance under Islam from the time of the conception.[653]

c) Law Related to Hermaphrodite

A person whose sexual position is ambiguous and difficult to be declared is known as Khunthā al Mushkal. The gender of this type of individual is decided upon his/her physical appearance under Islamic law. The calculation of share for such a person should be both of a man and a woman. Ḥanafī school of thought is of the opinion that Khunthā al Mushkal is entitled to a smaller share.[654]

d) Law of Inheritnace Relating to Missing Person

Missing person is defined in Islamic law as an individual whose where-about is unknown and no one is sure that such a person is still alive or not and the word mafqūd is used for him/her. Until his/her confirmation of death by someone, such an individual be considered alive under Islamic law. The share of such an individual is reserved till his/her return. If such an individual is not returning to his/her home and is confirmed by someone that he/she is dead, then the share of such an individual be divided among the heirs as per Islamic law. The time of death of such a person is calculated from the time when he/she disappeared and the legal heirs of such person are ascertained from that date.[655]

e) Law of Inheritance Related to Step-Relations

Step-relations under Islamic law have no right of inheritance from each other. There is no tie of consanguinity as mentioned in Sharī'ah between them. Therefore, in Islam a stepson and a stepmother are not heirs to one another.[656]

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[653] Al-Zuḥaylī, *Al-Fiqh al-Islāmī wa Adillatuhu*, vol. 10, 7862.
[654] Ibn-e-Rushd, Bidāyat al-Mujtāhid wā Nihāyah al Muqtaṣid, vol. 2, 365.
[655] Ibid.
[656] Ibid.

In Islam the woman's share is one-half of the man's share in most of the cases. It is because the variations in financial tasks of man and women. Sometimes it has been claimed that half in inheritance indicates inferior status of women in Islam. This can be understood when the matter is studied as a whole in a comparative manner, rather than partially. Some people claim that Islam is unjust towards women because it entitles them to inherit half of what men get. In fact, those people only know one side of the truth. First, the principle for women inheriting half the money is only applicable in 45 percent of the cases. In the other percent, women inherit the same amount or sometimes even more. For example, a mother and a father each inherit the sixth of their son's property when they are not the only inheritors. In addition, the laws of inheritance in Islām are proportional to the duties of spending. Indeed a man in Islām has the responsibility of supporting his family, his brother's children (when his brother dies), and his parents (when they retire and do not have an income), his children from his previous marriage (if he has them) and his household, including his wife and children. An examination of the inheritance law within the overall framework of the Islamic Law reveals not only justice but also an abundance of compassion for woman. It is also evident that Islam gives clear picture and intent to abolishing custom relating to the right of a widow or daughter. The next Chapter will analyse the incorporation, recognition, codification and enforcement ofcustom in the prevalent law of sub-continent during British rule, by analysing the series of judgments on the point of law of inheritance.

Chapter No. 5

Analysis of the Case Law of Inheritance in British India and Pakistan

Chapter No. 5: Analysis of the Case Law of Inheritance in British India and Pakistan

Before the colonial rule of England in subcontinent, matters of succession and inheritance among Muslims were administered and decided partly byMuhammadan Law and partly by customary law.[657] When the British Government started its ascendency it assured local people by solemn act of parliament that their personal laws and customs would be applicable to them in matters of their religious concerns. Laws were promulgated which contemplates that in cases of Muslim community, the rule of decision in all suits or actions pending adjudication or filed before the Supreme court of judicature at Fort William in Bengal pertaining to succession and inheritance of land, matters of rents, sales of goods and in any contractual liability among Muslims, shall be determined by Muhammadan laws.[658] This rule was also inserted in section 15 of regulation IV of 1793, which provided that in all suits among Muhammadans regarding inheritance and succession, Muhammadan law were to be considered as general rule. But afterwards the intention of the legislature has changed and it allowed custom or usages as the rule of decision by Court, through series of enactment like Bombay regulation IV of 1827, Punjab Law Act IV of 1872[659] relating to civil courts of Punjab, Madras Court Act III of 1873[660], the Central Provinces Act XX OF 1875[661], the Burma Court Act IX of 1887 and

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[657]In Coulson's words for non-Arab Muslims, however, the reception of Islamic Inheritance system "posed serious problems, for its basic concepts were alien to the traditional structures of their societies".Coulson, J. Neol, *A History of Islamic Law* (London: Edinburgh, 1964), 137.

[658]Amir Ali. Syed, *Mahemmodan Law*, (Lahore: Publishing Company, 1976 vol.2), 15.

[659]Pearl, David, *ATextBook on Muslim Personal Law*, (London: Croom Helm, 1979), 34.

[660]Ibid., 35.

[661]Section 5 of Act XX of 1875 provides that "in questions regarding inheritance, special property of females, betrothal, marriage, dower, adoption, guardianship, minority, basterdy, family relations, wills, legacies, gifts, partition, or any religious usage or intuitions, the rule of decision shall be the Muhammadans Law in cases where the parties are Muhammadans . . . . except in so far as it is opposed to the provisions of this code, provided that when among any class or body of persons or among the members

Oudh Act XVIII of 1876.[662] In 1825 section 2 of regulation XI make the intention of the British legislature more clearer by making custom as a primary rule of decision "where any custom exist" which rises dispute of personal legal issues whereas personal law of Muslims and Hindus shall only be applied in matters where no such customary law exist.[663] Sir Lawrence Jenkins said in a case before the judicial committee in 1922:

"The litigants are Muhammadans to whom this Act applies: so that *prima facie* all questions as to succession among them must be decided according to Muhammadan law. In India, however wisdom plays a large part in modifying the ordinary law, and it is not established that here may be a custom at variance even with the rules of Muhammadan law governing the succession in a particular community of Muhammadans. But the custom must be proved".[664]

To understand the question of recognition of Custom in Islam, it is better to understand the concept of custom in Islamic law and status of custom in English Legal system.

1. Concept of 'Urf in Islam

The earlier jurists make only a passing reference to custom, and they have never considered it as a source of law. In Modern times, some writers have given more importance to custom as a source of law. Custom has been a source of law but in a limited sense. This will be obvious from the discussion below.

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of any family any custom prevails which is inconsistent with the law applicable between such persons under this section and, which, if not inconsistent with such law, would have been given effect to as legally binding such custom shall, notwithstanding anything therein contained to be given to. Amir Ali Syed, *Mahemmodan Law* vol.2 (Lahore: Publishing Company, 1976), 18.

[662]Ibid., 16.

[663] William Henry Rattigan, *A Digest of Customary law*, ed. Omprakash Aggrawala (Allahbad: University Book Agency, 1989), 1.

[664] Muhammad Ibrahim Bowther V. Shaik Ibrahim Rawther (1922). I.L.R. 45 Mad. 808.814.

1.1 Definition of 'Urf

'Urf' has its Arabic roots in word *'arf'* which means to know, Lisān al- 'Arab recognises 'urf' in the same meaning as *'urf, Irfān* and *'ārifah* which means that anything the people know as good or any effort you make by speech or action to help others. Recognising someone's service or help offered to another to enable them to achieve an ambition is also covered by this concept. Generally, the word is mostly used for a higher level of feelings and a good and dignified expression.[665] *'Urf* (custom) and its derivative *ma'rūf* appears in the Qur'ān, *"Keep to forgiveness enjoin 'urf and turn away from the ignorant."*[666] Zamakhsharī in his commentary on this verse states that: *'urf* is known as a beautiful (nice or good) deed.[667]Another word largely used synonymous with *'urf* is *'ādah,* which means repetition or recurrent practice of an individual or a group.[668] Technically *'urf* is defined as "habitual practices which are acceptable to people of sound nature."[669]'Ādah is defined as habitual practices without a rational relationship.[670]Another definition is offered by 'Abd al-Wahhāb al-Khallāf: "*Urf* is a matter well known by the majority of the people whether it is words, some practice or some abandonment. But it does not negate any of the *Qur'ānic* verse or the Sunnah of the Prophet (SAW)."[671]

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[665]Ibn Manẓūr, Lisān al- Arab, vol. 11, 144.
[666] Qur'ān: 7:199.
[667]Zamakhsharī, Mahmūd bin *'Umar, Al Kashshāfh al-Haqā'iq Ghawāmidal-Tanzīlwa''Uyūnal-Aqāwīlfī Wujūhal-Tawīl* vol 2 (Beirut, Dār al-Kitāb al-'Arabī :1366A.H), 138.
[668] IbnManẓūr, Lisān al- Arab, vol. 4, p, 311.
[669] For Detail See Ghazālī, Abū Ḥāmid Muḥammad ibn Muḥammad, *Al-Mustaṣfā min 'Ilm al-Uṣūl* (Baghdād: Maktabat al-Muthannā, 1970); Jaṣṣāṣ al-Rāzī, Abū Bakr Aḥmad ibn 'Alī, *Uṣūl al-Fiqh al-Musammā bi-al-Fuṣūl fī al-Uṣūl* (Kuwayt: Wizārat al-Awqāf wa-al-Shu'ūn al-Islāmīyah, 1988); Juwaynī Imām al-Ḥaramayn, Abū al-Ma'ālī 'Abd al-Malik ibn 'Abd Allāh, *Al Burhān fī Uṣūl al-Fiqh* (Cairo: Dār al-Anṣār, 1980); Karkhī, 'Abd Allāh ibn al-Ḥusayn, *Risālah fī al-Uṣūl* (Cairo: n.d), Wahbah al-Zuhaylī,' Usūl al-Fiqh al-Islāmī vol. 2 (Dār al-Fikr al-Muā'sir, Beirut, 1986) vol. 2, 82; Muḥammad Amīn Āfandī Ibn Ābidīn, *Majmū' Rasā'il Ibn 'Ābidīn* vol. 2 (Suhail Academy Lahore, n.d), 114.
[670] Ibid.
[671] 'Abd al-Wahhāb al-Khallāf, 'Ilm Uṣūl al-Fiqh, 90.

1.2 Types of 'Urf

'Urf is primarily divided into two types: *qawlī* (verbal) and *fàlī* or *'amalī* (actual or practical).

1.2.1 'Urf Qawlī

This kind of *'urf* consists those words and phrases which are commonly used in the public in special meaning, which even cannot be find in dictionaries. This is defined as:

"*Urf* based on speech introduces a certain sense of a word among people, so they – when they hear it – interpret it in just one sense. And they do not go for any other (i.e. literal) meaning."[672]

So basically these "Words and phrases which are commonly used among people and their meanings are grasped by people by turning to context and effort by reason."[673]

According to these definitions this kind of *'urf* helps people to understand the words in the way they use to utilise these phrases.

According to Ibn 'Ābidīn, *'urf qawlī* is definitive, precise and well known among people.[674]

For instance, the word *walad* in its literal sense means (offspring) both son or daughter, but it is commonly used in the meaning of son It occurs in the *Qur'ān*:

"God commands you as regards your children's (inheritance): to the male, a portion equal to that of two females... ".[675]

At another place the *Qur'ān* enlightens us on the issue:

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[672] Al-Ḥājj, Ibn Amīr, *Al-Taqrīr wa al-Tahbīr* vol. 1 (Beirut: Dār al-Kitāb al-'Ilmiyah, n.d), 282.
[673] Muṣṭafā al-Zarqa, *Al-Mudkhil al-Fiqh al-'Āmm* vol. 2 (Beirut: Dār al-Kitāb al-'Ilmiyah, n.d),844.
[674] Ibn 'Ābidīn, Muḥammad Amīn, *Majmū'Rasā'il Ibn 'Ābidīn* vol. 2, 115.
[675] Qur'ān, 4:176.

"Let him who has abundance spend of his abundance, and he whose provision is measured, let him spend of that which Allāh has given him. Allāh asks nothing of any soul save that which He has given it."[676]

Commenting on this verse, Ibn al-'Arabī writes: "The Islamic law has not determined the quantity of maintenance allowance. The quantity according to the usage (of the area) – will be decided according to the financial position of the spender (the husband)."[677] Ibn al-'Arabī opines that many regulation of Islamic law formulated according to the practices of masses.[678] It is said by Aḥmad Fahmi and others that the verbal custom should be self-evident.[679] For instance a man with a stick threatened some one by saying: "Today I will not let you get away. Today I will make an end of your life." It does not mean that he want to kill someone it only means that he wants to beat him only. As far as the extent of *'urf qawlī* is concerned, Islamic law gives the principle that the speech of a speaker will be interpreted in accordance with the custom and usage of his language.

1.2.2 'Urf 'Amalī

'Urf 'amalī is a practice which people in a certain area adopt. Muṣṭafā al-Zarqā defines the term: *'Urf 'amalī* is a situation where people get used to a certain way of life in their habitual and social matter."[680]

This definition contains a phrase *al-af'āl al-'ādiyah* which refers to ones habitual practices – for example – eating, drinking, wearing clothes and ploughing. Another

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[676] Qur'ān, 65:7.
[677] Abū Bakr Muḥammad ibn 'Abd Allāh Ibn al-'Arabi, *Ahkām al-Qur'ān* vol.4 (Beirut: Dār al-Kitāb al-'Ilmiyah, 2008), 1841.
[678] Ibid.
[679] *Aḥmad Fahmī* Abū Sinnah, *Al-'Urf wa al-'Ādah fi Ra'y al-Fuqahā* (Dār al-Fikr al-'Arabī), 18.
[680] Muṣṭafā al-Zarqa, *Al-Mudkhil al-Fiqh al-'Āmm* vol. 2, 852.

phrase *al-muāmalāt al-madaniyah* points to mutual human rights and contracts. Like to buy or sell something without uttering any word which one normally uses for sale or purchase.[681] It is said that if *'urf'amalī* is not contradictory or against the objectives and principles of Islamic law it is considered as complete authority as far as societal matters are concerned.

These *'urf,* either *qawlī* or *'amalī*, are divided into two types: *al-'urf al-'āmm* general custom and *al-'urf al-khāṣ* (special custom).[682]

1.3 Conditions of the Validity of 'Urf

a- *'Urf* must not oppose a *naṣṣ* or ultimate rules of the Islamic law.[683]

b- *'Urf* must be persistent in most cases. The practice of few people cannot be the custom.[684]

c-The existence of custom must be recognised at the time of the transaction.

d-*'Urf* must symbolise a general and regular experience.

The practices of few people cannot be considered as custom as in *Majallah al-Ahkam al-'Adliyyah* it is provided that 'effect is only given to custom which is of regular occurrence'.[685] Custom is a mediator; that is to say, custom, whether public or private, may be invoked to justify the giving of judgment. A matter established by *'urf* (custom) is like a matter established by law.

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[681] Ibn Qudāmah 3/481.
[682]Wahbah al Zuhaylī,' Usūl al-Fiqh al-Islāmī, vol. 2, 829.
[683]Kamali, Muhammad Hāshim, Principles of Islamic Jurisprudence, (Islamic Text Society, Cambridge, 1997), 286.
[684] Ibid.
[685] Ibid.

2. Custom in English Legal System

In order to understand the intention of English legislature in colonial law making, background and evolution of their own legal system must be considered. Unified English legal system emerges with the Norman conquest of England in 1066[686] and the struggle of people for political power. As a result, Common law system was introduced as a National legal system which allowed judges to use discretion and pragmatic approach in the matters under the control of the sovereign King.

Circuit bench of judges travelled across the country and selected best local custom which laid the foundation of English law. This evolution or legal development reaches its peak when it establishes its distinct institutional existence in the shape of three courts, namely, court of Common Pleas, Court of Exchequer and King's Bench, but they dealt only with defined matters and did not cross a formal and procedural constraint which reflects the weaknesses of common law.

This substantive injustice paved the way for development of Equity. Commoners were allowed to provoke jurisdiction of Lord Chancellor who acted on King's conscience by the end of 13th century. This approach resulted in fair decision in matters declined by common law courts due to want of jurisdiction. Newly established and most popular court of Lord Chancellor considered custom as one of the main factors in announcing decisions. Eventually these two parallel legal doctrines merged in 1873 and 1875 by the Judicature Act and Equity started to reflect as a gloss on the face of common law.[687]

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[686]Gary Slapper, David Kelly, English Legal system ed. 10th (London: Cavandish publishing Limited), 11.
[687] Cathrine Elliot, Frances Quinn, English Legal System (England: Pearson Education Limited, 2010), 24.

2.1 Definition of Custom in Common Law

In common law the literal definition of custom is stated as below: "A practice that by its common adoption and long unvarying habit has come to have the force of law."[688]

This definition points out the fact that custom is a matter accepted by the common people. Also, it has been put into practice since long. In statutory law, another phrase, to explain this concept, is "custom and usage" which is defined in these words: "General rules and practices that have become generally adopted through unvarying habit and common use."[689]Another definition is given as: "Custom in its origin is a rule of conduct, which the governed observe spontaneously and not in pursuance of a law set by a political superior."[690]

According to Halsbury: "A custom is a particular rule which has existed either actually or presumptively from time immemorial and has obtained the force of law in a particular locality, although contrary to or not consistent with the general common law of the realm."[691] According to Salmond "custom is frequently the embodiment of those principles which have commended themselves to the national conscience as principles of justice and public utility."[692]

2.2. KINDS OF CUSTOM IN COMMON LAW

There are two kinds of custom in Common law: legal custom and conventional custom.

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[688] Garner, Bryan A., *Black's Law Dictionary* ed. 8th (Thomson West, 2004), 413.
[689] Ibid.
[690] Inayat Ali Sheikh, *Commentary on the Customary Law* (Law Times Publication, Lahore, 1980), 1.
[691] The Laws of England, Vol. X. P. 318.
[692] Fitzgerald P.J, *Salmond on Jurisprudence*, Universal Law Publications New Delhi, 2006, 12th Ed., 190.

2.2.1 Legal Custom

Salmond explains what legal custom is: "Custom which is operative per se as a binding rule of law, independently of any agreement on the part of those subject to it."[693] To put legal custom in the words of V. D. Mahajan: "The legal custom is one whose legal authority is absolute. It possesses the force of law proprio vigore."[694]

The force which goes with legal custom can be well appreciated in these words: "The parties affected may agree to a legal custom or not but they are bound by the same."[695]

Legal custom is further divided into two kinds: general and local custom.

a) General Custom

It is common and abided by in the whole country, or it may be restricted to some territory, as Mahajar writes: "A general custom is that which prevails throughout the country and constitutes one of the sources of the land."[696] There was a time when in England common law was considered as general custom and a saying went among people: "The common law of the realm is the common custom of the realm."[697] This idea continued to exist until the end of the eighteenth century. But that the Common Law of the realm and general law were synonyms was not correct.

b) Local Custom

It is a custom confined to just one area. Besides, it must be in practice since long time and so old as human memory cannot grasp when it was commenced.

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[693] Ibid., 192.
[694] Stephen Guest, Adam Geary, James Penner, Wayne Morrison, *Jurisprudence and Legal Theory* (London: University of London Press, 2004), 213.
[695] Ibid.
[696] Stephen G., Adam G., James P., Wayne M., *Jurisprudence and Legal Theory*, 216.
[697] Ibid.

V. D. Mahajan defines it in the following words: "Local custom is that which prevails in some defined locality only such as borough or country and constitutes a source of law for the place only."[698]

2.2.2 Conventional Custom

In Common law the principles which deals with business are based on conventional custom. Salmond states: "A conventional custom is as established practice which is legally binding, not because of any legal authority independently possessed by it, but because it has been expressly or implicitly incorporated in a contract between the parties concerned."[699]

Concept of custom was so deep-rooted in the entire legal system of England that it was recognised as one of the sources among four main fountains of legal doctrine. Initially English jurist takes two dissenting views regarding the status of custom in the development of English Law. According to one school of thought, codified law of England is the refined form of custom and customary behaviour of society. While other school of thought considered both contradictory with each other and of the view that law was only formulated to replace customary form of behaviour of society. But later on jurist recognise it as a source of law by formulating a criteria to consider custom as valid and enforceable, if it fulfills the following criteria:

1. It must be practiced prior from 1189 or time immemorial
2. It must be practiced without any interruption and was continuous
3. It must be unanimously followed without any objection and felt as obligatory
4. It must be defined precisely and have clear meaning

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[698] Ibid.
[699] Fitzgerald P.J , *Salmond On Jurisprudence*,193.

5. It must be consistent with other laws and based on rational footings[700]

With that historical background and overwhelming reliance on custom, English law givers slowly but constantly implemented the same pattern of evolution of controlled colonial legal system.

3. Customary Law in British-India

In British India, Legislature and Courts mostly allowed Custom as the rule of inheritance. This fact is evident from the pattern of legislation and series of case laws. Main factor which led customary practice was that majority of Muslims in that area were previously Hindu. Though Islam gives a complete code of Law in matters of inheritance but due to strong cultural impact it does not completely vanish.

In case of *RupLlal Chaudhry v Latu Lal Chaudhry*[701] court decided that when one Muslim changes the persuasion of one school of thought and starts following the other his practices and disposition observed also converts to the rules defined by the new school of thought. But later on, Court recognised the observance of custom. In case of *Jawala Bukhsh v Dharam Singh*[702] judicial committee allowed adherence of Hindu Custom though parties in that case were Muslims converted from Hindus.

Hindus believe that when a Hindu changes his religion, his heirs succeed all property and only subsequently acquired property is distributed according to Muslim personal law in Islam. Islam provides the concept of absolute ownership of property and does not distinguish between self acquired and ancestral property in all matters of deposition and eliminates all types of custom.

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[700] Rattigan.W.H. *A Digest of Customary law*, 182.
[701] 1878. 3. Cal. L.R. 97.
[702] 1866 10 Moo. IA 516, 536.

In *Hakim v Gul Khan*[703] it was held by the court that Islam rejects every custom which is in conflict or contrary to its prescription. But in subcontinent where the over whelming majority of people were converted Muslims from Hindus kept adhering customs. Court in these cases recognised that observance.

In *Mirabibi v Vellayana*[704] Madras High Court, decided the matter where the female heir was ousted from succession on the basis of custom by accepting and applying the principles of customs but held that custom must fulfill all requirements of a valid custom and must be acceptable for having force of law.

Supreme Court of Bombay in *Hirbae v Gorbai*[705], *Rahim Bai v Hirbai*[706], *Ashaba v Haji Tyeb*[707], *Muhammad Sadik v Haji Ahmad, Haji Abdul Sattar*[708] also allowed observance of Hindu Law in matters of inheritance for Khojas and Memons where no custom contrary to Hindu Law exists in these communities.

In *Bai Baiji v Bai Santo*[709] same principle was applied in case of Borah's Sunni, who were converted to Islam few centuries ago.

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[703] 1882. I.L.8 Cal 826.
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3.1 Customary Law in Punjab

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[710] Amir Ali. Syed, *Mahemmodan Law*, vol. 2, 15.

