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# Custom and Female Right of Inheritance: An Appraisal of the Evolution of Judicial Decisions in British India and Pakistan

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## Abstract

*This article analyses the incorporation, recognition, codification, and enforcement of custom in the prevalent law of the subcontinent during British rule, by analysing the series of judgments on cases related to female right of inheritance. It also answers the following questions: From where these customs originated among Muslims? What were the principles, which English-led courts settled for custom to be enforced as law? How were these customs codified in Punjab during the land settlement process by the English land revenue authorities? and subsequently, which statutes provide basis for recognition of prevailing custom as law? Answers of these questions are extracted from the decisions announced before independence by colonial courts and after partition by excusatory legal system of Pakistan. Then, the article discusses the phase of Islamisation of adopted colonial law, which starts from promulgation of West Pakistan Muslim Family law Act on March 15, 1948. It also investigates how courts interpret that law, what conflicts emerge from these interpretations, how long the plea of "existing customary law in tribes" remained the ratio decidendi of decisions by the court over Muslim Personal Law in cases where female descendants were ousted from their right of inheritance ordained by Allah in the Qur'ān, especially the case of Muhammad Ishaque decided by Federal Shariat Court in 1981, which for the first time declared customary law repugnant to the injunctions of Islam, and the subsequent decision of the Supreme Court in appeal on it and amendment in the form of section 2-A of Muslim Personal Law Shariat Application Act in 1983. Finally, it analyses the decisions of the court after that amendment with its scope in terms of its retrospectivity prior to March 15, 1948, which remains the point of contention in most of decisions especially in 2012 when the Supreme Court restricted operation of section 2-A before March 15, 1948 by a dissenting decision.*

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## Keywords

inheritance, custom, women rights, British India, Pakistani law, judicial decisions.

## Introduction

Before establishment of the colonial rule of England in Indian subcontinent, matters of succession and inheritance among Muslims were administered and decided partly by Islamic law[1] and partly by local customs,[2] varied from area to area and caste to caste, and occasionally overrode the perimeters of religious identities.[3] When the British government started its ascendency, it assured

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[1] In Noel 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." Noel J. Coulson, *A History of Islamic Law* (London: Edinburgh, 1964), 137.

[2] *'Urf* has its Arabic roots in word *'arf,* which means to know. *Lisān al-'Arab* recognises *'urf* in the same meaning as *ma'rūf* and *'ārifah,* which mean anything that 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. The word is mostly used for a higher level of feelings and a good and dignified expression. Another word that is often used as synonymous with *'urf* is *'ādah,* which means repetition or recurrent practice—not necessarily having rational relationship—of a group. Muḥammad Amīn, *Taysīr al-Taḥrīr* (Cairo: Maktabat Muṣṭafā al-Bābī al-Ḥalabī, n.d.), 1:317. Technically, *'urf* is defined as "habitual practices which are acceptable to people of sound nature." In another definition "*'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'ān or the *sunnah* of the Prophet (peace be on him)." For details, see Muḥammad b. Muḥammad al-Ghazālī, *al-Mustasfā min 'Ilm al-Uṣūl* (Baghdād: Maktabat al-Muthannā, 1970); Aḥmad b. 'Alī al-Jaṣṣāṣ al-Rāzī, *Uṣūl al-Fiqh al-Musammā bi 'l-Fuṣūl fi 'l-Uṣūl* (Kuwait: Wizārat al-Awqāf wa al-Shu'ūn al-Islāmiyyah, 1988); 'Abd al-Malik b. 'Abd Allāh al-Juwaynī, *al-Burhān fi Uṣūl al-Fiqh* (Cairo: Dār al-Anṣār, 1980); 'Abd Allāh b. al-Ḥusayn al-Karkhī, *Risālah fi 'l-Uṣūl* (Cairo: n.p., n.d.); Wahbah al-Zuḥaylī, *'Uṣūl al-Fiqh al-Islāmī*, 2 vols. (Damascus: Dār al-Fikr, 1986), 2:828; Muḥammad Amīn b. 'Ābidīn, *Majmū'at Rasā'il Ibn 'Ābidīn*. 2 vols. (Lahore: Suhail Academy, n.d), 2:114; Muṣṭafā Aḥmad al-Zarqā, *al-Madkhal al-Fiqhī al-'Āmm*, 2 vols. (Damascus: Dār al-Qalam, 2004), 2:865–959. In common law, the literal definition of custom is stated as follows: "A practice that by its common adoption and long unvarying habit has come to have the force of