.....except insofar as such law has been altered or abolished by legislative enactment; or is opposed to the provisions of this Act or has been modified by any such custom as in above referred to. There is no doubt that in the Punjab as in Bombay provable custom takes precedence over Muslim law when the court has to determine the issue before it in accordance with the personal law.[711]

Custom was allowed to derogate from the Muslim personal law in other areas of British India beside Bombay and the Punjab. In Madras, for example, the civil courts Act (1873) contained a provision is section 16 similar to the Punjab Laws Act. The problem whether custom or the personal law is applied as the governing law has been particularly relevant with respect to the small Mappilla Muslim community from Malabar. The leading case concerning this group is the decision of Tyabji J in *Kunhambi v. Kulanthar* decided by the Madras court in 1915.[712] The question before the court was whether the Mappilla community was governed by its normal personal law, the Muslim law, or by a particular variation of Hindu law with respect to the dispute in issue. Tyabji J argued that the question was primarily one of fact whether the particular parties have adopted the one system of law or the order and whether they have been governing their conduct in accordance with the one system or the other. If a custom is proved then there is no doubt that the Muslim personal law is not applicable. In contrast to the position in Madras, in Bombay and in the Punjab, custom was not granted statutory recognition in other areas of British India. This was particularly the case in Bengal, in the united provinces and in Assam. The Allahabad High court at first read the lack of a statutory mention of custom in the Civil Courts Acts of these areas to imply that no customary deviation should be

[711] Rattigan.W.H. *A Digest of Customary law*, 11.
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permitted from the purity of the personal laws, these early cases were overruled in 1913 in *Muhammad Ismail v Lala Sheo-mukh Rai.*[713] From this case, the position is that custom does not have any less effect upon the Muslim law in Bengal and Assam than in other areas where it is expressly mentioned as the primary rule of decision. It has already been seen that there was a desire by the religious Muslim to reduce the role of custom. The stress laid by the Act of 1872 upon custom must not be mistaken or exaggerated. In *Abdul Hussein Khan v Sona Dero*[714] the judicial committee appraised the observation of Robertson,J. in *Daya Ram v Sohel Singh:*

"There is no presumption created by the cause (section 5 of the Act) in favor of custom; on the contrary it is only when the custom is established that it is to be the ruler of decision. The legislature did not show itself enamored of custom rather than law nor does it show any tendency to extend the 'principles' of custom to any matter to which a rule of custom is not clearly proved to apply."[715]

The basis of the most important rules of Punjab customary law is that in most of the Punjab villages, land is held by a make proprietor "as a member of a village community which at no distant period held the whole of their lands jointly, recognising in the individual member only a right of usufruct that is as right to enjoy the profits of a portion of the common and actually cultivated by him and his family and to share in those of the portion still under joint management in such a community the proprietary title and

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[715] Ibid.

the power of permanently alienating parts of the common property is vested in the whole body."[716]

The main feature of the Muhammadan law of inheritance is that it gives a share to females. Apart from the content of a man's heirs, Muhammadan law allows him to dispose of one-third only of the property of which he dies possessed and in the case of *Sunnī* gifts given are invalid because they produce inequality among heirs. Yet the Punjab custom imposes on the Muhammadan who is subject to the customary law principles which are not only foreign to his personal law and contradictory thereof but which can be seen to be modifications of Hindu rules, thus custom in many cases gives an interest for life to a Muhammadan widow. In other cases it excludes females, e.g., married daughter from inheriting in the presence of collateral also again it imposes limits upon the female's right to deal with the property which she inherits, restricting it as nearly as may be to a right to enjoy the protits for her own life while in some villages inhabited by Muhammadan a widow may be allowed larger powers, the general rule against alienations by a widow applies to Muhammadan and Hindu without distinction custom may refuse to her any right to claim partition or to sell save for necessity; or it may recognise a limited right in her to make a gift of it to a nephew or a son – in – law. As regards the right of a male proprietor to alienate, village custom follows closely neither Hindu nor be Muhammadan idea but recognise that a man's male des pendants have rights in his ancestral property and that it is necessary to prevent the intrusion of strangers into the proprietary body by rules as to pre – emption the distinction between ancestral

[716]*Gujaar v Sham Das*, 107 P. R. 1887 While a person who is not an agriculturalist or a member of on agriculturalist tribe may be governed in any pedicure law nevertheless on the question whether the Punjab customary law applies to any individual it is of importance to ask whether be is a member of an agriculture tribe and also a member of a village community people who for generations have drifted away from agriculture or taken to living in cities will not be presumed to be governed by customary law.

and acquired property which is foreign to Muhammadan law, is of great importance under custom; the right of alienating ancestral property being sometimes restricted even in the absence of direct descendants in the interests of collaterals, e.g., nephew. In some cases gifts to daughters or sister or their sons cannot be objected to; in others they can be cancelled.[717] By an Act of 1920 collaterals cannot contest an alienation of ancestral immoveable property unless they are descended by male lineal descent from the great grandfather of the alien or; and alienations of non – ancestral immovables cannot be contested as being contrary to custom. Since the Punjab legislature in 1900 passed the Alienation of Land Act that the sanction of the Deputy commissioner is required to permanent alienations of land made by a member of an agriculture tribe unless the alliance in a member of the same tribe or a tribe in the same group. In the year 1937, the customary law of the Muslims was abrogated by the Muslim Shariat Act. The exception of the agricultural land contained in the act of 1937. So, the exclusion of agricultural land takes away a very large part of the effect of the act of 1937.[718]

After that in 1937 The Muslim Personal Law (Shariat) Application Act, 1937 (Act XXVI of1937) was introduced. Section 2 of this act states that *"Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift ... the rule of decisions in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat)"*[719].

This Law only applied to intestate succession and had no application to testate Succession.

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[717] Roland Wilson, *Anglo Muhammadan Law*, ed. A. Yousuf Ali,179.
[718] M. Farani, *Manual of Family Laws in Pakistan*, 426.
[719] Ibid.

4. Law of Inheritance in Pakistan

After independence The West Punjab Muslim Personal Law (Shariat) Application Act (IX of 1948) enlarged the scope to cover the questions regarding succession (including succession to agricultural land). In 1951 the scope was further enlarged to all questions of succession (whether testate or intestate). In 1950 quite similar amendment was introduced in Sindh. In 1962, The West Pakistan Muslim Personal Law (Shariat) Application Act was enacted. *"Notwithstanding any custom or usage to the contrary, in all questions regarding succession, (whether testate or intestate) ...., the rule of decisions shall be the Muslim Personal Law (Shariat) in cases where the parties are Muslims."* An important result was that it seems to be that women became entitled to inherit the property. Section 2 of the West Pakistan Muslim Personal Law (*Shariat*) Application Act, 1962, was as amended further in 1983[720] when Article 2A was included in the abovementioned section which states as "*Notwithstanding anything to the contrary contained in section 2 or any other law for the time being in force, or any custom or usage or decree, judgment or order of any court, where before the commencement of the Punjab Muslim Personal Law (Shariat) Application Act, 1948, a male heir had acquired any agricultural land under custom from the person who at the time of such acquisition was a Muslim:*

a) he shall be deemed to have become, upon such acquisition, an absolute owner of such land, as if such land had devolved on him under the Muslim Personal Law (Shariat);

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[720] M. Farani, *Manual of Family Laws in Pakistan*, 427; Pearl, David, *A Text Book on Muslim Personal Law*, 206.

1.2 Types of 'Urf

'Urf is primarily divided into two types: *qawlī* (verbal) and *fàlī* or *'amalī* (actual or practical).

1.2.1 'Urf Qawlī

This kind of *'urf* consists those words and phrases which are commonly used in the public in special meaning, which even cannot be find in dictionaries. This is defined as:

"*Urf* based on speech introduces a certain sense of a word among people, so they – when they hear it – interpret it in just one sense. And they do not go for any other (i.e. literal) meaning."[672]

So basically these "Words and phrases which are commonly used among people and their meanings are grasped by people by turning to context and effort by reason."[673]

According to these definitions this kind of *'urf* helps people to understand the words in the way they use to utilise these phrases.

According to Ibn 'Ābidīn, *'urf qawlī* is definitive, precise and well known among people.[674]

For instance, the word *walad* in its literal sense means (offspring) both son or daughter, but it is commonly used in the meaning of son It occurs in the *Qur'ān*:

"God commands you as regards your children's (inheritance): to the male, a portion equal to that of two females... ".[675]

At another place the *Qur'ān* enlightens us on the issue:

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[672] Al-Ḥājj, Ibn Amīr, *Al-Taqrīr wa al-Tahbīr* vol. 1 (Beirut: Dār al-Kitāb al-'Ilmiyah, n.d), 282.
[673] Muṣṭafā al-Zarqa, *Al-Mudkhil al-Fiqh al-'Āmm* vol. 2 (Beirut: Dār al-Kitāb al-'Ilmiyah, n.d),844.
[674] Ibn 'Ābidīn, Muḥammad Amīn, *Majmū'Rasā'il Ibn 'Ābidīn* vol. 2, 115.
[675] Qur'ān, 4:176.

"Let him who has abundance spend of his abundance, and he whose provision is measured, let him spend of that which Allāh has given him. Allāh asks nothing of any soul save that which He has given it."[676]

Commenting on this verse, Ibn al-'Arabī writes: "The Islamic law has not determined the quantity of maintenance allowance. The quantity according to the usage (of the area) – will be decided according to the financial position of the spender (the husband)."[677] Ibn al-'Arabī opines that many regulation of Islamic law formulated according to the practices of masses.[678] It is said by Aḥmad Fahmi and others that the verbal custom should be self-evident.[679] For instance a man with a stick threatened some one by saying: "Today I will not let you get away. Today I will make an end of your life." It does not mean that he want to kill someone it only means that he wants to beat him only. As far as the extent of *'urf qawlī* is concerned, Islamic law gives the principle that the speech of a speaker will be interpreted in accordance with the custom and usage of his language.

1.2.2 'Urf 'Amalī

'Urf 'amalī is a practice which people in a certain area adopt. Muṣṭafā al-Zarqā defines the term: *'Urf 'amalī* is a situation where people get used to a certain way of life in their habitual and social matter."[680]

This definition contains a phrase *al-af'āl al-'ādiyah* which refers to ones habitual practices – for example – eating, drinking, wearing clothes and ploughing. Another

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[676] Qur'ān, 65:7.
[677] Abū Bakr Muḥammad ibn 'Abd Allāh Ibn al-'Arabi, *Ahkām al-Qur'ān* vol.4 (Beirut: Dār al-Kitāb al-'Ilmiyah, 2008), 1841.
[678] Ibid.
[679] *Aḥmad Fahmī* Abū Sinnah, *Al-'Urf wa al-'Ādah fi Ra'y al-Fuqahā* (Dār al-Fikr al-'Arabī), 18.
[680] Muṣṭafā al-Zarqa, *Al-Mudkhil al-Fiqh al-'Āmm* vol. 2, 852.

phrase *al-muāmalāt al-madaniyah* points to mutual human rights and contracts. Like to buy or sell something without uttering any word which one normally uses for sale or purchase.[681] It is said that if *'urf'amalī* is not contradictory or against the objectives and principles of Islamic law it is considered as complete authority as far as societal matters are concerned.

These *'urf,* either *qawlī* or *'amalī*, are divided into two types: *al-'urf al-'āmm* general custom and *al-'urf al-khāṣ* (special custom).[682]

1.3 Conditions of the Validity of 'Urf

a- *'Urf* must not oppose a *naṣṣ* or ultimate rules of the Islamic law.[683]

b- *'Urf* must be persistent in most cases. The practice of few people cannot be the custom.[684]

c-The existence of custom must be recognised at the time of the transaction.

d-*'Urf* must symbolise a general and regular experience.

The practices of few people cannot be considered as custom as in *Majallah al-Ahkam al-'Adliyyah* it is provided that `effect is only given to custom which is of regular occurrence'.[685] Custom is a mediator; that is to say, custom, whether public or private, may be invoked to justify the giving of judgment. A matter established by *'urf* (custom) is like a matter established by law.

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[681] Ibn Qudāmah 3/481.
[682]Wahbah al Zuhaylī,` Usūl al-Fiqh al-Islāmī, vol. 2, 829.
[683]Kamali, Muhammad Hāshim, Principles of Islamic Jurisprudence, (Islamic Text Society, Cambridge, 1997), 286.
[684] Ibid.
[685] Ibid.

2. Custom in English Legal System

In order to understand the intention of English legislature in colonial law making, background and evolution of their own legal system must be considered. Unified English legal system emerges with the Norman conquest of England in 1066[686] and the struggle of people for political power. As a result, Common law system was introduced as a National legal system which allowed judges to use discretion and pragmatic approach in the matters under the control of the sovereign King.

Circuit bench of judges travelled across the country and selected best local custom which laid the foundation of English law. This evolution or legal development reaches its peak when it establishes its distinct institutional existence in the shape of three courts, namely, court of Common Pleas, Court of Exchequer and King's Bench, but they dealt only with defined matters and did not cross a formal and procedural constraint which reflects the weaknesses of common law.

This substantive injustice paved the way for development of Equity. Commoners were allowed to provoke jurisdiction of Lord Chancellor who acted on King's conscience by the end of 13th century. This approach resulted in fair decision in matters declined by common law courts due to want of jurisdiction. Newly established and most popular court of Lord Chancellor considered custom as one of the main factors in announcing decisions. Eventually these two parallel legal doctrines merged in 1873 and 1875 by the Judicature Act and Equity started to reflect as a gloss on the face of common law.[687]

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[686]Gary Slapper, David Kelly, English Legal system ed. 10th (London: Cavandish publishing Limited), 11.
[687] Cathrine Elliot, Frances Quinn, English Legal System (England: Pearson Education Limited, 2010), 24.

2.1 Definition of Custom in Common Law

In common law the literal definition of custom is stated as below: "A practice that by its common adoption and long unvarying habit has come to have the force of law."[688]

This definition points out the fact that custom is a matter accepted by the common people. Also, it has been put into practice since long. In statutory law, another phrase, to explain this concept, is "custom and usage" which is defined in these words: "General rules and practices that have become generally adopted through unvarying habit and common use."[689]Another definition is given as: "Custom in its origin is a rule of conduct, which the governed observe spontaneously and not in pursuance of a law set by a political superior."[690]

According to Halsbury: "A custom is a particular rule which has existed either actually or presumptively from time immemorial and has obtained the force of law in a particular locality, although contrary to or not consistent with the general common law of the realm."[691] According to Salmond "custom is frequently the embodiment of those principles which have commended themselves to the national conscience as principles of justice and public utility."[692]

2.2. KINDS OF CUSTOM IN COMMON LAW

There are two kinds of custom in Common law: legal custom and conventional custom.

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[688] Garner, Bryan A., *Black's Law Dictionary* ed. 8th (Thomson West, 2004), 413.
[689] Ibid.
[690] Inayat Ali Sheikh, *Commentary on the Customary Law* (Law Times Publication, Lahore, 1980), 1.
[691] The Laws of England, Vol. X. P. 318.
[692] Fitzgerald P.J, *Salmond on Jurisprudence*, Universal Law Publications New Delhi, 2006, 12th Ed., 190.

2.2.1 Legal Custom

Salmond explains what legal custom is: "Custom which is operative per se as a binding rule of law, independently of any agreement on the part of those subject to it."[693] To put legal custom in the words of V. D. Mahajan: "The legal custom is one whose legal authority is absolute. It possesses the force of law proprio vigore."[694]

The force which goes with legal custom can be well appreciated in these words: "The parties affected may agree to a legal custom or not but they are bound by the same."[695]

Legal custom is further divided into two kinds: general and local custom.

a) General Custom

It is common and abided by in the whole country, or it may be restricted to some territory, as Mahajar writes: "A general custom is that which prevails throughout the country and constitutes one of the sources of the land."[696] There was a time when in England common law was considered as general custom and a saying went among people: "The common law of the realm is the common custom of the realm."[697] This idea continued to exist until the end of the eighteenth century. But that the Common Law of the realm and general law were synonyms was not correct.

b) Local Custom

It is a custom confined to just one area. Besides, it must be in practice since long time and so old as human memory cannot grasp when it was commenced.

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[693] Ibid., 192.
[694] Stephen Guest, Adam Geary, James Penner, Wayne Morrison, *Jurisprudence and Legal Theory* (London: University of London Press, 2004), 213.
[695] Ibid.
[696] Stephen G., Adam G., James P., Wayne M., *Jurisprudence and Legal Theory*, 216.
[697] Ibid.

V. D. Mahajan defines it in the following words: "Local custom is that which prevails in some defined locality only such as borough or country and constitutes a source of law for the place only."[698]

2.2.2 Conventional Custom

In Common law the principles which deals with business are based on conventional custom. Salmond states: "A conventional custom is as established practice which is legally binding, not because of any legal authority independently possessed by it, but because it has been expressly or implicitly incorporated in a contract between the parties concerned."[699]

Concept of custom was so deep-rooted in the entire legal system of England that it was recognised as one of the sources among four main fountains of legal doctrine. Initially English jurist takes two dissenting views regarding the status of custom in the development of English Law. According to one school of thought, codified law of England is the refined form of custom and customary behaviour of society. While other school of thought considered both contradictory with each other and of the view that law was only formulated to replace customary form of behaviour of society. But later on jurist recognise it as a source of law by formulating a criteria to consider custom as valid and enforceable, if it fulfills the following criteria:

1. It must be practiced prior from 1189 or time immemorial
2. It must be practiced without any interruption and was continuous
3. It must be unanimously followed without any objection and felt as obligatory
4. It must be defined precisely and have clear meaning

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[698] Ibid.
[699] Fitzgerald P.J , *Salmond On Jurisprudence*,193.

5. It must be consistent with other laws and based on rational footings[700]

With that historical background and overwhelming reliance on custom, English law givers slowly but constantly implemented the same pattern of evolution of controlled colonial legal system.

3. Customary Law in British-India

In British India, Legislature and Courts mostly allowed Custom as the rule of inheritance. This fact is evident from the pattern of legislation and series of case laws. Main factor which led customary practice was that majority of Muslims in that area were previously Hindu. Though Islam gives a complete code of Law in matters of inheritance but due to strong cultural impact it does not completely vanish.

In case of *RupLlal Chaudhry v Latu Lal Chaudhry*[701] court decided that when one Muslim changes the persuasion of one school of thought and starts following the other his practices and disposition observed also converts to the rules defined by the new school of thought. But later on, Court recognised the observance of custom. In case of *Jawala Bukhsh v Dharam Singh*[702] judicial committee allowed adherence of Hindu Custom though parties in that case were Muslims converted from Hindus.

Hindus believe that when a Hindu changes his religion, his heirs succeed all property and only subsequently acquired property is distributed according to Muslim personal law in Islam. Islam provides the concept of absolute ownership of property and does not distinguish between self acquired and ancestral property in all matters of deposition and eliminates all types of custom.

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[700] Rattigan.W.H. *A Digest of Customary law*, 182.
[701] 1878. 3. Cal. L.R. 97.
[702] 1866 10 Moo. IA 516, 536.

In *Hakim v Gul Khan*[703] it was held by the court that Islam rejects every custom which is in conflict or contrary to its prescription. But in subcontinent where the over whelming majority of people were converted Muslims from Hindus kept adhering customs. Court in these cases recognised that observance.

In *Mirabibi v Vellayana*[704] Madras High Court, decided the matter where the female heir was ousted from succession on the basis of custom by accepting and applying the principles of customs but held that custom must fulfill all requirements of a valid custom and must be acceptable for having force of law.

Supreme Court of Bombay in *Hirbae v Gorbai*[705], *Rahim Bai v Hirbai*[706], *Ashaba v Haji Tyeb*[707], *Muhammad Sadik v Haji Ahmad, Haji Abdul Sattar*[708] also allowed observance of Hindu Law in matters of inheritance for Khojas and Memons where no custom contrary to Hindu Law exists in these communities.

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[715] Ibid.

the power of permanently alienating parts of the common property is vested in the whole body."[716]

The main feature of the Muhammadan law of inheritance is that it gives a share to females. Apart from the content of a man's heirs, Muhammadan law allows him to dispose of one-third only of the property of which he dies possessed and in the case of *Sunnī* gifts given are invalid because they produce inequality among heirs. Yet the Punjab custom imposes on the Muhammadan who is subject to the customary law principles which are not only foreign to his personal law and contradictory thereof but which can be seen to be modifications of Hindu rules, thus custom in many cases gives an interest for life to a Muhammadan widow. In other cases it excludes females, e.g., married daughter from inheriting in the presence of collateral also again it imposes limits upon the female's right to deal with the property which she inherits, restricting it as nearly as may be to a right to enjoy the protits for her own life while in some villages inhabited by Muhammadan a widow may be allowed larger powers, the general rule against alienations by a widow applies to Muhammadan and Hindu without distinction custom may refuse to her any right to claim partition or to sell save for necessity; or it may recognise a limited right in her to make a gift of it to a nephew or a son – in – law. As regards the right of a male proprietor to alienate, village custom follows closely neither Hindu nor be Muhammadan idea but recognise that a man's male des pendants have rights in his ancestral property and that it is necessary to prevent the intrusion of strangers into the proprietary body by rules as to pre – emption the distinction between ancestral

[716]*Gujaar v Sham Das*, 107 P. R. 1887 While a person who is not an agriculturalist or a member of on agriculturalist tribe may be governed in any pedicure law nevertheless on the question whether the Punjab customary law applies to any individual it is of importance to ask whether be is a member of an agriculture tribe and also a member of a village community people who for generations have drifted away from agriculture or taken to living in cities will not be presumed to be governed by customary law.

and acquired property which is foreign to Muhammadan law, is of great importance under custom; the right of alienating ancestral property being sometimes restricted even in the absence of direct descendants in the interests of collaterals, e.g., nephew. In some cases gifts to daughters or sister or their sons cannot be objected to; in others they can be cancelled.[717] By an Act of 1920 collaterals cannot contest an alienation of ancestral immoveable property unless they are descended by male lineal descent from the great grandfather of the alien or; and alienations of non – ancestral immovables cannot be contested as being contrary to custom. Since the Punjab legislature in 1900 passed the Alienation of Land Act that the sanction of the Deputy commissioner is required to permanent alienations of land made by a member of an agriculture tribe unless the alliance in a member of the same tribe or a tribe in the same group. In the year 1937, the customary law of the Muslims was abrogated by the Muslim Shariat Act. The exception of the agricultural land contained in the act of 1937. So, the exclusion of agricultural land takes away a very large part of the effect of the act of 1937.[718]

After that in 1937 The Muslim Personal Law (Shariat) Application Act, 1937 (Act XXVI of1937) was introduced. Section 2 of this act states that *"Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift ... the rule of decisions in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat)"*[719].

This Law only applied to intestate succession and had no application to testate Succession.

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[717] Roland Wilson, *Anglo Muhammadan Law*, ed. A. Yousuf Ali,179.
[718] M. Farani, *Manual of Family Laws in Pakistan*, 426.
[719] Ibid.

4. Law of Inheritance in Pakistan

After independence The West Punjab Muslim Personal Law (Shariat) Application Act (IX of 1948) enlarged the scope to cover the questions regarding succession (including succession to agricultural land). In 1951 the scope was further enlarged to all questions of succession (whether testate or intestate). In 1950 quite similar amendment was introduced in Sindh. In 1962, The West Pakistan Muslim Personal Law (Shariat) Application Act was enacted. *"Notwithstanding any custom or usage to the contrary, in all questions regarding succession, (whether testate or intestate) ..., the rule of decisions shall be the Muslim Personal Law (Shariat) in cases where the parties are Muslims."* An important result was that it seems to be that women became entitled to inherit the property. Section 2 of the West Pakistan Muslim Personal Law (*Shariat*) Application Act, 1962, was as amended further in 1983[720] when Article 2A was included in the abovementioned section which states as "*Notwithstanding anything to the contrary contained in section 2 or any other law for the time being in force, or any custom or usage or decree, judgment or order of any court, where before the commencement of the Punjab Muslim Personal Law (Shariat) Application Act, 1948, a male heir had acquired any agricultural land under custom from the person who at the time of such acquisition was a Muslim:*

a) he shall be deemed to have become, upon such acquisition, an absolute owner of such land, as if such land had devolved on him under the Muslim Personal Law (Shariat);

[720] M. Farani, *Manual of Family Laws in Pakistan*, 427; Pearl, David, *A Text Book on Muslim Personal Law*, 206.

b) *Any decree, judgment or order of any Court affirming the right of any reversioner under custom or usage, to call in question such an alienation on directing delivery or possession of agricultural land on such basis shall be void, in executable and of no legal effect to the extent it is contrary to the Muslim Personal Law (Shariat) Act;*

c) *All suits or other proceedings of such a nature pending in any court and all execution proceedings seeking possession of land under such decree shall abate forthwith.*[721]

It seems from a plain study of section 2-A that the law does not abolish all types of customs and not fulfill all the purposes of making amendments in section 2-A.

Firstly, section 2-A of West Pakistan Muslim Personal law only emphasised on one angle of the problem and relates to the abolishment of custom of reversionary right and restriction on the alienation of property inherited under custom in which the grandson of the 'last male full owner' challenge the alienation of property by his father and according to section 2-A "the person who acquired land under custom before 15-3-1948 would be deemed or presumed that he has acquired land under Islamic Law. While making amendment in the form of section 2-A the legislature ignores the right of women guaranteed in *Qur'ān* relating to succession in her father's state prior to 15-3-1948 which is also negated under the customary law by inserting a deeming clause in which the 'last male heir' would be presumed to be the full owner under Islamic law.

In the second instance as no law is based on presumptions so the words "deemed to or presumed" used in section 2-A by legislature wipes out the certainty of law of

[721] Ibid. 430.

succession ordained by Almighty Allāh in the *Qur'ān* 1400 years ago and does not give any clear picture and intent to abolishing custom relating to the right of a widow or daughter in her father's estate prior to 15-3-1948 where daughter challenges the main mutation passed prior to 15-3-1948.

Thirdly, as 2-A being retrospective in effect, the time of retrospectivity (15-3-1948) where the case is not covered under the umbrella of 'past and closed transaction' is still questionable.

Furthermore in early 19th century in an undivided subcontinent, while deciding the cases of succession among Muslims under section 26 of Bombay Regulation IV of 1827, the crux of the decision lies on the point of proof of customary law in the family or tribe in order to override *Sharī'ah*. Where, if custom is proved to be the rule of inheritance among family of Muslims, customary law were prevalent and Islamic law was ignored. Now under section 2-A of the West Pakistan Muslim Personal Law Sharia tApplication Act 1962 the same rule is applicable due to that deeming clause and still female heirs of a deceased were deprived of their legal, Sharī' right of inheritance. Reliance is placed on a dozens of decisions few of which are as under:

4.1 Cases of Inheritance before Promulgation of Shariat Act 1948

In 1917, *Abdul Hussein's*[722] case distinguishes and defines the criteria of applying custom as rule of governance in matter of inheritance. Mir Hussein Ali Khan Talpur died on 30thJanuary 1907 as intestate (neither child nor widow). Abdul Hussein son of his brother by half blood (collateral) filed a suit claiming that the diseased belonged to Talpur family of Baloch tribe and in the matter of inheritance the family was governed by

[722](1917) 45 IA 10.

custom. According to the prevalent custom, females were excluded from share of inheritance of paternal relations. He further claimed that the deceased belonged to *Sunnī* school of thought and therefore giving all the property to deceased sister in inheritance are detrimental to his vested right Privy Council observed that it is hard to define someone's personal believe but both Muslim sects were so sharply divided in preservance of their rituals, believes and performance of prayers that it was not hard to find their sect. Evidence of defined actions, observance and conduct of deceased and his family was taken into account. On the basis of this, both the courts below were unanimous that deceased belong to *Shī'ah* persuasion. The appellant based and supported his claim to apply custom on the basis of S. 26 Bombay regulations VI of 1827 which was extended to District of Sind and contemplates that,

"The law to be observed in the trial of suits shall be Acts of Parliaments and Regulations of government applicable to the case; in the absence of such acts and regulations, the usage of the country in which the suit arose; if none such appears the law of defendant; and in the absence of specific law and usage, justice equity and good conscience alone."[723]

While deciding the issue, Privy Council relied upon the ratio of the case, deciding application of custom in India as discussed in *Daya Ram v Sohal Singh* and held that, it lies upon a person demanding custom as a rule of governance on a particular matter to prove the prevalence of custom and not personal law. It is also declared that the claimant

[723] Amir Ali. Syed, *Mahemmodan Law*, vol. 2, 18.

had to prove what the custom is. Section 5 of Punjab Act does not create presumption that custom prevail as the rule of governance, straight away.[724]

Custom as rule of governance was alien to law of India. In England custom which was claimed in a particular district if proved to be followed outside, it loses its authority as law.

Court also mentioned the authenticity of custom by referring the case law of *Ramala Kshmi Ammal* as,

> "It is of the essence of special usages modifying the ordinary law of succession that they should be ancient and invariable and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that courts can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends."[725]

In this case, the plaintiff alleged custom in complaint, affidavit and appeal. More than 60 witnesses testify custom as governing law. But Privy Council gave weightage to one oral testimony of Rustom Khan head of Rustomanis, tribe who confirmed that deceased family was governed by Muhammadan law in matters of inheritance and there is no custom which exclude female from their share. This oral account, strengthened by the revenue record in which mutation of inheritance of one Mir Ghulam Ali Khan (family members of deceased) was registered according to Muhammadan Law. Privy Council thus rejected the claim that parties were ever governed by custom.

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[724] Fyzee.A.A. Asaf, *Cases In the Muhammadan Law of India and Pakistan* (Oxford: The Clarendon Press, 1965), 99.
[725] B.B.Mitra, *Indian Succession Act* (Calcutta: Eastern Law House, 1940), 79.

The case like *Mst. Sardar Bibi v Haq Nawaz Khan*[726] in 1934 paved the way for *Shariat* Act. In 1935 matter of inheritance of Karim Bokhsh, last male owner who died in 1921 leaving behind two daughters, a minor son and a widow. He belonged to a Gishkori Baloch tribe. Revenue authorities attested mutation in favor of a son by excluding daughters and widow. Sardar Bibi elder daughter of deceased brought a suit in 1927 claiming that the rule governing succession at the time of death of her father was Muhammadan law and she had wrongly been deprived from her share of inheritance and she claimed 7/32 share in her father's estate. During proceedings of case it appeared in *Rivāj i 'Ām* that the tribe was governed by customary law till 1920 but in 1920 all the members of tribe appeared before settlement officer and declared that from now onwards, the rule governing succession among them was Muhammadan law and not custom.

Karim Bokhsh was one of the signatories of that dedication. High Court on the basis of authorities declared that "the declaration made by the tribe was influenced by a wave of religious renaissance and zeal which had passed across Dera Ghazi Khan around 1920; therefore, High Court dismissed the claim of plaintiff and upheld customary law prevalent among Baloch tribes. High Court also observed that,"the abrogation of custom, had to be inferred by the continuous conduct of parties and not by wave of religious renaissance."

[726] *Mst. Sardar Bibi v Haq Nawaz Khan.*

4.2 Cases of Inheritance after Promulgation of Shariart Application Act 1948

In *Mst. Shahzadan Bibi v. Amir Hussain Shah*[727] case Amir Hussain Shah claimed his reversion right by filing a suit being collateral in 3rd degree of the last male full owner challenged alienation of property by his female heirs. Facts of the case were that Syed Riaz Hussain Shah died in 1933 leaving behind Mst. Khurshid Bibi (widow) Shahzadan Bibi (daughter) and Hakim Zaidi daughter from predeceased wife of last owner of land. Mutation of inheritance was sanctioned in two equal shares between widow and Hakim Zaidi daughter. On the death of widow her share goes to unmarried daughter Shahzadan Bibi. The other half was mutated in favour of Shahzadan Bibi on the marriage of Hakim Zaidi under customary law. On 10 April 1949, by three different mutations 7020 kanals and 12 Marlas were gifted by Shahzadan Bibi to her stepsister and her husband Manzoor Hussain. Case was defended on three grounds that plaintiff has no *locus standi*, parties were not governed by custom and they persuaded *Athna 'Ashariyah* sect.

Trial court dismissed the suit on the ground that:

a) Plaintiff failed to prove restricted right of alienation
b) Last full of alienation
c) Last full owner Shahzadan Bibi has right to alienate the property, plaintiff was not legal heir according to Sh'īah law of inheritance.

The decision was upheld by District judge. But high court in second appeal reversed the decision of both the courts below, question that parties were governed by agricultural custom and Shahzadan Bibi was limited owner and not full owner.

[727]PLD 1956 SC 227.

Supreme Court while deciding the matter referred answers to question No. 11,15,16,17 and 19 for *Rivāj i 'Ām* of District Mianwali from where the parties belonged and land was situated.

According to *Rivāj i 'Ām* prepared by government officer in consultation with parties tribe (Sayyed) widow can hold deceased husband's property as limited estate till her second marriage of death. She can alienate the property by giving notice of legal necessity to the male heirs of deceased for bearing expense on daughter's marriage government revenue or fine discharging husband debts or agricultural improvements was also written in *Rivāj i 'Ām* that daughter cannot inherit as full owner in presence of widow's son or upto 5th degree collaterals. There was no distinction between self acquired, ancestral, immoveable or immoveable property.[728]

Supreme Court dismissed the appeal by holding

1. Custom was proved among tribe of parties and Sayyed were consulted at the time of preparation of *Rivāj i 'Ām*. And section 5(a) of Punjab law act 1872, clearly came into force when custom was proved action 2-A of Muslim Personal Law Shairat Application Act, 1948 has no effect on "limited estate" of female heir and legislature internationally allowed "limited estate of female" to exhaust its time .
2. Section 3 of Muslim Personal Law 1948, provided express retrospective effect and succession of immoveable property held by female as limited owner will be open to succession on its termination as if last male owner died at the end. It was also deduced from this provision that, if the termination of limited estate was

[728]PLD 1956 SC 234.

effected on occasion of marriage remarriage of holder she was eligible to get her legal share form last male full owner.[729]

Muslim Personal Law Shairat Application Act 1948 was silent on the subject of alienation by female, before termination of limited estate and it was not even restricting the application of customary law on the subject.

Supreme Court based these reasons on the ratio of its earlier judgment given in *Muhammad Asghar Shah v Muhammad Gulsher Khan* case[730] on the basis of above speaking reasons Supreme Court held that, Act of 1948 does not extend the right of female limited owner and any alienation of property by her before termination, is subject to customary law same as before 16-3-1948.[731]

In *Khair Din v Kamal Din case*[732] a suit was initiated by three sons, claiming reversionary right against a gift made by Khair Din who acquired property under Customary law and gifted one fifth share to his 4th son. It is admitted fact that the property was ancestral. Trial court dismissed the suit on the ground that often promulgation of Act of 1948 and subsequent amendment in 1951, donor of gift has absolute right over property and plaintiff has no *locus standi.*

High court reversed the decision on the ratio of two judgments of superior court cited as *Basher Ahmad v Muhammad*[733] and *Abdullah v Bakhto Mai*[734]. Learned Council for the appellant/respondent based his case in favor of the gift on the argument that,

1) Male heir has got absolute ownership of property by operation of law.

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[729] *Mst. ShahzadanBibi v. Amir Hussain Shah* 1956 SC 227.
[730] PLD 1949 Lah 116.
[731] PLD 1961 SC 461.
[732] PLD 1956 SC 321.
[733] PLD 1956 Lah 934.
[734] PLD 1956 SC 321.

2) By operation of new law "agnatic" theory, the very base of suit by reversioner got abolished.
3) Heirs of last male full owner has vested right in property held by female as life estate, no such right is available in case of life estate held by male owner.
4) If male heir cannot alienate property amendment introduced in 1951 becomes meaningless.

Main question for decision in that case was, whether by amendment in law Muslim male holding estate under custom became absolute owner or not?

Supreme Court for the decision in subject case considered facts and arguments advanced by the council and analysis section 2 and 3 of the Act of 1948, along with amendment in 1951, operation of section 5 of Punjab Law Act 1872 the ratio of laws given in Bakhto Mai's case and the definition of ownership by different authors and concluded that a suit under section 42 was competent by Muslim law heir,

a) To protect his right in case of alienation by female holding life estate.
b) The only difference brought by Muslim Personal Law Shariat Application Act 1948 was that *Sharī'at* will govern succession after termination of life estate.
c) No expressed words provided by the amendment to end "status quo ante" and there is no reason why a person inherited property under custom should not remain bound by that law.

It is therefore held by Supreme Court that respondent /plaintiff have vested reversioner rights and Khair Din will continue to govern under customary law.[735]

[735] *Basher Ahmad v Muhammad* PLD 1956 Lah 934.

In *Muhammad Yousuf v Mst. Karam Khatoon*[736] case suit was initiated by Mst. Kamalzai after the death of her mother in 1951 who was a limited owner, seeking possession of 12/40 share in whole property of her father Karam Khan who died in 1934. On death of Karam Khan the property was distributed under Customary law in a ratio of two third to deceased's son Aslam Khan and Zaman Khan. One third of share was given to deceased widow Mst. Rohana and daughter Mst. Kamalzai (plaintiff) as limited owner. Suit was contested by the brothers on two grounds. First that they have inherited land under customary law and second the alienation of property took place before promulgation of North West Frontier Act of 1935.

Now according to Law, inheritance of Karam Khan opened only to the extent of limited estate of their mother and time barred trial court dismissed the suit on merit.

Appellate court reversed the decision.

Judgment of at variance was assailed to high court which decided the appeal in favour of appellant/plaintiff, leave was granted by Supreme Court on two points:

1) Whether question of limitation arises in that case
2) Whether entire property of the deceased will open to inheritance after the termination of limited estate

Supreme Court based its judgment in the light of section 4 of North West Frontier Province Shariat Application Act, 1935 and declined the claim of plaintiff and held that, succession of only limited estate of Mst. Rohana will open. It was also held by Supreme Court that it was in the knowledge of the plaintiff/respondent that the land is divided

[736]PLD2003 SCMR 1535.

among heirs of deceased under Customary law, which create ouster on the basis of limitation Supreme Court recognise the division based on customary law.[737]

In 1974 Supreme Court decided that a person, who was a Muslim law heir, in limited estate held by a female limited owner, was not under obligation to file a suit before termination of limited estate. Facts concluding the case to above *stare decises* were that, on the death of Phullu a Daharjutt of Multan, land was mutated in favor of Allah Bukhsh his son under customary law who also died issue less and the land was transferred to her mother Mst. Khanan (widow of last male full owner in preference to her sister and third degree colletral).

Dispute arose on her death in June 1955 when children of Rustam and Bhota, real brothers of Phullu (last male full owner) and husband and children of Mst. Bhadai daughter of Phullu, challenged two alienations made by Mst. Khanan. One by an oral gift in 1930 in favour of her daughter Bhagan's three sons Allah yar, Muhammad and Ahmad and second by registered gift deed in favour of Allah Jwai and four sons of Mst. Sadhan.[738]

Claim was contested on the point limitation for first alienation and for second alienation arguments advanced that Mst. Khanan alienated the property as full owner.

Trial court held that:

i. Parties were governed by custom

ii. Properties were devolved on Kahanan as limited owner

iii. Suit was barred by time as first alienation of property is in 1930.

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[737] *Mst Hussain Zadgai v. Mst Bibi Rohana* 1974 SC 07.
[738] Ibid.

And allowed the alienation to the extent of one sixth share which have been devolved on her by Sharī'at Trial court also determined share of the plaintiff under Shariat Act.

The matter was assailed in appeal in which was decided that the last full male owner was Allah Bukhsh and not Phullu. Mst. Khanan was holding the land as mother and as limited owner. She had no power of alienation and the land was not ancestral, regarding plaintiff no.1 to 6.

Court referred the definition of "ancestral properties given in Rittingan digest of Customary Law, which define it as,

" As regards son's property inherited from a direct male lineal ancestor and as regard collaterals, property inherited form a common ancestor, property which has never been held by common ancestor cannot be regarded as ancestral in any sense".[739] Supreme Court upheld the decision of High Court.

4.3Cases after Amendment of 2-A In Shariat Application Ammendment Act 1962

In *Muzaffar Khan v Muhammad Aslam* Muzaffar Khan Plaintiff in 1972 challenged the gift made by his nephew Muhammad Aslam Khan [740] to his sisters Mst. Roshan Jan and Mst. Nabi Begam in 1966 registered on 28-08-1967. Suit was filed on the grounds that under customary law of inheritance Muhammad Aslam could not alienate the property, and his gift affected adversely on the presumptive right of plaintiff. Suit was decreed in favor of plaintiff but the decree was set aside in appeal by District Judge on two grounds:

1. Plaintiff failed to establish that the property was ancestral.

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[739]Ibid.,15.
[740] PLD1972 98.

2. He also failed to prove that he was presumptive heir, and thus he has no *locus standi.*

Civil revision was filed which was dismissed on four grounds:

1. Plaintiff inherited property in 1923 from Ali Mardan, excluding other heirs and suit was barred by limitation.
2. Plaintiff was not Muslim Law heir of Ali Mardan.
3. Respondent acquired complete title of property under perception doctrine.
4. Gift made by respondent / defendant was otherwise considered as inheritance of sisters.

Petitioner/Plaintiff assailed the decision in Supreme Court by filing leave to appeal which was granted to consider that the property was inherited before enforcement of NWFP Shariat Act of 1935 and respondent – defendant was childless and under custom he can hold limited interest. He based his case on the Judgment of Supreme Court cited as *Khatoon v. Mala and 5 others*[741] in which it was held that NWFP Shariat Act 1951 does not restrict customary law of alienation, to be operative in Cases of inheritance of agricultural land. The case law was distinguished by Supreme Court and held that it was only applicable where male owner died before enforcement of Shariat Act 1948 unlike act of 1935.

Supreme Court decided the case on the basis of *Mst. Sahib Jaan Bibi v. Wali Dad Khan*[742] and in light of amendment in Section 3 of Shariat Act held that NWFP Act of 1935 was retrospective in nature and in question of inheritance whether deceased died before or after the promulgation of that Act he will be considered to die within the

[741]PLD 1974 SCMR 341.
[742]PLD 1961 Peshawar 9.

domain of Muhammadan Law. Supreme Court dismissed the appeal on the basis of locus standi, limitation and retrospectively of NWFP Shariat Act 1935.[743]

In *Abdul Ghafoor v. Muhammad Sham* case after the intersection of section 2-A in Muslim Personal Law of 1948 Supreme Court decided four appeals in a single comprehensive and authoritative judgment, as identical law points on the matter of inheritance are involved.[744] Facts involving first appeal were that appellant-plaintiff in 1958 challenged the scale of ancestral property by the defendant being adverse to reversioner right under customary law of inheritance after the death of defendant. This suit for declaration was defended on two grounds:

a) Alienation of property permitted for good management of property under customary law.
b) Under new enactment he was competent to alienate his property as absolute owner.

Two facts are admitted in this case:

1. Property in dispute was ancestral
2. Parties were governed by customary law.

Under Customary law property can only be alienated on the basis of legal necessity or for consideration. High Court rejected the plea of defendant and held that the property was inherited prior to promulgation of Muslim Personal Law and referred a case decided in 1956 which contemplates that power of alienation of property after enforcement of the Shariat Act of 1948 were not changed. While it only effects the subsequent succession on

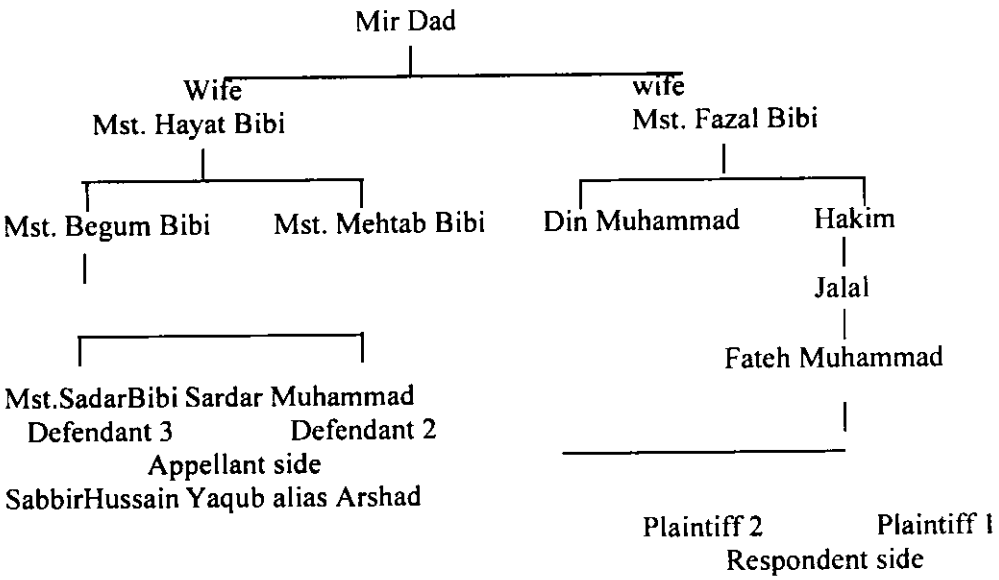
[743]PLD 1984 SC 39.
[744]PLD 1985 SC 407.

termination of limited estate and that case also affirm the reversioner right to contest alienation.

Second Appeal pending decision involves the assertion of Musa Khan who challenged the alienation of ancestral property, being collateral of the deceased Taj Muhammad who died in 1920. He claimed 4/144th share in suit property and impugned gift of half of the deceased property in favour of 2 daughter's of deceased (Zenab and Shakran) made by widow on 23-06-1953. Widow already mutated other half to Bakhat Sawi and Basran in 1941. She died few days after alienation of that property. Plaintiff takes a plea that she was a limited owner under custom when Shariat Act of 1948 was enforced and by virtue of 1951 amendment, she was entitled to inherit only 1/8th share in suit property and thus could not gift more than her share. The suit was decreed daughters (donee of the gift) had two contentions.

1. The impugned property was not ancestral and was purchased by the father.
2. Upon amendment in the law of 1951 widow can alienate the property as full owner. In third appeal the standing of the parties can be understood by following pedigree table.[745]

[745] Ibid.



Yaqub and Sabbir great grandson of Hakim son of Mir dad from Mst. Fazal Bibi, in March 1958, instituted a suit by challenging a mutation attested in favour of children of Mst. Hayat Bibi, second widow of Mir Dad from Mst. Fazal Bibi in March 1958 instituted a suit by challenging a mutation attested in favour of Children of Mst. Hayat Bibi second widow of Mir Dad in May 1957 on the basis that half of the property of Mir Dad deceased was held by Mst. Hayat Bibi for limited interest/maintenance under customary law. Alienation of property to the progeny of Mst. Hayat Bibi was depriving plaintiff from their rightful ownership.

Trail court decided the suit in favour of plaintiff on the ground that:

a) Property was ancestral

b) Parties were governed by custom and there was a custom that on the death of widow property will be reverted back to male heir of family.

Appellate court reversed the decision on the point that Mst. Hayat Bibi died after promulgation of Shariat Act and succession in that case was opened on the death of Mst. Hayat Bibi. High court set aside the decision of appellate court and restored the decree of trial court.[746]

Supreme Court heard the matter on following points:

1. Whether according to custom deceased widow was limited owner.
2. Whether respondent /plaintiff discharged their onus to proof that deceased widow was only maintenance holder.
3. Whether High Court ignored compilation of *Riwāj-e-'āam* of Sialkot District, just because of omission in written statement.

Forth appeal was regarding a suit filed by Nazir Ahmad alleging therein that his father Hussain Bukhsh inherited 446 Kanals of agricultural land under customary law of inheritance. Out of which he sold 105 kanal 12 Marals in 1951 to Javed Mehmood Akram at the price of Rs. 80,000/- when he was 9 years old, effecting adversely his reversionary right after the death of his father.

The suit was contested on the ground that one of the attestator of sale deed was plaintiff respondent's brothers, another son of vendor among other grounds.

Suit was decreed on the ground that vender was limited owner and he can alienate only on the grounds of legal necessity which was proved only to the extent of Rs. 12,500/-.

Decree was passed with a condition that plaintiff shall obtain possession of the land not compassing legal necessity on paying back the amount to vendee. Appeals of both the parties was dismissed by District as well as High court.[747]

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[746] Ibid., 413.
[747] Ibid., 431.

Supreme Court before imparting its judgment discussed the factors and background which culminated the law of inheritance in the form of Shariat Act and subsequent insertion of Section 2-A thereafore. British invaders made laws according to their needs to govern different territories. Section 5 of Punjab Law Act IV of 1872 was on the legislation along with Punjab Limitation (custom) Act I of 1920 and the Punjab Custom (power to contest) Act II of 1920 clause 5(b) of section 5 of 1872 empowers Muslims to practice Islamic Law in matters of inheritance. Case law were developed which set the touchstone that whenever the law was modified by custom, the rule of decision would be customary law Muslims made efforts for enforcement of Shariat and got first break through in the form of Nort-Western Frontier Province (Shariat Application) Act 1935 and a central statute of Muslim Personal Law (Shariat Application) Act 1937 which removes overriding effects of custom in different matters including inheritance except in matters relating to agricultural Land, charities, Charitable institution and religious endowment other than waqf.

After partition first enactment to make Shariat as a rule of decision among Muslims were made in the form of West Pakistan Shariat Application Act 1948 in matters related to inheritance in Punjab.

Major changes were incorporated by inserting Section 3 of MPL (SA) Sind Ammendment Act XXII of 1950 which abolished the words, "questions relating to agricultural land and charities and endowment from the law."

Bahawalpur State Shariat Application Act 1951, and Khairpur State Muslim Female Inheritance, (Removal of Customs) Act 1952 were also enforced.

New legislation did not fulfill the required purpose. As the case law developed by various courts continuously spelled out that "no alienation could take place without the consent of concern reversioner unless it was for consideration and necessity. Females/widows inheriting the estate in different form were also dealt with, on somewhat similar lines. Supreme Court cited a dozen of case laws of this issue.

Therefore, a new law in the form of West Pakistan Shariat Act V of 1962 was enacted along with Punjab Muslim Personal Law, (Removal of Doubts) Ordinance 1972.

Shariat Act of 1962 has introspective nature and terminates limited estates held by Muslim female under customary law.

After all these efforts customary law still prevailed till 1981 when Federal Shariat Court in *Muhammad Ishaque case*[748] declared customary law repugnant to the Injunction of Islam and new ordinance inserting section 2-A was approved which undoubtedly removes various short comings.

Supreme Court also emphasised on implication of Section 2-A as

(1) Power of alienation was given to Muslim heir who has acquired agriculture property before 15-03-1948.

(2) Absolute ownership of land.

(3) All customary legislations, even if they were previously held by superior courts to be applicable lost their operation.

(4) It nullifies all customs, usages, all orders, judgment and decrees of courts with its overriding effect.

(5) It retrospectively goes prior to 15-3-1948 when it was put in "Juxtaposition" with Shariat Act of 1962. It makes a person acquiring agricultural land under

[748]Shariat Petition No.13-B of 1980, decided on 19-5-1981.

customary law, by its deeming clause and absolute owner as if deeming clause an absolute owner as if the land had devolved on him under Shariat.

(6) It will not only neutralize the pending suits but also culminated decrees and even cases pending execution.

Supreme Court decided the appeals filed by the plaintiff seeking reversioner rights. In the light of section 2-A on two grounds.

1) The new law provides full power of alienation and imposes no restriction on male heir" who inherited land under custom before 15-03-1948.
2) And under clause (c) all suits and other proceedings on the subject had been abated.[749]

In case[750] of *Ghulam Ahmad Shah v. Mst Ghulam Sarwer Naqi* died in 1903 leaving behind 3 sons, a daughter and landed property in different estates of undivided India. Mutations according to Islamic law of inheritance were entered except in one estate where Mst. Ghulam Sarwer Naqi (daughter) was not only deprived of her legal share but also her name was omitted from the list of legal heirs on impugned mutation dated 20 July, 1963.

Matter was agitated in original civil jurisdiction by Mst. Ghulam Sarwer Naqvi which was defended by her brother on the grounds.

1) The petitioners relinquish her claim in this estate on account of expenditure incurred on her 2nd marriage; intervening divorce 5 years maintenance and a Rs. 10,000 incurred on murdered case resulted in occasion of her divorce.
2) That relinquishment resulted wavier and estoppels.

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[749]1985 SC 407.
[750]PLD 1990 SC 1.

3) That law of adverse possession and ouster hit that case.

4) Suit is barred by time.

5) Subsequent purchasers were not implemented as party in the case. Trail court dismissed the suit on the ground of relinquishment; the decision was assailed in appeal which was accepted. Judgment at variance was decided in favour of respondent-plaintiff in civil revision which came under consideration of Supreme Court in leave to appeal.[751]

The main argument of counsel for petitioner-defendant in Supreme Court was that respondent-plaintiff failed to challenge her ouster for a long time which matured adverse possession in favour of his client. While answering a question of court that she become co-sharer in her father's property immediately after his death, the counsel reiterated the point that not challenging the mutation sanctioned against her for a long time constitute ouster and plea of co-sharers right become in fructuous.

Court while imparting its judgment on these legal points declared. Relied on it 3 decisions given of that points. This judgment also set a yardstick for the court that in similar cases the suit is treated to be based on title and not for correction of revenue record.

In *Aswar Muhammad v. Sharif Uddin*[752]case it was held that wrong mutation confer no right in property as the revenue record is maintained only for purposes of ensuring realisation of land revenue. In Anwar Muhammad case, inheritance of Lekhwera was in dispute. Mutation was attested in 1907-08. The petitioner resisted the claim on the

[751] Ibid.
[752] 1983 SCMR 626.

ground that suit for declaration was not competent as they were not in possession of land and it was barred by time.

Learned counsel for the petitioner also reiterated his point on the ground that before enforcement of Land Revenue Act in Bahawalpur, settlement was recorded with regard to payment of Land Revenue and persons who were in cultivating possession over the land excluding altogether others who were not in possession and counsel wanted to transform this scenario into principle of inheritance. Supreme Court held that this claim is based on custom and not on *Sharī'at.*

> "The possession of one co-sharer is for the benefit of all other co-sharer." Impugned mutations conferred no right in the property of one co-sharer excluding Lakhwera."[753]

In 1982 Supreme Court also delighted on the views of different jurists even of non-Muslim, upon rules of inheritance and position of females in succession in Hindu, Roman, English and Islamic legal systems, and emphasised that Muslim law of inheritance is derived from the *Qur'ān* and the *Sunnah.*

Supreme Court also mentioned the praising remark of F.Z Tayabji, Sir William John, S.Visey Fitzgerald, Macnaghten and Rumsey for their books. Supreme Court also elaborates female position in Muslim law, by giving the touchstone that, blood relationship is the cause of title to succession by referring the *Qur'ānic* verse of *Al- Nisā*, and concluded that Islam gave the position to those heirs which were previously excluded by custom. Female property and personal independence in Roman law is limited and court referred to Sir Henry Mane's observation about it.

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[753] Ibid.

Roman law influenced by Common law, English law gives the concept of unity of personalities and no considered married woman as separate individual. So, she was incapable of holding any separate property. These disabilities were subsequently amended by Court of Equity and Married Woman's Property Act.

In Hindu law, women never got independence at any stage of her life. At first, she depended on her father then under husband and after his death under the control of her son. Muslim law recognises individuality of Muslim women to own or alienate property at her before or after marriage. While, concluding this comparison Supreme Court held that Muslim women enjoy a superior right in comparison to her English or Hindu sister. Muhammad (SAW) affected a paradigm shift in recognising the right of women from complete servitude to complete enjoyment and privilege of rights equal to that of men. SC referred constitutional amendment and addition of article 2-A. In the case in hand, sister becomes absolute owner of her share of property without intervention of revenue officials. Supreme Court also noticed that in impugned revenue record her existence as a daughter was also denied.

Whether so called relinquishment of her accrued right in inherited property even under Islamic dispensation is permissible in Islam or not? While assuming that question Supreme Court referred to the last sermon of Prophet (SAW) in the word that man have right quo woman and they have similar rights qua men," Supreme Court also raises a question whether recognition and protection of sights of female heir is matter of public policy or not. The answer is in affirmative based on two *aḥadīth* mentioned in a book "Saying of Muhammad (S.A.W)" edited and translated by Mirza Abdul Fadl, as for perfection as a Momin it is necessary qualification that he should be best among them to

his women folk (in treatment), and in second *ḥadīth* called her a crystal, and also referred chapter 4 verse 34. Supreme Court held that relinquishment is against public policy and contrary to section 23 of contract act, which states that the consideration or object of an agreement is lawful unless it is forbidden by law." The respondents action in agreeing to the relinquishment (though denied by her being against public policy, the very act of agreement and contract constituting the relinquishment was void."[754]

Supreme Court based its finding at these two issues on the basis of three judgments of superior courts, cited as E.A Evans verses Muhammad Ashraf[755], *Sibtain Fazli v. Muhammad Ali Khan*[756] and *Atlas Industrial Cooperation v. Dr. Jalil Ashar*[757], considering them against public policy. Supreme Court held that in present legal framework by insertion of object resolution new principles of public policy with Islamic spirit would have to be applied, and considered section 23, 25, 16 of Contract Act deciding the issue on relinquishment.[758] The question regarding the exception of section 25 of contract act hits the case of respondent petition adversely on ground of relinquishment without consideration on account of natural love and affection with brother declared void on the basis of public policy under section 23 of Contract Act. Such relinquishment is based on social constraints the flow of love cannot be so unnatural. In present case the claim of spending money on her maintenance, intervening divorce and criminal case are against injunction of Islam as the *Qur'ān* declares:

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[754]PLD 1990 SC 1.
[755]PLD 1964 SC 536.
[756]1964 SC 337.
[757]1970 PLD Kar 241.
[758]PLD 1990 SC 1.

"Men as protectors and maintainers. The sight of sister equated will be right of daughter."[759]

The contract of relinquishment is void. Firstly, against public policy and secondly, it lacks consideration. Thirdly, neither it is recognised in Islam nor it is valid transfer under transfer of property act. Lastly, is does not meet the ingredient of gift.

The question of estoppels, adverse possession, and wavier is decided against petitioner defendant in the basic that in Islam , brothers are required to protect the right of sisters and even otherwise the main ingredient of hostility in adverse possession is missing in that case. Moreover, the principle of public policy and accrual of right of inheritance, on the death of father would negate the wavier and estoppels plea. Supreme Court in the above circumstances dismissed the petition in favor of sister.[760]

In *Jannat v. Jannat*[761] case Sarwar son of Khair Din died in 1930 leaving behind two sons and two daughters and landed property. Mutation of inheritance was passed in favour of both brothers Ghulam Hussain and Ashiq Hussian excluding both sisters Ghulam Jannat and Mst. Bakhto Mai. Mst. Jannat filed a suit for declaration of her rights over $1/6^{th}$ share of inheritance out of her deceased father's property. She claimed that it has come to her knowledge in 1991 that they were not included in mutation of inheritance. Both brothers filed written statement separately. Ashiq Hussian replied that he was giving share of produce to Bakhto Mai his sister regularly and maintaining Mst. Jannat was the duty of Ghulam Hussian.

Court decided the case on point of law that custom among heirs of Ghulam Sarwer in the matter of inheritance was not proved and newly introduced section had retrospective

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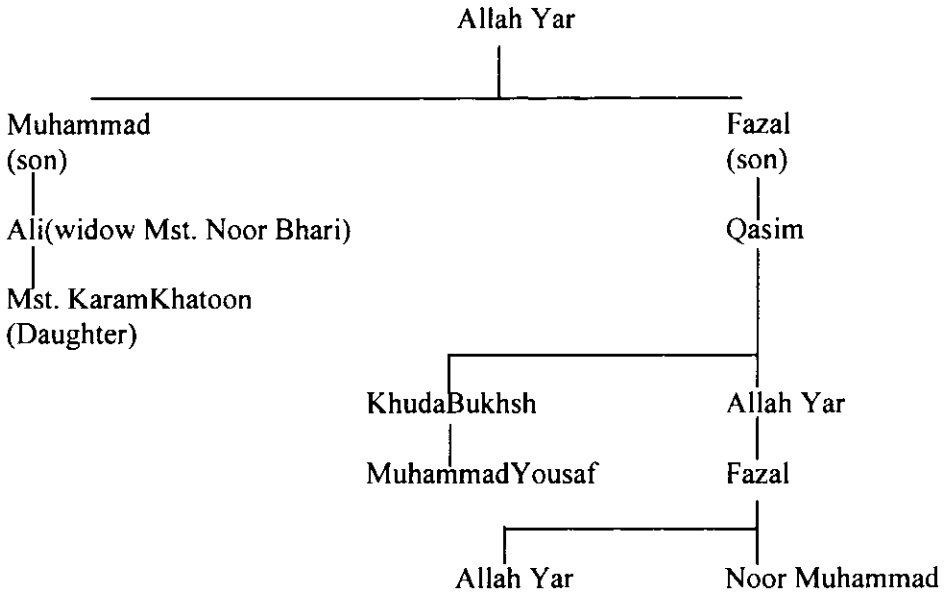
[759] Qur'ān, 4:34.
[760] 1990 SC 1.
[761] 2003 SCMR 362.

effects. Learned defending counsel from the side of brother argued that Legislature only intends to remove restrictions of the power of ownership viz alienation, it does not re-open the inheritance of last made full owner who died prior to 1948. Muslim after induction of section 2-A will enjoy full rights over the property under Muhammadan Law to the extent of their share and not the entire property. Supreme Court decided that the admission of Ashiq Hussian about paying share of produce to her sister; divorce of Ghulam Jannat's daughter from the son of Ghulam Hussian just before the institution of suit and the ratio of law discussed in Abdul Ghafoor's case merit the decision in favour of daughter. In *Muhammad Yusuf v. Mst Karam Khatoon*[762] case Karam Khan daughter of last male full owner died in year 1923-24 challenged the mutation attested in favour of collateral of Ali (last owner) after the death of widow of Ali (mother of plaintiff). The mutation was attested under customary law in 1946. The relationship between parties is in pedigree table below.



[762]2003 SCMR 1535.

Trial court and District Court dismissed the suit on the basis that customary law was prevalent in Bahawalpur estate, when the mutation was attested. High Court reversed the decision and decreed the suit in favour of daughter. Varies of the decision was preferred through appeal before Supreme Court. Supreme Court decided the matter in the light of section 5 of Punjab Law Act 1872, Bahawalpur Shariat Application Act and the law discussed by Justice Robertson in *Daya Ram v. Sohel Singh* mentioned in 1906 Punjab Report 390.

Supreme Court held that, before enforcement of Shariat Act, in Bahawalpur the parties were governed by Punjab Act which provides that, "Muslim will be governed by Muhammadan Law and if custom was proved to be the rule of decision, only then clause (a) of section 5 was applicable to the parties. Supreme Court rejected the plea of considering "entry into *Wājib al arḍ*" as evidence and proof of custom and declares that collateral was failed to proof custom as governing law of parties in their personal matters.

It was also held that after insertion of Section 2-A in Muslim Personal Law Shariat Application Act, if Mst. Noor Bhari widow of Ali was supposed to be the limited owner even then she would inherit her *Sharaī* share. And the residue will go to her daughter and collateral. Supreme Court decided the matter in favour of respondent/plaintiff and entitled her 9/16 share.[763]

The most relevant case in the history of that evolution of that law was decided by the full bench of Supreme Court with a split views in 2012.

In *Ghulam Haider and others v. Murad through Legal representatives*[764] *2012* PLD 501facts constituting the list, were that Lal son of Janan died in 1943/44 leaving behind

[763] *Muhammad Yusuf v. Mst Karam Khatoon*2003 SCMR 1535.
[764] *GhulamHaider and others v. Murad through Legal representatives 2012* PLD 501.

property in two revenue estates, situated at Mouza Chabri Bala Sharqi and Bala Gharbi, his heir included a son Murad, a daughter Bano and a widow Sehati who died 24-25 years after his demise.

Mutation of inheritance of almost all the land was sanctioned on 29-10-1944 vide mutation No. 4536 under Customary law in the name of Murad son of Lal excluding deceased's daughter and widow. Few kanals of land was mutated under Islamic law of inheritance on 28-02-1959 in favor of son, daughter and widow of deceased.

Suit was filed on 15-10-1973 by Murad challenging mutation No. 5631 on the ground that Lal was governed by Customary and the mutation attested in 1959 under Islamic law of succession is void. By that time widow of deceased also passed away. Bano daughter of deceased contested the suit on the point that, her father was governed by Islamic system of inheritance and the land was fraudulently transferred under customary law in 1944 by Murad; subject land was subsequently transferred in the name of Kattu son of Murad.

A separate suit was filed by Bano on 6-3-1974 for this purpose civil court demised the suit of Murad and decreed the claim of Bano. Two appeals were filed by Murad. In District Court which was remanded back for framing of issues that,

1. Whether property was ancestral
2. Whether Lal was governed by Customary law

In 1980 Civil Court reversed the decision law favour of Murad and dismissed Bano's suit after death of Bano in 1980, her legal heirs preferred an appeal which were allowed by ADJ in 1984 on the ground that parties were governed by Islamic law.

Civil revision was filed in High Court by legal heirs of Murad which resulted in restoration of decree of civil court. It was held that parties were governed by customary law at the time of attestation of mutation and all the land of Lal shall devolve on Murad. Leave to appeal was sought in 2001 by legal heirs of Bano which was granted by Supreme Court to examine the scope of section of Muslim Personal Law Shariat Application Act.

Majority view of this five member bench of honorable Supreme Court is based on the *ratio decidandi* of Abdul Ghafoor's case given by this court on the same legal point.[765] Majority view also set aside the interpretation of law given by this court in Mst. Jannat v Ghulam Jannat case. While giving decision on the scope of section 2-A Supreme Court in the above referred judgment held that, section 2-A covers all matter of inheritance related to male heirs who acquired land prior to 15-3-1948. Under customary law the introduction of section 2-A in MPL (SA) Act, 1948 make such male heir an absolute owner free from all encumbrance. It was held by the majority view in the present judgment that, "intention of the legislature was that the entire devolution on the basis of customary law of inheritance was meant to be saved by section 2-A and such devolution in its entirety was meant to be deemed to have been under Islamic law of inheritance".

Supreme Court also took a keen view while dissenting to its previous judgment on a question of devolution of property only to the extent of legal share to male heir on the ground that it is contrary to the express words and spirit of section 2-A. Section 2-A Islamized an un-Islamic act through a legal fiction.

Supreme Court held that the law given in Mst. Jannat's case if applied creates complication and generate more litigation. All acquisitions under customary law from a

[765] Ibid.

Muslim before 15-03-1948 are Islamized by a deeming clause. Thus, Majority of the bench decided against Mst. Bano to the extent of mutation attested in favour of Murad prior to 15-03-1948.

Two honourable judges disagreed with the majority view on conclusion drawn by them while interpreting section 2-A of the Act and ratio of precedent cited at the bar.[766]

The honourable judges were of the view that when predecessor-in-interest of last male full owner of the parties died, the act in field in the case of succession was Punjab Law Act 1872. Section 5 of the act has two fold,

(1) Any custom which is not contrary to equity, justice and good conscience and not altered by any other law is applicable in personal matters of subjects.

(2) Rule of decision among Muslims shall be Muahmmadan Law.

According to Justice Ejaz Afzal, Muhammadan has not been provided with a choice of selecting custom or Muhammadan Law as rule of decision in their personal matters according to the tone and tenor of words of statute. "Muhammadan Law where parties are Muhammadan" are mandatory in nature.

The judge also declares that, if for an instance Muslim falls within the domain of customs even then, the custom depriving someone from its due share it is not just, equitable and based on good conscience. Honourable Justice also interpreted words "equity and justice" to support his reasoning. He also referred judgment given in *Daya Ram v. Sohel Singh* case, decided by Lahore Chief Court. While discussing the varies of custom as law in distribution of agricultural land in succession in 1906. He also based this arguments on Muhammad Jan's case, decided by Privy council and the Judgment of Justice Robertson of Punjab Chief Court reported in Punjab Record vol. 41 Page 39

[766] Ibid.

which was also endorsed by Supreme Court in Mst. Qaiser Khatoon's case in 1971. That section 5 of PLA 1872 does not create presumption that someone fall directly in the domain of custom. The assertor has to prove two things:

1) He was previously governed by custom.
2) What the particular custom is?

to fall within the preview of section 5(a) of Punjab Law Act 1872.

While interpreting section 5, minority view relied on TG Bhoja's case decided in 1916; it was held by Privy Council that "where the words of statute are dear, even a long and uniform interpretation of it can be overruled, if it's contrary to the meaning of enactment".

Supreme Court on the basis of above reasons held that it is mandatory in the Punjab Law Act 1872, that rule of decision among Muslims were Muslim Personal Law.

Learned Justice held that, section 2-A nowhere approves or approbate custom as a rule of decision. In present circumstances Murad failed to discharge his ouns in proving custom as a rule of inheritance among his family. Lal directly was governed by section 5(b) of Punjab Law Act. Majority view prevails and Murad continue to cultivate the land by fiction of law.[767]

Course of purifying Law of inheritance from the shadows of customary law and implementing Shariat in its classical form stretched over four decades. Pakistani courts continued to announce dissenting judgments on this issue. Majority of honourable judges based their decisions on the existence and non-existence of custom among parties and *Riwāj-e 'Aām* was recognised as the main source of proving custom. Honourable Justice

[767]PLD 2012 SC 501.

Afzal Zulla (late) and Honourable Justice Ejaz Afzal considered prevalence of custom as baron rights of female and emphasised on deciding the matter on the basis of classical Islamic texts. It can also be seen that how effectively legislature responded to the arising issues in the law of inheritance. After all these efforts Muslim female is in much better position in that segment of life than five decade ago.

Chapter No. 6

Historical Background of Justice, Equity and Good-Conscience in British-India and Pakistan

Chapter No. 6

Historical Background of Justice, Equity and Good-Conscience in British-India and Pakistan

Since the earlier days of East India Company, the formula of equity, justice and good-conscience had been used to provide law for areas of the legal system not covered by statute law or personal laws. The regulation of 1781 and 1793 for instance, stipulated that in cases not otherwise specially provided for the judges should decide according to equity, justice and good-conscience. The notion was copied from Regulation to Regulation and from Regulation to Statute[768]. According to Derrett this formula when it was first introduced in the Royal Charter of 9 August 1683, did not exclusively refer to English Law but primarily to other source of law which were deemed to be appropriate as a 'just' rule to the facts of the case.[769] By the end of nineteenth century British Indian Courts tended to apply under the formula equity, justice and good-conscience in the first instance English Law as residual law.[770] In Pakistan courts would some time apply this formula of Common Law to fill the gap. This study not only explores the background of equity in Common Law with brief comparison with Islamic Law of equity (*Istiḥsān*) but also discusses the case law of Pakistan where this formula has been used instead of Islamic Law.

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[768]See Section 6 of The Punjab Laws Act 1872.
[769]J.D.M.Derrett, 'Justice, Equity and Good-Conscience', in J.N.D. Anderson, *Changing Law in Developing Countries* (London, 1963, 140).
[770]Ibid., 144.

1. Historical Nature of Equity

Equity is hard to define. Many scholars attempted to define it but they ended by capitulating to the general view. Equity has diverse set of meanings. David M. Walker proposed the meaning of equity. He defined it in three senses as in the first sense it is fairness, justice and sometimes understood as synonymous to natural justice. In second sense, equity is applied in different circumstances where a rule of law seems unreasonable and unfair. In the third sense, equity is that which was developed and applied by the courts of chancellor and since 1875 by chancery division of the high courts.[771] In continental legal system, it is purely conceptual and the term is almost synonymous to natural justice.[772]

There is a difference between the meaning of Law in England and in continental and Islamic world. Continental speech conceals the difference between law and right; where as English speech conceals the correction between them.[773]

The term equity suffers the same fate. In English legal system natural justice is not the foundation of decisions but undoubtedly it effects the interpretation of the law.

The description of equity as that law, which is administered by the English courts of chancery, of course is hardly a definition. Yet that is the customary introductory description of equity.

The purpose of such definition is to make it necessary that the law administered by the chancery courts of England be known in order to understand equity so the purpose

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[771] David M. Walter, *The Oxford Companion To Law* (Clarendon press Oxford. 1980),424-425.
[772] Ronald Jack Walker, *The English legal system* (London: Batfeeworths London, 1985), 41.
[773] John William Salmond, Patrick John, *Salmond on Jurisprudence* (Sweet and Maxwell, 1966), 9.

of such definition is an invitation to inquiry. However, equity long precedes the court of chancery in England.[774]

Equity is a universal moral rule which is founded on the principle of justice that justice must be done, despite the seeming finality of the rule, if that rule actually works as injustice. Equity as a juristic theory has two periods, ancient & modern, which are not separate but are tied together and the study of only one is fruitless without the other.

The oldest known civilization was founded in ancient Mesopotamia. The oldest code of law deciphered entirely, was made by King of Babylonia, Hammurabi. In 1902 the diorite block was discovered at Susa containing 2600 lines of text which was decoded entirely.

The Mesopotamian civilization was amalgamation of many nations long time before Babylon. The code of Hammurabi showed complexity terrifying the gradual development of law codes. These rules and provisions were also about property rights and inheritance Rule No. 42 and 48[775] are similar to the modern rules of law than equity but grouping towards the righteousness which is more than arbitrary statute law. But Rule 42 and 48 are somewhat analogous to modern equitable relief. Furthermore, the maxim of equity was found in many tablets of Sumerian, Assyrio-Chaldean and in Nineveh. It is similar to the modern maxim of equity.

"He who listenenth not to his conscience, the judge will not listen to his right"

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[774] Horward L.Oleck, Historical Nature of Equity Jurisprudence, *Fordham Law Review*, 1, no. 20 (1951), 23.

[775] Ibid.

The similarity between the modern and ancient was that the final judge of appeal was the "King" (Sovereign). The appeal to the king is a receiving characteristic of equity.[776] Hebrews were the source of ancient law and lore of the west. When led by Abraham they fled from Ur to Palestine and their contact with Egypt. They elaborated the laws of their have and Mosaic code, which is the basis of all law of the nations of Western world[777] The Mosaic code was strong and extraordinary and within its moral principle equity was distilled in broader sense. The word "equity" appears in the Old Testament "To receive the instruction of wisdom, justice, judgment and equity"[778]. In the story of King Soloman, once again the appeal to the King appears.

All the western tradition, civilization and law owe their debt to Hebrews who preserved their progenitor codes from destruction. With the addition of the New Testament, Bible became the basis of all western tradition.[779] Suffice it to say that equity is its very essence.

Ancient Egypt which was a little younger than eastern empire has not developed in the field of law, as the priests were all in all and Pharaoh was so remote to the people that there was no chance of appeal to him.

Ancient Greece, the foundation of western civilization, also contributed little to the development of law and equity. The first written law was Draconian law which was said to be written in blood, was famous for its severity. His laws were rewritten by Salon. But the language was so observe that they were open to numerous interpretations descriptions. There were not courts of law is the modern sense. Everyone has a chance to

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[776] BW Palmar, The Ancient Roots of the Law: We cannot escape the Past, *American Bar Association Journal* 35, no. 8 (1949), 633.

[777] Horward L.Oleck, Historical Nature of Equity Jurisprudence, *Fordham Law Review*, 24.

[778] Proverbs I, iii.www.bible.com [accessed 12th December 2016].

[779] John William Salmond, Patrick John, *Salmond on jurisprudence*, 24.

judicial office. Judges became superior as they considered themselves above law. Here, perhaps is the first instance in Greek Jurisprudence of interpretation of rules of law which can be said to resemble equity.[780] Aristotle was less interested in natural law rather he made a distinction between forms of justice. According to Aristrotle "that justice consists in treaty equals equally and 'in equals' in proportion to their inequality." [781] By 400 B.C the Greek courts became corrupt as they became the stage of display forensic talents.

Elements of Greek Jurisprudence are discernible in latter Roman law, but the Romans were not greatly indebted to Hellenic culture in the particular respect. Romans were inspired and influenced by Etrusians, who were Asiatic people and most probably brought with them the laws of Mesopotamia to Italy. Etrusia was highly developed civilization but invaded by barbarians and last invasion, which was fatal by Rome. Romans were blessed with logic and orderliness, they balanced their jurisprudence. Many of the Roman principles of law were originated by the Asiatic nations.[782]

Romans were materialists. Their first law was in the form of 12 tables of Decemiri established in 451 B.C.[783] because these laws were rigid. They were revised later but they remaind the Roman law. In first century before the birth of Christ they became so confused that they failed to equalize the individual liberty and safeguarding the material interest, inhabitants of Rome were mostly salves. The laws were written to safeguard the interest of very small number of people, the property owners.

Praetors (magistrate) have two types of jurisdiction. Legal proceedings were highly formalized in Rome for different actions. Writs were submitted to the magistrate.

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[780] Horward L.Oleck, Historical Nature of Equity Jurisprudence, *Fordham Law Review*, 25.
[781] Wacks Raymond, *Philosophy of Law: A Very Short Introduction* (Oxford University Press, 2006), 35.
[782] Livy, *History of Rome*, tr. Rev. Canon Roberts (New York: E. P. Dutton and Co. 1912),11.
[783] Albert Kocourek and John H. Wigmore, *Sources of Ancient And Primitive Law* (Boston, Little, Brown, and company, 1915), 45.

Who if approves them, he send the parties to "judex" (modern jury) who listened to the parties and pass down the judgment and then again praetor approves or revives the judgment. . Praetor had the jurisdiction to listen the writ without judex.

"In extraordinary Jurisdiction a praetor decided a suit, including questions of law and of fact, himself, without the technical restraints of forms or writs".[784]

This is equity jurisdiction and procedure, quite comparable with modern practice. The extraordinary jurisdiction modified the harsh result of the application of the stiff rules of 'ordinary' jurisdiction.

Later the function of the magistrate expanded. He now not only has the power to decide suit but also the power of formulation of law. In 300 A.D the idea of the judex was abandoned. The judge became all in all. The Roman 'ordinary' and 'extraordinary' serves in modern courts of 'common law' and 'chancery' in British and America.

The old civil code of Rome, the natural law was combination of *jus gentium* and *Lex Naturae*. This combination was called *Aequitas* equity. As the time passed, the old civil code of law conflicted with the universal law and thus abandoned by the judges. They developed remedies, as forms of action or defenses. In time repeated usage developed real certainty and the new body of law was formed and this was Equity. After Christianity equity became the dominant pervasive law. Firstly, Emperor Theodosius compiled new code and later Emperor Justanian recodified the law which became the basis of roman civilization.[785]

The Britain concept of equity was close to roman evolution of equity with certain bold differences. The roman equity was developed in the existing court structure. However,

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[784] Horward L.Oleck, Historical Nature of Equity Jurisprudence, *Fordham Law Review*, 26.
[785] J.D.M.Derrett, 'Justice, Equity and Good-Conscience', 46.

the English judges made it necessary the establishment of a separate system of courts and jurisprudence.

In the medieval period with the authority of church the Roman acquit as was improved and through church spread all over Europe. Germans, French and English in the development of law owe their debt to Romans and on later its impact was profound. It is from English law American law and equity was developed.

2. English History of Equity

Modern equity was administered "the courts of chancery". At that time proceedings were recorded in Latin that is why the chancellor's jurisdiction was also known as Latin Jurisdiction.[786] Under this jurisdiction the chancellor, provided remedy to the litigant who was denied the right by common law. He also had the power to remit the case to King's Bench if injustice was made for further investigation and if found guilty the party was severely punished in the name of king. But the important aspect of chancery was equity. It is still a debated topic that whether equity is the result of chancellor's jurisdiction or chancellor's jurisdiction is the result of principles of equity. English law owes its debt to the extraordinary lawyers of that time who were capable of creating and molding principles of equity. Among them were Sir Thomas More (1529-1532) Lord Elles mere (1596-1617), Sir Francis Bacon (1618-1621) Lord Nottingham (1673-1682) and Lord Hardwicke (1737-1756).

The chancellor was the only judge in the court of chancery, so it was difficult for him to hear all cases. In 16th century he delegated his powers to Masters of chancery to hear cases, and the chief of the masters was known as Master of Rolls. In 18th century the

[786]Ronald Jack Walker *The English Legal System*, 41.

Master of Rolls became the 2nd judge of the chancery. These Masters' gradual advancement resulted in Lord Eldon's success who became the head of Chancery in nineteenth century. He was a great lawyer. He struggled to end corruption in the court of chancery in which he succeeded, but he used his power to any attempts at reforms of the judicial system. Because of the close association to the crown, the court along with equitable jurisdiction, they acquired the jurisdiction to appoint guardians of infants and the matter of care of lunatics or their property.[787]

The proceedings in courts of chancery were not complying with formalities of writing petition and procedure of common law courts. In courts of chancery judge, creates rights and remedies when justice required. "There was never any pretence that equitable rules dated from time immemorial. It was this that prompted John Selden's immortal aphorism that "Equity varies as the lent of the chancellor's foot".[788]

3. Islamic Concept of Equity (Istiḥsān) in Sharī'ah

3.1 Historical Background of Istiḥsān

Primarily in the Islamic tradition of legislation, the sources of the *Sharī'ah* were restricted to the *Qur'ān*, the *Sunnah*, and the use of individual view (*ra'y*), with the consent of a knowledgeable and experienced authority. It is useless to discuss that *istiḥsān* was functional at the period of the Prophet (SAW) as a source of law, since both 'the Prophet (SAW) himself and the *Qur'ān*,' the real and definite sources of the Sharī'ah were all that was needed. The notion of *istiḥsān* is a type of *ra'y*. One could enlarge the primary foundation or origin of *istiḥsān* to the era of the Prophet (SAW), given his advice to Mu'ādh. The Prophet asked "What will you do if you do not find guidance in the

[787] Gary Slapper, David Kelly, *English Legal System* ed. 10th (London: Cavandish publishing Limited), 28.
[788] Ronald Jack Walker *The English legal system*, 46.

Sunnah of the Apostle of God and in God's Book?" and Mu'ādh's replied, "I shall do my best to form an opinion and spare no pains"[789], contains the key to the evolution and dynamism of Islamic law. Primarily the principles of *Sharī 'ah* were not strictly applied but the basic purpose was to ensure that the objective of the act conformed to the *Sharī 'ah*. At the time of the fight of Banū Qurayzah, some Saḥābah of the Prophet (SAW) were sent to the opposition's place and were instructed to do the 'Asr prayer on arrival at that place. The time of 'Asr came during their ride and dispute arose: some of the Saḥābah prayed on time, while others did against it, taking the Prophet's (SAW) orders literally, and performed the 'Asr prayer on that place at sunset. They reported this event to the Prophet (SAW) who became silent. His silence was taken as support for both opinions, representing that no-one was doing wrong.[790] Both groups were looking for the objective of the *Sharī'ah*.

Therefore, individual opinions were given recognition at that era and these instances encouraged jurists to increase their understanding of Islam and express their view without any hindrance. That's why Companions of the Prophet (SAW) continued this tradition of using *ra'y* in their era also. After the Prophet (S.A.W), the same principle sustained amongst the Saḥābah, as can be witnessed in the verdict of 'Umar Ibn Khattāb concerning the inheritance of two half brothers.[791]

When 'Umar chose Shurayḥ and sent him to Kūfa as a *qāḍī*, he said him to follow this rule: "Seek a clear ruling in the *Qur'ān*, if you find what you are searching for, do not seek advice from another. However, if you could not find any guidance therein, then

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[789] Abū Dāwūd, Sulaymān ibn al-Ash'ath al-Sajastānī, al, *Sunan*, vol. 3 (Beirut: Tuz' al-Maktab al- Islāmī, 1989), 1019 h.3585.
[790]Muḥammad Ibn Sa'ad, *Al-Tabaqāt al-Kubrā*, vol. 2 (Beirut, 1957), 76.
[791]For detail see Noel J. Coulson, *Succession in the Muslim Family* (Cambridge university Press: London 1971), 73-74.

conform to the Sunnah. Should that fail you, then proceed with your personal judgment."[792] The basis of 'Umar's *ijtīhād* was to remove the difficulty from the lives of the people. The Saḥābah always tried to make their decisions according to the main objective of the *Qur'ān* and the Sunnah.

In Iraq the jurists used their individual opinion (ra'y) and *qiyās* (analogy), which shows their interest in the theory of law unlike the Medina School, which was more focused on the definite performance of the Islamic law.[793] According to Ahmad Hassan the term *istihsān* was not used in its technical sense with era of the aforementioned Irāq scholars.[794] The idea was prevalent in juristic practice, as we shall see when we look at the "application of the idea was prevalent in juristic practice as we shall see when we look at the "application of *istihsān* in the early Hanafī School". While Iraqi jurists applied the concept of *istihsān* by departing from the established ruling they did not give any reason for their practice.[795] But according to the opinion of Khaddūri and Liebesny the notion of *istihsān* was practiced by Māliki school of thought.[796]

3.2 Definition of Istiḥsān

The word *istiḥsān* is derived from the root word *hasuna*, which means something good and beautiful.[797]

According to Ḥanafī school of thought, *istihsān* means taking something according to one of the two forms of *qiyās*. *Istihsān* can be based on *ḥadīth* or *ijma'*. That is why the rejection of *istihsān* is pointless, since the Hanafīs say, cases are resorted to when they

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[792]Khudari, *Tārīkh*, 142-143.
[793]Kamal A. Fāruki, *Islamic Jurisprudence* (Pakistan Publishing House, Karachi, 1962), 24.
[794] Ahmed Hassan, The early Development of Islamic Jurisprudence (Islamabad: IRI. 2010). 147.
[795] Ibid.
[796]Khaddūrī, Majid and Liebesny, J. Herbert, 'Law in the Middle East',*The Middle East Institute*, (Washington,1955), 101.
[797]Hans Wehr, *A dictionary of modern written Arabic*. (Wiesbaden: otto harrassowitz: 1961). P208.

come in against to qiyās jalī (explicit analogy), so they use the tool of *istihsān* in priority. According to Maḥillāwī, 'We use the tool of *istihsān* when it is far stronger than *qiyās*. While the Ḥanafī's define *istihsān* as the *adillah* (evidences) agreed upon as opposite to explicit analogy (*qiyās jalī*).[798]

According to the above definition, it is clear that *istihsān* is only used by Ḥanafī school on the basis of stronger evidence and objectives of Islamic law and not according to the whims and wishes of jurists. Karkhī states that: '*istihsān* is when one takes a decision on a certain case different from that on which similar cases have been decided on the basis of its precedents for a reason which is stronger than the one found in similar cases and which requires departure from those cases."[799] According to Jaṣṣāṣ "On the basis of strong evidence, leaving a decision of *qiyās* is '*istihsān.*"[800] Bazdawī defines istihsān as, 'It is one of the two *qiyās.*'[801] In certain situations, *qiyās* is called *istiḥsān* owing to the power of its evidence.[802] Shaybānī says, "Some of the *qiyās* involves istihsān".[803] There are minor differences between the two. *Istiḥsān* is more general than qiyās khafī, because the former applies to things other than *qiyās khafī*. Ṣadr al-Sharī'ah observes that when the word qiyās is used absolutely, it means *qiyās jalī*; when the word istiḥsān is used it

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[798]Maḥillāwī, *Tashīl al-Wusūl 'ilā 'ilm al-Uṣūl*, 237; See also Karkhī, 'Abd Allāh ibn al-Ḥusayn, *Risālah fī al-Uṣūl* (Cairo: n.d); Ghazālī, Abū Ḥāmid Muḥammad ibn Muḥammad, *Al-Mustaṣfā min 'Ilm al-Uṣūl* (Baghdād: Maktabat al-Muthannā, 1970); Rāzī, Fakhr al-Dīn ibn Muḥammad, *Al Maḥṣūl fī 'IlmUṣūl al-Fiqh*, (Riyāḍ: al-Mamlakah al-'Arabīyah al-Sa'ūdīyah, Jāmi'at al-Imām Muḥammad ibn Su'ūd al-Islāmīyah, Lajnat al-Buḥūth wa-al-Ta'līf wa-al-Tarjamah wa-al-Nashr, 1979).

[799] Bazdawī Fakhr al-Islām, 'Alī ibn Muḥammad ibn al-Ḥusayn, *Kanz al-Wuṣūl ilā Ma'rifat al Uṣūl* in 'Abd al-'Azīz al-Bukhārī, *Kashf al-Asrār*, vol 2 (Cairo: Maktba al-Ṣanā'i', 1307), 3; See also Āmidī, Sayf al-Dīn Abū al-Husayn 'Alī ibn Abī 'Alī ibn Muḥammad al Tha'labī, *Al-Iḥkām fī Uṣūl al-Aḥkām* (Beirut: Dār al-Kutub al-'Ilmīyah, 1985).

[800] Juwaynī Imām al-Ḥaramayn, Abū al-Ma'ālī 'Abd al-Malik ibn 'Abd Allāh, *Al Burhān fī Uṣūl al-Fiqh* (Cairo: Dār al-Anṣār, 1980), 67.

[801] Bazdawī, *Kanz al-Wuṣūl ilā Ma'rifat al Uṣūl* in 'Abd al-'Azīz al-Bukhārī, *Kashf al-Asrār*, vol 2,7.

[802] 'Alauddin 'Abd al-'Aziz al- Bukhārī,, Kashf al-'Asrar 'An Usul Fakhr al-Islam al-Bazdawī, ed. Muḥammad al-Mu'tasim bi-Allah al-Baghdadī, 6.

[803] Ṣadr al-Sharī'ah al-Thānī al-Maḥbūbī, 'Ubayd Allāh ibn Mas'ud, *Sharḥ al Tawḍīḥ 'alā al-Tanqīḥ*, vol. 2, ed.1[ST](Cairo: al-Maṭba'ah al-Khayrīyah, 1324).81-82.

means qiyās khafī.[804] Bazdawī says that the qiyās which has a weak effect is called *qiyās* and the *qiyās* which has a strong effect is called istiḥsān.[805] Sarakhsī defines *istihsān* as "abandonment of an opinion to which *qiyās* would lead in favour of a different opinion when supported by stronger evidence and adapted to what is acceptable to the public."[806] Ibn Humām defines *istiḥsān* as 'A proof which is agreed upon textually by necessity and by hidden analogy if it happens to be opposed to a *qiyās* which leads to its understanding.[807]

3.3 Istiḥsān and Equity: A Comparison

Istiḥsān is the notion of Islamic Law which is quite similar to the concept of equity. Equity is the notion of English law based on the doctrine of fairness and good will, and derives legality from a principle in natural rights and natural justice.[808] The above mentioned both concepts basically provides fairness and goodness to people when the law is rigid or unable to provide fair rules. The major difference between them is that equity depends on the natural law and *Istiḥsān* is based on the objectives of *Sharī'ah*. But this difference need not be overemphasised if one bears in mind the convergence of values between the *Sharī'ah* and natural law, and of Islam as din al-fitra (the natural religion), with natural values. Not withstanding their different approaches to the question of right and wrong, the values upheld by natural law and the divine law of Islam are substantially concurrent. Both assume that right and wrong are not a matter of relative convenience for the individual but derive from eternally valid standards which are ultimately independent of human cognizance and adherence. But natural law differs with

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[804]Bazdawī, *Kanz al-Wusūl ilā Ma'rifat al Uṣūl* in 'Abd al-'Azīz al-Bukhārī, *Kashf al-Asrār*, vol 2, 84.
[805] Ibid.
[806] Sarakhsī, Shams al-A'immah Abū Bakr Muḥammad ibn Abī Sahl Aḥmad, *Kitāb al-Uṣūl*, 145.
[807] Shāṭibī, vol.2, 137.
[808]P.G. Osborn, *A Concise Law Dictionary*, ed. 5th (London: Sweet & Maxwell, 1964), 124.

the divine law in its assumption that right and wrong are inherent in nature.[809] From an Islamic perspective, right and wrong are determined, not by reference to the nature of things, but because God has determined them as such. Unlike equity which is founded in the recognition of a superior law. *Istiḥsān* does not seek to constitute an independent authority beyond the *Sharī'ah* and it differs with equity in that the latter recognize a natural law apart from and essentially superior to positive law.[810]

4. Application of the Doctrine of Justice, Equity and Good-Conscience in British-India

The notion, justice, equity and good-conscience was introduced for the first time in Bengal in the year 1780. It was later transplanted in the *mofussil* of Bombay and Madras Presidencies. Gradually the maxim was introduced into other territories of India and when judicial system was introduced here.

S.5 of the Central Provinces Laws Act, 1875, provided that in questions regarding certain topics, the Hindu Law had to be applied in cases where the parties were Hindus and the Muhammadan law in cases where the parties where Muhammadans. According to S.6, in cases not provided for by S-5, or any other law for the time being in force, the course were to act according to justice, equity and good-conscience. In the North West Frontier Province, the question of law was governed by the Worth-West Frontier Province Law and Justice Regulations. S-27 of the Regulation VII prescribed that decisions in certain matters would be according to the law governed by the North-West Frontier Province Law and Justice Regulation. S-27 of Regulation VII prescribed that

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[809]Cf. Malcolm Kerr, *Islamic Reform*, (Berkeley: University of California Press, 1961), 57.
[810]George Makdisi, 'Legal Logic and Equity in Islamic Law', *American Journal of Comparative Law*, 33 (1985), 90.

decision in certain matters would be according to the law of the parties concerned. S-28 laid down that in cases not otherwise specially provided for the Judges were to decide according to justice, equity and good-conscience. S-3 of the Oudh Laws Act, 1876 also provided that failing the other sources of law, "The Courts shall act according to justice, equity and good-conscience. In Punjab the doctrine of justice, equity and good-conscience was introduced by the Punjab Laws Act, 1872. According to Privy Council, the maxim of justice, equity and good-conscience was adopted as 'the ultimate test for all the provincial Courts in India.'[811]

The notion constituted the residuary source of law. The general scheme of law was that if on the particular point of dispute before the court there was no parliamentary law, no regulation and if it fell outside the heads of which Muhammadan and Hindu laws were prescribed then the court was to decide the matter decoding to justice equity and good-conscience. It has already been seen that the Warren Hastings's plan specifically laid down the law to be applied by the courts only for few topics i.e., inheritance, marriage, caste and other religious usages and institutions. These topics did not exhaust the entire area of civil litigation with which the courts used to be confronted. No specific direction or guidance was given either by the Warren Hastings's plan or even by the later Regulations regarding the law which the courts were applied to the residuary heads of litigation.

Thus was there a serious gap in the legal system. In this vacuum, the courts were to act according to justice, equity and good-conscience. This notion provided theoretical

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[811] Pearl, David, *A Text Book on Muslim Personal Law*, 26-27; M.C. Setalvad, *The Common Law In India*, 30.

legal basis for the courts to decide cases for which no law had been specifically provided.[812]

But the scheme of law, if it can be called a scheme at all, was far from satisfactory, what does equity, justice and good-conscience mean? The question faced by the course was from which source were they to draw the principles of, justice equity and good -onscience. The notion did not have any precise and definite connotation. It pointed to no specific body of law. The maximum did not give any articulate direction or guide-line to the judges to follow in deciding disputes. In simple terms, it meant nothing else but discretion of the judge. In the beginning, no way had been specified in which the judges were to exercise their discretion. They had full freedom to decide the cases coming before them to the best of their ability and capacity in such a way as appeared to them to do substantial justice between the parties concerned. The notion opened the door for lawmaking by the judges from case to case. A judge could draw on anybody of principles which he thought to be based on justice and good-conscience in the context of the fact-situation of the dispute which he was called upon to decide. The inevitable result of such a flexible state of law was bound to be confusion and uncertainty in the country's legal system. Discretion of one may differ another. The notion of equity, justice and good-conscience varied from judge to judge. No litigant could be sure as to what legal principles would be applied by a particular judge to a particular factual situation to decide the after. In course of time, however certain guidelines were developed to guide judicial discretion in this respect.[813]

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[812] Martin Lau, The *Role of Islam in the Legal System of Pakistan*, 40.
[813] Rankin, George, *Custom and the Muslim Law in British India*, Transactions of the Grotius society, 25, (1939), 117.

The persons on who devilled the function of dispensing jussive in the initial stages of the country's administration by the company were all without any legal training. They were Englishmen who were not acquainted with the people's languages and customs.[814]

To enable them to do adequate justice, they were provided with the assistance of native law officers, *qāḍī*s and *pundit*s, who expounded to them the Muslim and the Hindu laws respectively, and guide the judges in the task of adjuration of disputed questions. In this setup and practice arose in the courts to apply the personal laws of Muslims and Hindus as the case might be even in those mattes in which it was incumbent on the judge to apply these laws under the plan of 1772 but he had freedom to act according to justice, equity and good-conscience. A further use for the formula arises where the doctrines of the personal laws are obscure because of difference of opinion between the native judges (jurists). In *Aziz Bano v. Muhammad Ibrahim* it was held that a choice most consistent with justice, equity and good-con science could be made between the conflicting opinions in Islamic law; and a similar view was evened with reference to *Hindu law in Rakhalraj v. Debendra.*[815]

It remains to discuss a peculiar feature of 'justice, equity and good-conscience' as known in South-Asia. Repeatedly advocates attempt to argue that a provision of the personal law or indeed of some statute to equity and good-conscience so to do. In no case have they succeeded. It is very curious that this argument should be raised since in *Moonshee Bazloor Ruheen v. Shamsoonnissa Begum* the Privy Counsel in diligently and

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[814] William Henry Rattigan *A Digest of Customary Law*, ed. Omprakash Aggrawala (Allahbad: University Book Agency, 1989), 1.
[815] David Pearl, *A Text Book on Muslim Personal Law*, 26-27; M.C. Setalvad, *The Common Law In India*, 30.

with great emphasis repelled the notion that a definite rule of the personal law could be nullified because it did not square with the courts' notion of justice, equity and good-conscience. Sir James W. Colive said:

"The passages just quoted, if understood in their literal sense, imply that cases of this kind are to be decided without references to the Mahomedan law, but according to what is termed, 'equity and good – conscience'" i-e., according to that which the judge may think the principle of natural justice require to be done in the particular case. Their lordships most emphatically dissent from that conclusion. It is in their opinion, opposed to the whole policy of the law in British India and particularly to the enactment (Reg IV of 1793, S, 15)... This directs that in suits regarding marriage ..... are to be considered as the general rules by which judges are to form their decisions and they can conceive nothing more likely to give just alarm to Mahomedan community than to learn by a judicial decision that their law the application of which has been thus secured to them, is to be overridden upon a question which so materially concerns their domestic relations. The judges were not dealing with a case in which the Mahomedan law was in plain conflate with the general municipal law or with the requirements of a more advance and civilized society – as for instance, if a Mussulman had insisted on the right to slay his wife taken in adultery. In the reports of our ecclesiastical court there is no lack of cases, in which a human judging decoding to his own sense of what is just and fair without reference to positive law, would let the wife go free; and yet, the proof falling short of legal cruelty, the Judge has felt constrained to order her to return to her husband.' This left it open to be supposed that the personal laws could be overridden if they were in

of such definition is an invitation to inquiry. However, equity long precedes the court of chancery in England.[774]

Equity is a universal moral rule which is founded on the principle of justice that justice must be done, despite the seeming finality of the rule, if that rule actually works as injustice. Equity as a juristic theory has two periods, ancient & modern, which are not separate but are tied together and the study of only one is fruitless without the other.

The oldest known civilization was founded in ancient Mesopotamia. The oldest code of law deciphered entirely, was made by King of Babylonia, Hammurabi. In 1902 the diorite block was discovered at Susa containing 2600 lines of text which was decoded entirely.

The Mesopotamian civilization was amalgamation of many nations long time before Babylon. The code of Hammurabi showed complexity terrifying the gradual development of law codes. These rules and provisions were also about property rights and inheritance Rule No. 42 and 48[775] are similar to the modern rules of law than equity but grouping towards the righteousness which is more than arbitrary statute law. But Rule 42 and 48 are somewhat analogous to modern equitable relief. Furthermore, the maxim of equity was found in many tablets of Sumerian, Assyrio-Chaldean and in Nineveh. It is similar to the modern maxim of equity.

"He who listenenth not to his conscience, the judge will not listen to his right"

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[774] Horward L.Oleck, Historical Nature of Equity Jurisprudence, *Fordham Law Review*, 1, no. 20 (1951), 23.

[775] Ibid.

The similarity between the modern and ancient was that the final judge of appeal was the "King" (Sovereign). The appeal to the king is a receiving characteristic of equity.[776] Hebrews were the source of ancient law and lore of the west. When led by Abraham they fled from Ur to Palestine and their contact with Egypt. They elaborated the laws of their have and Mosaic code, which is the basis of all law of the nations of Western world[777] The Mosaic code was strong and extraordinary and within its moral principle equity was distilled in broader sense. The word "equity" appears in the Old Testament "To receive the instruction of wisdom, justice, judgment and equity"[778]. In the story of King Soloman, once again the appeal to the King appears.

All the western tradition, civilization and law owe their debt to Hebrews who preserved their progenitor codes from destruction. With the addition of the New Testament, Bible became the basis of all western tradition.[779] Suffice it to say that equity is its very essence.

Ancient Egypt which was a little younger than eastern empire has not developed in the field of law, as the priests were all in all and Pharaoh was so remote to the people that there was no chance of appeal to him.

Ancient Greece, the foundation of western civilization, also contributed little to the development of law and equity. The first written law was Draconian law which was said to be written in blood, was famous for its severity. His laws were rewritten by Salon. But the language was so observe that they were open to numerous interpretations descriptions. There were not courts of law is the modern sense. Everyone has a chance to

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[776] BW Palmar, The Ancient Roots of the Law: We cannot escape the Past, *American Bar Association Journal* 35, no. 8 (1949), 633.
[777] Horward L.Oleck, Historical Nature of Equity Jurisprudence, *Fordham Law Review*, 24.
[778] Proverbs I, iii.www.bible.com [accessed 12th December 2016].
[779] John William Salmond, Patrick John, *Salmond on jurisprudence*, 24.

judicial office. Judges became superior as they considered themselves above law. Here, perhaps is the first instance in Greek Jurisprudence of interpretation of rules of law which can be said to resemble equity.[780] Aristotle was less interested in natural law rather he made a distinction between forms of justice. According to Aristrotle "that justice consists in treaty equals equally and 'in equals' in proportion to their inequality." [781] By 400 B.C the Greek courts became corrupt as they became the stage of display forensic talents.

Elements of Greek Jurisprudence are discernible in latter Roman law, but the Romans were not greatly indebted to Hellenic culture in the particular respect. Romans were inspired and influenced by Etrusians, who were Asiatic people and most probably brought with them the laws of Mesopotamia to Italy. Etrusia was highly developed civilization but invaded by barbarians and last invasion, which was fatal by Rome. Romans were blessed with logic and orderliness, they balanced their jurisprudence. Many of the Roman principles of law were originated by the Asiatic nations.[782]

Romans were materialists. Their first law was in the form of 12 tables of Decemiri established in 451 B.C.[783] because these laws were rigid. They were revised later but they remaind the Roman law. In first century before the birth of Christ they became so confused that they failed to equalize the individual liberty and safeguarding the material interest, inhabitants of Rome were mostly salves. The laws were written to safeguard the interest of very small number of people, the property owners.

Praetors (magistrate) have two types of jurisdiction. Legal proceedings were highly formalized in Rome for different actions. Writs were submitted to the magistrate.

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[780] Horward L.Oleck, Historical Nature of Equity Jurisprudence, *Fordham Law Review*, 25.
[781] Wacks Raymond, *Philosophy of Law: A Very Short Introduction* (Oxford University Press, 2006), 35.
[782] Livy, *History of Rome*, tr. Rev. Canon Roberts (New York: E. P. Dutton and Co. 1912),11.
[783] Albert Kocourek and John H. Wigmore, *Sources of Ancient And Primitive Law* (Boston, Little, Brown, and company, 1915), 45.

Who if approves them, he send the parties to "judex" (modern jury) who listened to the parties and pass down the judgment and then again praetor approves or revives the judgment. . Praetor had the jurisdiction to listen the writ without judex.

"In extraordinary Jurisdiction a praetor decided a suit, including questions of law and of fact, himself, without the technical restraints of forms or writs".[784]

This is equity jurisdiction and procedure, quite comparable with modern practice. The extraordinary jurisdiction modified the harsh result of the application of the stiff rules of 'ordinary' jurisdiction.

Later the function of the magistrate expanded. He now not only has the power to decide suit but also the power of formulation of law. In 300 A.D the idea of the judex was abandoned. The judge became all in all. The Roman 'ordinary' and 'extraordinary' serves in modern courts of 'common law' and 'chancery' in British and America.

The old civil code of Rome, the natural law was combination of *jus gentium* and *Lex Naturae*. This combination was called *Aequitas* equity. As the time passed, the old civil code of law conflicted with the universal law and thus abandoned by the judges. They developed remedies, as forms of action or defenses. In time repeated usage developed real certainty and the new body of law was formed and this was Equity. After Christianity equity became the dominant pervasive law. Firstly, Emperor Theodosius compiled new code and later Emperor Justanian recodified the law which became the basis of roman civilization.[785]

The Britain concept of equity was close to roman evolution of equity with certain bold differences. The roman equity was developed in the existing court structure. However,

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[784] Horward L.Oleck, Historical Nature of Equity Jurisprudence, *Fordham Law Review*, 26.
[785] J.D.M.Derrett, 'Justice, Equity and Good-Conscience', 46.

the English judges made it necessary the establishment of a separate system of courts and jurisprudence.

In the medieval period with the authority of church the Roman acquit as was improved and through church spread all over Europe. Germans, French and English in the development of law owe their debt to Romans and on later its impact was profound. It is from English law American law and equity was developed.

2. English History of Equity

Modern equity was administered "the courts of chancery". At that time proceedings were recorded in Latin that is why the chancellor's jurisdiction was also known as Latin Jurisdiction.[786] Under this jurisdiction the chancellor, provided remedy to the litigant who was denied the right by common law. He also had the power to remit the case to King's Bench if injustice was made for further investigation and if found guilty the party was severely punished in the name of king. But the important aspect of chancery was equity. It is still a debated topic that whether equity is the result of chancellor's jurisdiction or chancellor's jurisdiction is the result of principles of equity. English law owes its debt to the extraordinary lawyers of that time who were capable of creating and molding principles of equity. Among them were Sir Thomas More (1529-1532) Lord Elles mere (1596-1617), Sir Francis Bacon (1618-1621) Lord Nottingham (1673-1682) and Lord Hardwicke (1737-1756).

The chancellor was the only judge in the court of chancery, so it was difficult for him to hear all cases. In 16th century he delegated his powers to Masters of chancery to hear cases, and the chief of the masters was known as Master of Rolls. In 18th century the

[786]Ronald Jack Walker *The English Legal System*, 41.

Master of Rolls became the 2nd judge of the chancery. These Masters' gradual advancement resulted in Lord Eldon's success who became the head of Chancery in nineteenth century. He was a great lawyer. He struggled to end corruption in the court of chancery in which he succeeded, but he used his power to any attempts at reforms of the judicial system. Because of the close association to the crown, the court along with equitable jurisdiction, they acquired the jurisdiction to appoint guardians of infants and the matter of care of lunatics or their property.[787]

The proceedings in courts of chancery were not complying with formalities of writing petition and procedure of common law courts. In courts of chancery judge, creates rights and remedies when justice required. "There was never any pretence that equitable rules dated from time immemorial. It was this that prompted John Selden's immortal aphorism that "Equity varies as the lent of the chancellor's foot".[788]

3. Islamic Concept of Equity (Istiḥsān) in Sharī'ah

3.1 Historical Background of Istiḥsān

Primarily in the Islamic tradition of legislation, the sources of the *Sharī'ah* were restricted to the *Qur'ān*, the *Sunnah*, and the use of individual view (*ra'y*), with the consent of a knowledgeable and experienced authority. It is useless to discuss that *istiḥsān* was functional at the period of the Prophet (SAW) as a source of law, since both 'the Prophet (SAW) himself and the *Qur'ān*,' the real and definite sources of the Sharī'ah were all that was needed. The notion of *istiḥsān* is a type of *ra'y*. One could enlarge the primary foundation or origin of *istiḥsān* to the era of the Prophet (SAW), given his advice to Mu'ādh. The Prophet asked "What will you do if you do not find guidance in the

[787] Gary Slapper, David Kelly, *English Legal System* ed. 10th (London: Cavandish publishing Limited), 28.
[788] Ronald Jack Walker *The English legal system*, 46.

Sunnah of the Apostle of God and in God's Book?" and Mu'ādh's replied, "I shall do my best to form an opinion and spare no pains"[789], contains the key to the evolution and dynamism of Islamic law. Primarily the principles of *Sharī 'ah* were not strictly applied but the basic purpose was to ensure that the objective of the act conformed to the *Sharī 'ah*. At the time of the fight of Banū Qurayzah, some Saḥābah of the Prophet (SAW) were sent to the opposition's place and were instructed to do the 'Asr prayer on arrival at that place. The time of 'Asr came during their ride and dispute arose: some of the Saḥābah prayed on time, while others did against it, taking the Prophet's (SAW) orders literally, and performed the 'Asr prayer on that place at sunset. They reported this event to the Prophet (SAW) who became silent. His silence was taken as support for both opinions, representing that no-one was doing wrong.[790] Both groups were looking for the objective of the *Sharī'ah*.

Therefore, individual opinions were given recognition at that era and these instances encouraged jurists to increase their understanding of Islam and express their view without any hindrance. That's why Companions of the Prophet (SAW) continued this tradition of using *ra'y* in their era also. After the Prophet (S.A.W), the same principle sustained amongst the Saḥābah, as can be witnessed in the verdict of 'Umar Ibn Khattāb concerning the inheritance of two half brothers.[791]

When 'Umar chose Shurayḥ and sent him to Kūfa as a *qāḍī*, he said him to follow this rule: "Seek a clear ruling in the *Qur'ān*, if you find what you are searching for, do not seek advice from another. However, if you could not find any guidance therein, then

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[789] Abū Dāwūd, Sulaymān ibn al-Ash'ath al-Sajastānī, al, *Sunan*, vol. 3 (Beirut: Tuz' al-Maktab al- Islāmī, 1989), 1019 h.3585.

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conform to the Sunnah. Should that fail you, then proceed with your personal judgment."[792] The basis of 'Umar's *ijtīhād* was to remove the difficulty from the lives of the people. The Saḥābah always tried to make their decisions according to the main objective of the *Qur'ān* and the Sunnah.

In Iraq the jurists used their individual opinion (ra'y) and *qiyās* (analogy), which shows their interest in the theory of law unlike the Medina School, which was more focused on the definite performance of the Islamic law.[793] According to Ahmad Hassan the term *istihsān* was not used in its technical sense with era of the aforementioned Irāq scholars.[794] The idea was prevalent in juristic practice, as we shall see when we look at the "application of the idea was prevalent in juristic practice as we shall see when we look at the "application of *istihsān* in the early Hanafi School". While Iraqi jurists applied the concept of *istihsān* by departing from the established ruling they did not give any reason for their practice.[795] But according to the opinion of Khaddūri and Liebesny the notion of *istihsān* was practiced by Māliki school of thought.[796]

3.2 Definition of Istiḥsān

The word *istiḥsān* is derived from the root word *hasuna*, which means something good and beautiful.[797]

According to Ḥanafī school of thought, *istihsān* means taking something according to one of the two forms of *qiyās*. *Istihsān* can be based on *ḥadīth* or *ijma'*. That is why the rejection of *istihsān* is pointless, since the Hanafīs say, cases are resorted to when they

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[792]Khudari, *Tārīkh*, 142-143.
[793]Kamal A. Fāruki, *Islamic Jurisprudence* (Pakistan Publishing House, Karachi, 1962), 24.
[794] Ahmed Hassan, The early Development of Islamic Jurisprudence (Islamabad: IRI, 2010), 147.
[795] Ibid.
[796]Khaddūrī, Majid and Liebesny, J. Herbert, 'Law in the Middle East',*The Middle East Institute*, (Washington,1955), 101.
[797]Hans Wehr, *A dictionary of modern written Arabic*. (Wiesbaden: otto harrassowitz: 1961). P208.

Muslim before 15-03-1948 are Islamized by a deeming clause. Thus, Majority of the bench decided against Mst. Bano to the extent of mutation attested in favour of Murad prior to 15-03-1948.

Two honourable judges disagreed with the majority view on conclusion drawn by them while interpreting section 2-A of the Act and ratio of precedent cited at the bar.[766]

The honourable judges were of the view that when predecessor-in-interest of last male full owner of the parties died, the act in field in the case of succession was Punjab Law Act 1872. Section 5 of the act has two fold,

(1) Any custom which is not contrary to equity, justice and good conscience and not altered by any other law is applicable in personal matters of subjects.

(2) Rule of decision among Muslims shall be Muahmmadan Law.

According to Justice Ejaz Afzal, Muhammadan has not been provided with a choice of selecting custom or Muhammadan Law as rule of decision in their personal matters according to the tone and tenor of words of statute. "Muhammadan Law where parties are Muhammadan" are mandatory in nature.

The judge also declares that, if for an instance Muslim falls within the domain of customs even then, the custom depriving someone from its due share it is not just, equitable and based on good conscience. Honourable Justice also interpreted words "equity and justice" to support his reasoning. He also referred judgment given in *Daya Ram v. Sohel Singh* case, decided by Lahore Chief Court. While discussing the varies of custom as law in distribution of agricultural land in succession in 1906. He also based this arguments on Muhammad Jan's case, decided by Privy council and the Judgment of Justice Robertson of Punjab Chief Court reported in Punjab Record vol. 41 Page 39

[766] Ibid.

which was also endorsed by Supreme Court in Mst. Qaiser Khatoon's case in 1971. That section 5 of PLA 1872 does not create presumption that someone fall directly in the domain of custom. The assertor has to prove two things:

1) He was previously governed by custom.
2) What the particular custom is?

to fall within the preview of section 5(a) of Punjab Law Act 1872.

While interpreting section 5, minority view relied on TG Bhoja's case decided in 1916; it was held by Privy Council that "where the words of statute are dear, even a long and uniform interpretation of it can be overruled, if it's contrary to the meaning of enactment".

Supreme Court on the basis of above reasons held that it is mandatory in the Punjab Law Act 1872, that rule of decision among Muslims were Muslim Personal Law.

Learned Justice held that, section 2-A nowhere approves or approbate custom as a rule of decision. In present circumstances Murad failed to discharge his ouns in proving custom as a rule of inheritance among his family. Lal directly was governed by section 5(b) of Punjab Law Act. Majority view prevails and Murad continue to cultivate the land by fiction of law.[767]

Course of purifying Law of inheritance from the shadows of customary law and implementing Shariat in its classical form stretched over four decades. Pakistani courts continued to announce dissenting judgments on this issue. Majority of honourable judges based their decisions on the existence and non-existence of custom among parties and *Riwāj-e 'Aām* was recognised as the main source of proving custom. Honourable Justice

[767]PLD 2012 SC 501.

Afzal Zulla (late) and Honourable Justice Ejaz Afzal considered prevalence of custom as baron rights of female and emphasised on deciding the matter on the basis of classical Islamic texts. It can also be seen that how effectively legislature responded to the arising issues in the law of inheritance. After all these efforts Muslim female is in much better position in that segment of life than five decade ago.

Chapter No. 6

Historical Background of Justice, Equity and Good-Conscience in British-India and Pakistan

Chapter No. 6

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Since the earlier days of East India Company, the formula of equity, justice and good-conscience had been used to provide law for areas of the legal system not covered by statute law or personal laws. The regulation of 1781 and 1793 for instance, stipulated that in cases not otherwise specially provided for the judges should decide according to equity, justice and good-conscience. The notion was copied from Regulation to Regulation and from Regulation to Statute[768]. According to Derrett this formula when it was first introduced in the Royal Charter of 9 August 1683, did not exclusively refer to English Law but primarily to other source of law which were deemed to be appropriate as a 'just' rule to the facts of the case.[769] By the end of nineteenth century British Indian Courts tended to apply under the formula equity, justice and good-conscience in the first instance English Law as residual law.[770] In Pakistan courts would some time apply this formula of Common Law to fill the gap. This study not only explores the background of equity in Common Law with brief comparison with Islamic Law of equity (*Istiḥsān*) but also discusses the case law of Pakistan where this formula has been used instead of Islamic Law.

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[768]See Section 6 of The Punjab Laws Act 1872.
[769]J.D.M.Derrett, 'Justice, Equity and Good-Conscience', in J.N.D. Anderson, *Changing Law in Developing Countries* (London, 1963, 140).
[770]Ibid., 144.

1. Historical Nature of Equity

Equity is hard to define. Many scholars attempted to define it but they ended by capitulating to the general view. Equity has diverse set of meanings. David M. Walker proposed the meaning of equity. He defined it in three senses as in the first sense it is fairness, justice and sometimes understood as synonymous to natural justice. In second sense, equity is applied in different circumstances where a rule of law seems unreasonable and unfair. In the third sense, equity is that which was developed and applied by the courts of chancellor and since 1875 by chancery division of the high courts.[771] In continental legal system, it is purely conceptual and the term is almost synonymous to natural justice.[772]

There is a difference between the meaning of Law in England and in continental and Islamic world. Continental speech conceals the difference between law and right; where as English speech conceals the correction between them.[773]

The term equity suffers the same fate. In English legal system natural justice is not the foundation of decisions but undoubtedly it effects the interpretation of the law.

The description of equity as that law, which is administered by the English courts of chancery, of course is hardly a definition. Yet that is the customary introductory description of equity.

The purpose of such definition is to make it necessary that the law administered by the chancery courts of England be known in order to understand equity so the purpose

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[771] David M. Walter, *The Oxford Companion To Law* (Clarendon press Oxford. 1980).424-425.
[772] Ronald Jack Walker, *The English legal system* (London: Batfeeworths London. 1985). 41.
[773] John William Salmond, Patrick John, *Salmond on Jurisprudence* (Sweet and Maxwell. 1966). 9.

of such definition is an invitation to inquiry. However, equity long precedes the court of chancery in England.[774]

Equity is a universal moral rule which is founded on the principle of justice that justice must be done, despite the seeming finality of the rule, if that rule actually works as injustice. Equity as a juristic theory has two periods, ancient & modern, which are not separate but are tied together and the study of only one is fruitless without the other.

The oldest known civilization was founded in ancient Mesopotamia. The oldest code of law deciphered entirely, was made by King of Babylonia, Hammurabi. In 1902 the diorite block was discovered at Susa containing 2600 lines of text which was decoded entirely.

The Mesopotamian civilization was amalgamation of many nations long time before Babylon. The code of Hammurabi showed complexity terrifying the gradual development of law codes. These rules and provisions were also about property rights and inheritance Rule No. 42 and 48[775] are similar to the modern rules of law than equity but grouping towards the righteousness which is more than arbitrary statute law. But Rule 42 and 48 are somewhat analogous to modern equitable relief. Furthermore, the maxim of equity was found in many tablets of Sumerian, Assyrio-Chaldean and in Nineveh. It is similar to the modern maxim of equity.

"He who listenenth not to his conscience, the judge will not listen to his right"

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[774] Horward L.Oleck, Historical Nature of Equity Jurisprudence, *Fordham Law Review*, 1, no. 20 (1951), 23.

[775] Ibid.

The similarity between the modern and ancient was that the final judge of appeal was the "King" (Sovereign). The appeal to the king is a receiving characteristic of equity.[776] Hebrews were the source of ancient law and lore of the west. When led by Abraham they fled from Ur to Palestine and their contact with Egypt. They elaborated the laws of their have and Mosaic code, which is the basis of all law of the nations of Western world[777] The Mosaic code was strong and extraordinary and within its moral principle equity was distilled in broader sense. The word "equity" appears in the Old Testament "To receive the instruction of wisdom, justice, judgment and equity"[778]. In the story of King Soloman, once again the appeal to the King appears.

All the western tradition, civilization and law owe their debt to Hebrews who preserved their progenitor codes from destruction. With the addition of the New Testament, Bible became the basis of all western tradition.[779] Suffice it to say that equity is its very essence.

Ancient Egypt which was a little younger than eastern empire has not developed in the field of law, as the priests were all in all and Pharaoh was so remote to the people that there was no chance of appeal to him.

Ancient Greece, the foundation of western civilization, also contributed little to the development of law and equity. The first written law was Draconian law which was said to be written in blood, was famous for its severity. His laws were rewritten by Salon. But the language was so observe that they were open to numerous interpretations descriptions. There were not courts of law is the modern sense. Everyone has a chance to

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[776] BW Palmar, The Ancient Roots of the Law: We cannot escape the Past. *American Bar Association Journal* 35, no. 8 (1949), 633.
[777] Horward L.Oleck, Historical Nature of Equity Jurisprudence, *Fordham Law Review*, 24.
[778] Proverbs I, iii.www.bible.com [accessed 12th December 2016].
[779] John William Salmond, Patrick John, *Salmond on jurisprudence*, 24.

judicial office. Judges became superior as they considered themselves above law. Here, perhaps is the first instance in Greek Jurisprudence of interpretation of rules of law which can be said to resemble equity.[780] Aristotle was less interested in natural law rather he made a distinction between forms of justice. According to Aristrotle "that justice consists in treaty equals equally and 'in equals' in proportion to their inequality." [781] By 400 B.C the Greek courts became corrupt as they became the stage of display forensic talents.

Elements of Greek Jurisprudence are discernible in latter Roman law, but the Romans were not greatly indebted to Hellenic culture in the particular respect. Romans were inspired and influenced by Etrusians, who were Asiatic people and most probably brought with them the laws of Mesopotamia to Italy. Etrusia was highly developed civilization but invaded by barbarians and last invasion, which was fatal by Rome. Romans were blessed with logic and orderliness, they balanced their jurisprudence. Many of the Roman principles of law were originated by the Asiatic nations.[782]

Romans were materialists. Their first law was in the form of 12 tables of Decemiri established in 451 B.C.[783] because these laws were rigid. They were revised later but they remaind the Roman law. In first century before the birth of Christ they became so confused that they failed to equalize the individual liberty and safeguarding the material interest, inhabitants of Rome were mostly salves. The laws were written to safeguard the interest of very small number of people, the property owners.

Praetors (magistrate) have two types of jurisdiction. Legal proceedings were highly formalized in Rome for different actions. Writs were submitted to the magistrate.

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[780] Horward L.Oleck, Historical Nature of Equity Jurisprudence, *Fordham Law Review*, 25.
[781] Wacks Raymond, *Philosophy of Law: A Very Short Introduction* (Oxford University Press, 2006), 35.
[782] Livy, *History of Rome*, tr. Rev. Canon Roberts (New York: E. P. Dutton and Co. 1912),11.
[783] Albert Kocourek and John H. Wigmore, *Sources of Ancient And Primitive Law* (Boston, Little, Brown, and company, 1915), 45.

Who if approves them, he send the parties to "judex" (modern jury) who listened to the parties and pass down the judgment and then again praetor approves or revives the judgment. . Praetor had the jurisdiction to listen the writ without judex.

"In extraordinary Jurisdiction a praetor decided a suit, including questions of law and of fact, himself, without the technical restraints of forms or writs".[784]

This is equity jurisdiction and procedure, quite comparable with modern practice. The extraordinary jurisdiction modified the harsh result of the application of the stiff rules of 'ordinary' jurisdiction.

Later the function of the magistrate expanded. He now not only has the power to decide suit but also the power of formulation of law. In 300 A.D the idea of the judex was abandoned. The judge became all in all. The Roman 'ordinary' and 'extraordinary' serves in modern courts of 'common law' and 'chancery' in British and America.

The old civil code of Rome, the natural law was combination of *jus gentium* and *Lex Naturae*. This combination was called *Aequitas* equity. As the time passed, the old civil code of law conflicted with the universal law and thus abandoned by the judges. They developed remedies, as forms of action or defenses. In time repeated usage developed real certainty and the new body of law was formed and this was Equity. After Christianity equity became the dominant pervasive law. Firstly, Emperor Theodosius compiled new code and later Emperor Justanian recodified the law which became the basis of roman civilization.[785]

The Britain concept of equity was close to roman evolution of equity with certain bold differences. The roman equity was developed in the existing court structure. However,

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[784] Horward L.Oleck, Historical Nature of Equity Jurisprudence, *Fordham Law Review*, 26.
[785] J.D.M.Derrett, 'Justice, Equity and Good-Conscience', 46.

the English judges made it necessary the establishment of a separate system of courts and jurisprudence.

In the medieval period with the authority of church the Roman acquit as was improved and through church spread all over Europe. Germans, French and English in the development of law owe their debt to Romans and on later its impact was profound. It is from English law American law and equity was developed.

2. English History of Equity

Modern equity was administered "the courts of chancery". At that time proceedings were recorded in Latin that is why the chancellor's jurisdiction was also known as Latin Jurisdiction.[786] Under this jurisdiction the chancellor, provided remedy to the litigant who was denied the right by common law. He also had the power to remit the case to King's Bench if injustice was made for further investigation and if found guilty the party was severely punished in the name of king. But the important aspect of chancery was equity. It is still a debated topic that whether equity is the result of chancellor's jurisdiction or chancellor's jurisdiction is the result of principles of equity. English law owes its debt to the extraordinary lawyers of that time who were capable of creating and molding principles of equity. Among them were Sir Thomas More (1529-1532) Lord Elles mere (1596-1617), Sir Francis Bacon (1618-1621) Lord Nottingham (1673-1682) and Lord Hardwicke (1737-1756).

The chancellor was the only judge in the court of chancery, so it was difficult for him to hear all cases. In 16th century he delegated his powers to Masters of chancery to hear cases, and the chief of the masters was known as Master of Rolls. In 18th century the

[786]Ronald Jack Walker *The English Legal System*, 41.

Master of Rolls became the 2nd judge of the chancery. These Masters' gradual advancement resulted in Lord Eldon's success who became the head of Chancery in nineteenth century. He was a great lawyer. He struggled to end corruption in the court of chancery in which he succeeded, but he used his power to any attempts at reforms of the judicial system. Because of the close association to the crown, the court along with equitable jurisdiction, they acquired the jurisdiction to appoint guardians of infants and the matter of care of lunatics or their property.[787]

The proceedings in courts of chancery were not complying with formalities of writing petition and procedure of common law courts. In courts of chancery judge, creates rights and remedies when justice required. "There was never any pretence that equitable rules dated from time immemorial. It was this that prompted John Selden's immortal aphorism that "Equity varies as the lent of the chancellor's foot".[788]

3. Islamic Concept of Equity (Istiḥsān) in Sharī'ah

3.1 Historical Background of Istiḥsān

Primarily in the Islamic tradition of legislation, the sources of the *Sharī'ah* were restricted to the *Qur'ān*, the *Sunnah*, and the use of individual view (*ra'y*), with the consent of a knowledgeable and experienced authority. It is useless to discuss that *istiḥsān* was functional at the period of the Prophet (SAW) as a source of law, since both 'the Prophet (SAW) himself and the *Qur'ān*,' the real and definite sources of the Sharī'ah were all that was needed. The notion of *istiḥsān* is a type of *ra'y*. One could enlarge the primary foundation or origin of *istiḥsān* to the era of the Prophet (SAW), given his advice to Mu'ādh. The Prophet asked "What will you do if you do not find guidance in the

[787] Gary Slapper, David Kelly, *English Legal System* ed. 10th (London: Cavandish publishing Limited), 28.
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Sunnah of the Apostle of God and in God's Book?" and Mu'ādh's replied, "I shall do my best to form an opinion and spare no pains"[789], contains the key to the evolution and dynamism of Islamic law. Primarily the principles of *Sharī 'ah* were not strictly applied but the basic purpose was to ensure that the objective of the act conformed to the *Sharī 'ah*. At the time of the fight of Banū Qurayzah, some Saḥābah of the Prophet (SAW) were sent to the opposition's place and were instructed to do the 'Asr prayer on arrival at that place. The time of 'Asr came during their ride and dispute arose: some of the Saḥābah prayed on time, while others did against it, taking the Prophet's (SAW) orders literally, and performed the 'Asr prayer on that place at sunset. They reported this event to the Prophet (SAW) who became silent. His silence was taken as support for both opinions, representing that no-one was doing wrong.[790] Both groups were looking for the objective of the *Sharī'ah*.

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[795] Ibid.
[796]Khaddūrī, Majid and Liebesny, J. Herbert, 'Law in the Middle East',*The Middle East Institute*, (Washington,1955), 101.
[797]Hans Wehr, *A dictionary of modern written Arabic*. (Wiesbaden: otto harrassowitz: 1961). P208.

come in against to qiyās jalī (explicit analogy), so they use the tool of *istihsān* in priority. According to Maḥillāwī, 'We use the tool of *istihsān* when it is far stronger than *qiyās*. While the Ḥanafī's define *istihsān* as the *adillah* (evidences) agreed upon as opposite to explicit analogy (*qiyās jalī*).[798]

According to the above definition, it is clear that *istihsān* is only used by Ḥanafī school on the basis of stronger evidence and objectives of Islamic law and not according to the whims and wishes of jurists. Karkhī states that: '*istihsān* is when one takes a decision on a certain case different from that on which similar cases have been decided on the basis of its precedents for a reason which is stronger than the one found in similar cases and which requires departure from those cases."[799] According to Jaṣṣāṣ "On the basis of strong evidence, leaving a decision of *qiyās* is '*istihsān.*"[800] Bazdawī defines istihsān as, 'It is one of the two *qiyās.*'[801] In certain situations, *qiyās* is called *istiḥsān* owing to the power of its evidence.[802] Shaybānī says, "Some of the *qiyās* involves istihsān".[803] There are minor differences between the two. *Istiḥsān* is more general than qiyās khafī, because the former applies to things other than *qiyās khafī*. Ṣadr al-Sharī'ah observes that when the word qiyās is used absolutely, it means *qiyās jalī*; when the word istiḥsān is used it

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[798]Maḥillāwī, *Tashīl al-Wusūl 'ilā 'ilm al-Uṣūl*, 237; See also Karkhī, 'Abd Allāh ibn al-Ḥusayn, *Risālah fī al-Uṣūl* (Cairo: n.d); Ghazālī, Abū Ḥāmid Muḥammad ibn Muḥammad, *Al-Mustaṣfā min 'Ilm al-Uṣūl* (Baghdād: Maktabat al-Muthannā, 1970); Rāzī, Fakhr al-Dīn ibn Muḥammad, *Al Maḥṣūl fī 'IlmUṣūl al-Fiqh*, (Riyāḍ: al-Mamlakah al-'Arabīyah al-Sa'ūdīyah, Jāmi'at al-Imām Muḥammad ibn Su'ūd al-Islāmīyah, Lajnat al-Buḥūth wa-al-Ta'līf wa-al-Tarjamah wa-al-Nashr, 1979),

[799] Bazdawī Fakhr al-Islām, 'Alī ibn Muḥammad ibn al-Ḥusayn, *Kanz al-Wuṣūl ilā Ma'rifat al Uṣūl* in 'Abd al-'Azīz al-Bukhārī, *Kashf al-Asrār*, vol 2 (Cairo: Maktba al-Ṣanā'i', 1307), 3; See also Āmidī, Sayf al-Dīn Abū al-Husayn 'Alī ibn Abī 'Alī ibn Muḥammad al Tha'labī, *Al-Iḥkām fī Uṣūl al-Aḥkām* (Beirut: Dār al-Kutub al-'Ilmīyah, 1985).

[800] Juwaynī Imām al-Ḥaramayn, Abū al-Ma'ālī 'Abd al-Malik ibn 'Abd Allāh, *Al Burhān fī Uṣūl al-Fiqh* (Cairo: Dār al-Anṣār, 1980), 67.

[801] Bazdawī, *Kanz al-Wuṣūl ilā Ma'rifat al Uṣūl* in 'Abd al-'Azīz al-Bukhārī, *Kashf al-Asrār*, vol 2,7.

[802] 'Alauddin 'Abd al-'Aziz al- Bukhārī,, Kashf al-'Asrar 'An Usul Fakhr al-Islam al-Bazdawī, ed. Muḥammad al-Mu'tasim bi-Allah al-Baghdadī, 6.

[803] Ṣadr al-Sharī'ah al-Thānī al-Maḥbūbī, 'Ubayd Allāh ibn Mas'ud, *Sharḥ al Tawḍīḥ 'alā al-Tanqīḥ*, vol. 2, ed.1[ST](Cairo: al-Maṭba'ah al-Khayrīyah, 1324),81-82.

means qiyās khafī.[804] Bazdawī says that the qiyās which has a weak effect is called *qiyās* and the *qiyās* which has a strong effect is called istiḥsān.[805] Sarakhsī defines *istihsān* as "abandonment of an opinion to which *qiyās* would lead in favour of a different opinion when supported by stronger evidence and adapted to what is acceptable to the public."[806] Ibn Humām defines *istiḥsān* as 'A proof which is agreed upon textually by necessity and by hidden analogy if it happens to be opposed to a *qiyās* which leads to its understanding.[807]

3.3 Istiḥsān and Equity: A Comparison

Istiḥsān is the notion of Islamic Law which is quite similar to the concept of equity. Equity is the notion of English law based on the doctrine of fairness and good will, and derives legality from a principle in natural rights and natural justice.[808] The above mentioned both concepts basically provides fairness and goodness to people when the law is rigid or unable to provide fair rules. The major difference between them is that equity depends on the natural law and *Istiḥsān* is based on the objectives of *Sharī'ah*. But this difference need not be overemphasised if one bears in mind the convergence of values between the *Sharī'ah* and natural law, and of Islam as din al-fitra (the natural religion), with natural values. Not withstanding their different approaches to the question of right and wrong, the values upheld by natural law and the divine law of Islam are substantially concurrent. Both assume that right and wrong are not a matter of relative convenience for the individual but derive from eternally valid standards which are ultimately independent of human cognizance and adherence. But natural law differs with

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[804]Bazdawī, *Kanz al-Wuṣūl ilā Ma'rifat al Uṣūl* in 'Abd al-'Azīz al-Bukhārī. *Kashf al-Asrār*, vol 2, 84.
[805] Ibid.
[806] Sarakhsī, Shams al-A'immah Abū Bakr Muḥammad ibn Abī Sahl Aḥmad, *Kitāb al-Uṣūl*, 145.
[807] Shāṭibī, vol.2, 137.
[808]P.G. Osborn, *A Concise Law Dictionary*, ed. 5th (London: Sweet & Maxwell, 1964), 124.

the divine law in its assumption that right and wrong are inherent in nature.[809] From an Islamic perspective, right and wrong are determined, not by reference to the nature of things, but because God has determined them as such. Unlike equity which is founded in the recognition of a superior law. *Istiḥsān* does not seek to constitute an independent authority beyond the *Sharī'ah* and it differs with equity in that the latter recognize a natural law apart from and essentially superior to positive law.[810]

4. Application of the Doctrine of Justice, Equity and Good-Conscience in British-India

The notion, justice, equity and good-conscience was introduced for the first time in Bengal in the year 1780. It was later transplanted in the *mofussil* of Bombay and Madras Presidencies. Gradually the maxim was introduced into other territories of India and when judicial system was introduced here.

S.5 of the Central Provinces Laws Act, 1875, provided that in questions regarding certain topics, the Hindu Law had to be applied in cases where the parties were Hindus and the Muhammadan law in cases where the parties where Muhammadans. According to S.6, in cases not provided for by S-5, or any other law for the time being in force, the course were to act according to justice, equity and good-conscience. In the North West Frontier Province, the question of law was governed by the Worth-West Frontier Province Law and Justice Regulations. S-27 of the Regulation VII prescribed that decisions in certain matters would be according to the law governed by the North-West Frontier Province Law and Justice Regulation. S-27 of Regulation VII prescribed that

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[809]Cf. Malcolm Kerr, *Islamic Reform*, (Berkeley: University of California Press, 1961), 57.
[810]George Makdisi, 'Legal Logic and Equity in Islamic Law', *American Journal of Comparative Law*, 33 (1985), 90.

decision in certain matters would be according to the law of the parties concerned. S-28 laid down that in cases not otherwise specially provided for the Judges were to decide according to justice, equity and good-conscience. S-3 of the Oudh Laws Act, 1876 also provided that failing the other sources of law, "The Courts shall act according to justice, equity and good-conscience. In Punjab the doctrine of justice, equity and good-conscience was introduced by the Punjab Laws Act, 1872. According to Privy Council, the maxim of justice, equity and good-conscience was adopted as 'the ultimate test for all the provincial Courts in India.'[811]

The notion constituted the residuary source of law. The general scheme of law was that if on the particular point of dispute before the court there was no parliamentary law, no regulation and if it fell outside the heads of which Muhammadan and Hindu laws were prescribed then the court was to decide the matter decoding to justice equity and good-conscience. It has already been seen that the Warren Hastings's plan specifically laid down the law to be applied by the courts only for few topics i.e., inheritance, marriage, caste and other religious usages and institutions. These topics did not exhaust the entire area of civil litigation with which the courts used to be confronted. No specific direction or guidance was given either by the Warren Hastings's plan or even by the later Regulations regarding the law which the courts were applied to the residuary heads of litigation.

Thus was there a serious gap in the legal system. In this vacuum, the courts were to act according to justice, equity and good-conscience. This notion provided theoretical

[811] Pearl, David, *A Text Book on Muslim Personal Law*, 26-27; M.C. Setalvad, *The Common Law In India*, 30.

legal basis for the courts to decide cases for which no law had been specifically provided.[812]

But the scheme of law, if it can be called a scheme at all, was far from satisfactory, what does equity, justice and good-conscience mean? The question faced by the course was from which source were they to draw the principles of, justice equity and good -onscience. The notion did not have any precise and definite connotation. It pointed to no specific body of law. The maximum did not give any articulate direction or guide-line to the judges to follow in deciding disputes. In simple terms, it meant nothing else but discretion of the judge. In the beginning, no way had been specified in which the judges were to exercise their discretion. They had full freedom to decide the cases coming before them to the best of their ability and capacity in such a way as appeared to them to do substantial justice between the parties concerned. The notion opened the door for lawmaking by the judges from case to case. A judge could draw on anybody of principles which he thought to be based on justice and good-conscience in the context of the fact-situation of the dispute which he was called upon to decide. The inevitable result of such a flexible state of law was bound to be confusion and uncertainty in the country's legal system. Discretion of one may differ another. The notion of equity, justice and good-conscience varied from judge to judge. No litigant could be sure as to what legal principles would be applied by a particular judge to a particular factual situation to decide the after. In course of time, however certain guidelines were developed to guide judicial discretion in this respect.[813]

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[812] Martin Lau, The *Role of Islam in the Legal System of Pakistan*, 40.
[813] Rankin, George. *Custom and the Muslim Law in British India*, Transactions of the Grotius society. 25. (1939), 117.

The persons on who devilled the function of dispensing jussive in the initial stages of the country's administration by the company were all without any legal training. They were Englishmen who were not acquainted with the people's languages and customs.[814]

To enable them to do adequate justice, they were provided with the assistance of native law officers, *qāḍī*s and *pundit*s, who expounded to them the Muslim and the Hindu laws respectively, and guide the judges in the task of adjuration of disputed questions. In this setup and practice arose in the courts to apply the personal laws of Muslims and Hindus as the case might be even in those mattes in which it was incumbent on the judge to apply these laws under the plan of 1772 but he had freedom to act according to justice, equity and good-conscience. A further use for the formula arises where the doctrines of the personal laws are obscure because of difference of opinion between the native judges (jurists). In *Aziz Bano v. Muhammad Ibrahim* it was held that a choice most consistent with justice, equity and good-con science could be made between the conflicting opinions in Islamic law; and a similar view was evened with reference to *Hindu law in Rakhalraj v. Debendra.*[815]

It remains to discuss a peculiar feature of 'justice, equity and good-conscience' as known in South-Asia. Repeatedly advocates attempt to argue that a provision of the personal law or indeed of some statute to equity and good-conscience so to do. In no case have they succeeded. It is very curious that this argument should be raised since in *Moonshee Bazloor Ruheen v. Shamsoonnissa Begum* the Privy Counsel in diligently and

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[814] William Henry Rattigan *A Digest of Customary Law*, ed. Omprakash Aggrawala (Allahbad: University Book Agency, 1989), 1.
[815] David Pearl, *A Text Book on Muslim Personal Law*, 26-27; M.C. Setalvad, *The Common Law In India*, 30.

with great emphasis repelled the notion that a definite rule of the personal law could be nullified because it did not square with the courts' notion of justice, equity and good-conscience. Sir James W. Colive said:

"The passages just quoted, if understood in their literal sense, imply that cases of this kind are to be decided without references to the Mahomedan law, but according to what is termed, 'equity and good – conscience'" i-e., according to that which the judge may think the principle of natural justice require to be done in the particular case. Their lordships most emphatically dissent from that conclusion. It is in their opinion, opposed to the whole policy of the law in British India and particularly to the enactment (Reg IV of 1793, S, 15)... This directs that in suits regarding marriage ..... are to be considered as the general rules by which judges are to form their decisions and they can conceive nothing more likely to give just alarm to Mahomedan community than to learn by a judicial decision that their law the application of which has been thus secured to them, is to be overridden upon a question which so materially concerns their domestic relations. The judges were not dealing with a case in which the Mahomedan law was in plain conflate with the general municipal law or with the requirements of a more advance and civilized society – as for instance, if a Mussulman had insisted on the right to slay his wife taken in adultery. In the reports of our ecclesiastical court there is no lack of cases, in which a human judging decoding to his own sense of what is just and fair without reference to positive law, would let the wife go free; and yet, the proof falling short of legal cruelty, the Judge has felt constrained to order her to return to her husband.' This left it open to be supposed that the personal laws could be overridden if they were in

consistent with the requirements of a more advised and civilized society. There were many cases in which Colonial Judges decided the cases on the bases of this formual.[816]

5. Analysis of the Case Law Regarding the Doctrine of Justice, Equity and Good-Conscience in Pakistan

Implementation of Muslim Personal in the light of principles of English legal system by British judges, without proper understanding the provisions of Islamic Law passed the way to formation of new Anglo-Muhammadan Legal System. The base of this system was justice, equity and good-conscience. During 18th century, this system was used to fill the gaps created by lack of statutory law by British Indian courts. It did not have its roots in proper in pure English judiciary. It could be based or natural law, Hindu Law, Muslim law or any other law, Pakistani courts tend to apply the notion of equity, justice and good conscience" in frequent occasions. This trend was tried to retain by the judiciary of Pakistan. Mr. Muhammad Afzal Zullah, Judge Lahore High Court (as he then was) was relying on the theme (dissenting view on Seth Chitor Mal v. Sahib Lal) of Syed Mahmood, Judge observed that by filling the gaps the courts must not follow any foreign notion of justice, equity and good-conscience, in preference to Islamic norms on the subject.[817] Quoting extensively from the pre as well as post partition judicial history of the country he conclude that Islamic principles, jurisprudence and philosophy shall govern the discretion of judges when called upon to fill any vacuum in law. The successive courts while deliberating upon this issue were influenced by the scheme of

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[816] *Abul Fata Mahomed Ishak and others v. Rasamaya Dhur Chowdhri and others* (1895) 22 Cal. 619; Islamic Surveys 2.-A History of Islamic Law by *N. J. Coulson, p.* 168; *Noorul Muheetho v. Sittle Rafeeka Leyaudeen and others* PLD 1953 P C *14; Agha Mahomed Jaffer Bindaneem v. Koolsom Bee Bee and others* (1899) 24 I A 196; and *The Secretary of State for Foreign Affairsv. Charlesworth, Pilling d Co. and another* (1901) 28 I A 121 ref. *Aziz Ahmad on* Islamic Law in Theory and Practice, (1956 Edn.,), 378

[817] *Haji Nizam Khan v. Additional District Judge Lyllpur*, PLD 1976 Lah 930.

Islamization of Laws in Pakistani Constitution. Several provisions in the constitution speak of Islamizing the existing legal system in the country. The effect of various constitutional articles, such as article 2, 2A, 31(1), 227, and 268(6) make it obligatory for the state organs to follow and apply the Islamic provisions of law in preference to forigen principles of law.[818]

Equity was actually merged in Pakistani legal system where it is allowed to the judges to use their discretion. The only criterion for filling the gaps and doing justice, where no statutory law is available is equity, justice and good-conscience.

In 1962 Lahore High Court in Abdul Ghani case used personal law to fill the gap in order to determine the legitimacy of a daughter because civil law of Pakistan did not provide the remedy.

Court always applies Islamic personal law to decide cases where this remedy is not exclusively available by statute under the flag of equity, justice and good-conscience. What is not written in statute and when no remedy provided in the law and court decide the lies on justice and good-conscience by applying principles imported for other laws is called equity.

Equity means equality, giving someone his right, and treating every human equal. Pakistani judicial dispensation used the English concept of "equity", justice and good conscience" by filling the gaps in statutory law by applying Islamic Principles.[819]

Justice Afzal Zullah by using Islamic principles and the ratio of case laws for the first time expressly substituted the provisions of defense of Pakistan ordinance 1965 and the defense of Pakistan rule 1965. In a case filed by State Bank of India, an artificial person

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[818] Pakistan Law Commission Report No 11, Filling a Legal Vaccumm, 5-6.
[819] Martin Lau, The *Role of Islam in the Legal System of Pakistan*, 44.

of enemy aliened against custodian of evacuee property after the outbreak of 1969 war and held that the right of enemy to pursue civil litigation was only suspended during the period of ruler but could not completely disallow on the basis of equity, justice and good conscienc. In 1976 Justice Zullah veiled in the impression of foreign legal system on equity by deciding the case of Hajji Nazim Khan for maintenance of impoverished child by an affluent grandfather. Gave the notion of equity, justice and good-conscience and Islamic reference.

In a case *of Ghulam Muhammad v. Province of Sindh* before Sindh High Court Ghulam Muhammad sought adverse possession of government land held by him in Kacehi Abad for more than thirty years; in that case Justice Arshad Noor Khan declined the relief by stating that the concept of 'might is right' is the base of adverse possession which might result in destruction. The above stated concept is also against notion of justice, equity, and good-conscience.[820]

Constitution jurisdiction was involved in 2007 by a mother Louis Anny Fairley; to redeem the custody of her minor child father ditched the orders of foreign court jurisdiction by violating the custody orders of the court. High court by using discretionary power order to give custody of minor to the petitioner (mother) declares the act of the father against equity, justice and good-conscience.

In a suit for specific performance of contract by Ghous Muhammad Khan, respondent, failed to file cross objection and appeal on finding against them. High court in that case ordered Appellate court to accept the respondents cross appeal/object to provide him chance of defense on the ground of equity, justice and good-conscience.[821]

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[820] 2008 CLC 960.

[821] 2002 VLR 989 Kar; *Bijan Khan v. Ghous Muhammad Khan.* PLD 1972 SC 139.

In *Haji Nazim Khan*'s case, the matter of maintenance of grandson from the pre-deceased son of a person came for adjudication. No substantive law provided the solution of this question thus Supreme Court decided the matter on the concept of social justice in Islam and comprehensively discussed the emergence of notion in 'equity, justice and good-conscience' in sub-continent and its use under Pakistani dispensation. It was also held that where no Qur'ānic text, Ḥadith, *Ijma'* and *Qiyās* is available for deciding any situation than the principles of Istiḥsān and Istislah must be followed which actually means equality, decisions based on good-conscience and public policy.

It was also held that in presence of Islamic legal dispensation of court would not be permitted to use principles of equity.

All residue laws should be Islamic law in Pakistan. It was thus decided that every relative within a prohibited degree is entitled to be maintained if he is poor, child, infirm, blind.[822]

In a recent judgment of *Khalida Shamim Akhtar v. Ghulam Jaffar* question emerged before Lahore "High" Court that whether an childless widow claims her share of inheritance from such deceased husband, when deceased persuade Shia sect; the issue had neither been adjudged by the judiciary nor any law has been promulgated in a codified form in Pakistan. Whereas respondents, the brothers of deceased, contested that under Shīah sect, widow is not entitled to any share of inheritance. Justice Ibad-ur-Rehman Lodhi in the absence of any statutory provision decided the matter on the basis of equity, justice and good-conscience, that a Muslim child less widow is entitled to one fourth share from the left over state of her husband.[823]

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[822] *Haji Nizam Khan v. Distt Judge* PLD 1976 Lah 930.

[823] 2016 Lahore 865.

In *PIA v. CDA* case Supreme Court while deciding the matter in a suit for recovery of damages initiated by a civil servant who suffered due to mollified order passes by the defendant. Supreme Court decided the matter on the basis of justice, equity and good-conscience and held that "law of torts or civil wrongs in Pakistan is almost whitely the English law which is administered as a rule of justice, equity and good-conscience before applying any rule of English law court has to see whether is suits to the society and circumstances." While deciding the sentity of affidavit in our judicial system Supreme Court again relied on the same notion and applied Islamic principle with prevalent common law and that affidavit carry full legal weight when sworn on either Islamic principle or solemn affirmation, as a piece of evidence.

In an execution proceeding judgment debtor transferred warehouse situated in Islamabad to PIA. CDA accepted the transfer of the warehouse and affected it in record. Decree holder agitated the case that sale of warehouse without registered deed is invalid.[824] Provisions of register Transfer of Property Act does not apply to Islamabad Capital territory. It was held by the High Court of Sindh that through "Provisions of Transfer of Property Act 1882 not applicable."

Pakistani Court not only in civil law emphasised on equity but in criminal law also based their decision on equity, justice and good-conscience.[825]

In a case of *Ghulam Murtaza v. State* Full Bench of Lahore High Court gave an authoritative order and defined the questions of sentence and policy of court involving recovery of notices keeping in view social, economic and legal perspective of granted sentence. The principle of equity by Justice Asif Saeed Khosa in that case is,

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[824] PLD 2011 Karachi 586.

[825] *Abdul Majeed Khan v Tawseen Abdul Haleem* 2012 CLD 6.

"Quintessence of civilization's evolution and growth in the legal field is a progression from dispensation of justice according to the principle of "equity justice and good conscience to justice according to law." To such territory but principles thereof involved apply by way of equity, justice and good conscience.[826]

In *Muhammad Hussain v. Dr. Zahoor Alam* case Supreme Court while deciding suit for specific performance of contract between parties sets itself a criteria not expressly provided by the words of statue to use direction. These parameters set by the Supreme Court based on the doctrine of equity not known to our co-defined law. Supreme Court follows three well known maxims of equity while exercising direction.

1) He who sets equity must come with the clear hands.
2) Law favours who are vigilant qua their rights.
3) The purpose of exercising jurisdiction is to see that Justice is reentered according to the values of equity and good conscience.[827]

The effects of the formula in India have been to smooth out discrepancies between systems of law and to introduce conceptions which strongly resemble the general character of English law. Actual rules of English Law are regularly relied upon in some fields.

Already at the end of the eighteenth century, British judges were referring to the Roman law formula of justice, equity and good conscience; by which they meant British laws, 'if they could apply to the Indian society and circum stances' though there were differing opinions as to its scope and whether it could supersede explicit Islamic norms.

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[826] PLD 2009 Lah 362.
[827] 2010 SCMR 286.

Hastings thought that when the administration of law seemed repugnant to principles of good government and common sense, the British should step in with a remedy.

Adoptability of "equity, justice and good-conscience" as a rule of decision on different matters in each and every legal dispensation of society shows that how we lack to codify an effective legal remedy based not only on rules of law but also on justice. Initially regulations of British rulers allowing equity to fulfill the gaps in the substantive and procedural law provided solid foundations for the merger of common and equitable legal system in colonial India. Equity is used as a residuary law in Pakistan. It provides a way out in all branches of legal systems whether it is civil, criminal, corporate or service matter. Though some jurists recommended replacing it with Islamic Concept of *istiḥsān*, yet they did not remain much successful. Equity is a device in Pakistan to conclude matters on justice.

Conclusion

Conclusion

This study has explored the process of Anglicization of Islamic law trough codification, translation and legislation under the English legal system by looking into the treatment of the classical Islamic law of *waqf*, indulging local custom in the law of inheritance especially in case of Punjab and exercising the doctrine of equity, justice and good-conscience by British Indian courts. It shows that Islamic law under the English judicial system was significantly changed. The outcome of the interaction between substantive Islamic law and procedural English law was a hybrid legal system Anglo-Muhammadan law. It was later renamed as Muslim Personal Law. This process of Anglicization was based on processes of legislation, translation, adjudication, codification and legal commentaries. This study shows that the whole process of anglicising of Islamic law in British India was based on interaction, cooperation and negotiation between the colonial administrators and native Muslims especially in the case of translations of Islamic texts. However, the translation of Islamic legal texts abolished the role of *'ulamā'* over time and eventually they were replaced by lawyers trained under the British education system and became free to apply their own laws without hesitation. In addition, unlike the pre-colonial *qāḍī*, British judges mechanically applied the translated 'legal codes' of Islamic law without any consideration of social context. They also operated under the principle of precedent. This caused inflexibility of the law. According to them, Islamic law was based on religion and thus was not subject to change or reinterpretation. However, Muslim lawyers, judges and legal commentators contested these views. Syed Mahmood, Ameer Ali and Abdur Rahim were the prominent Muslim judges who presented a progressive view of Islamic law. In addition to the decisions of

Muslim judges, the most important mode of resistance from within the system came in the form of legal commentaries. Muslims like Ameer Ali, Abdur Rahim, Faiz Tyabji and Asaf Fyzee. Their treatises were not simply a systematisation of judicial precedents, rather they critically analysed case law in the light of classical Islamic legal text. The *fatāwā*'s did not play a very significant role in legal developments which were taking place under the British judicial system.

This study shows that the changes brought into *waqf* law in British India were associated with the transformation in the nature of the state. The system of adjudication in pre-colonial India was multi-layered. Apart from *qāḍī* courts, the institutions of *maẓālim* (complaints to rulers), *dīwān* (revenue and taxes), guilds and village councils exercised judicial powers.[828] Under this institutional arrangement, informal legal changes could take place without affecting legal texts. However, British rule in India put to an end this arrangement. Although state institutions displaced traditional institutional structures, the same institutions still provided a platform for divergent stakeholders to negotiate with each other on legal and political issues. In the end, the outcome of the application of principles of classical Islamic law in a legal system operated under English adjudicative procedures and by a preponderance of English judges was Anglo-Muhammadan law; significantly different from both classical Islamic law and English law. Its main features included certain manifest contradictions. For instance, Anglo-Muhammadan law was mechanically applied with no consideration of the social and personal contexts of its subjects. The Anglo-Muhammadan law of *awqāf* rather suggests a synthesis, whereby local institutions were engrafted with English common-law and legislative institutions to

[828]E Tyan, Judicial Organization' in M Khadduri (ed) *Law in the Middle East*, vol. 1 (Middle East Institute 1955), 236-78.

create a distinctive juristic hybrid. This narrative defies the stereotypical depiction of Islamic law and English law as antithetical to each other. It shows that not only that these two legal systems coexisted, but their interaction also culminated in the form of a remarkable synthesis of two different legal traditions. This study has explored the legal developments in the fields of Islamic law, its amalgamation with English practices, the development of Anglo-Muhammadan codified law in colonial India and Pakistan. The approach of judges while interpreting Islamic law in English perspective, Muslims struggles in validation of their personal law, the intention of British rulers in developing legal framework through courts and not through legislation.

It has also emphasised the emergence of customary law from nowhere as a parallel system to that of personal law in matter of inheritance. Britisher's acceptability of customs in Punjab in matters of inheritance and its ignorance of customs and usages of Indian Muslims of Bengal in the matter of inheritance to serve their colonial regime and to develop feudal system in Punjab.

English invaders as first compiled *riwīj-e-'āam* through settlement officers in every district of Punjab by taking consent from "interested male elders" of every clan; then they considered that *riwīj-e-'āam* as valid piece of evidence.

They introduced two parallel systems with assertive clause that, if someone proves custom as a rule of decision for devolution of property among Muslims for inheritance on the basis of that *riwīj-e-'āam* (which itself was created by ignoring all rules of recognition of a valid custom) will be considered.

Muslim elite fell prey in this trap and ignored the ordains of Allāh Almighty in the matters of inheritance. All this resulted in depriving Muslim mothers, daughters,

sisters and widows from their vested rights, restricted them from alienation of property, developed the system of feudalism and concentrated power among limited elite.

Muslims struggled hard to break the shackles of this newly developed Anglo-Muhammadan law and after more than four decades were able to recognise Muslim man "an absolute owner" of property and ended all prevailing customs through a legal fiction. But this legal fiction remained limited in taking retrospectivity beyond promulgation of Muslim Personal Law Shariat Application Act i.e. 16-3-1948 and does not apply to deem every living Muslim who have been ignored from inheritance of his or her Muslim father. Course of purifying Law of inheritance from the shadows of customary law and implementing Shariat in its classical form stretched over four decades. Pakistani courts continued to announce dissenting judgments on this issue. Majority of honourable judges based their decisions on the existence and non-existence of custom among parties and *riwāj-e 'āam* was recognised as the main source of proving custom. Honourable Justice Afzal Zulla (late) and Honourable Justice Ejaz Afzal considered prevalence of custom as baron rights of female and emphasised on deciding the matter on the basis of classical Islamic texts. Insertion of section 2-A in 1983 clear majority of doubts but its retrospectivety always emerged ambiguous. It can also be seen that how effectively legislature responded to the arising issues in the law of inheritance. After all these efforts Muslim female is in much better position in that segment of life than 5 decade ago.

It is also proved by this study that Pakistani Courts are using the notion of "equity, justice and good-conscience in every field of law, to conclude the matters on justice and to deal people with equality.

Adoptability of "equity, justice and good-conscience" as a rule of decision on different matters, in each and every legal dispensation of society shows, how we lack to codify an effective legal remedy, based not only on rules of law but also on justice. Initially regulations of British rulers allowing equity to fulfil the gaps in the substantive and procedural law provided solid foundations for the merger of common and equitable legal system in colonial India. Equity was and is used as a residuary law in Pakistan. It provides a way out in all branches of legal systems, whether it is civil, criminal, and corporate or service matter. Though some jurists recommended replacing it with Islamic concept of *istīḥsān*, yet they do not remain much successful. Equity is a device in Pakistan to conclude matters on justice.

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INDEX OF STATUTARY LAWS/REGULATIONS

INDEX OF CASES

INDEX OF TERMINOLOGIES

INDEX OF PLACES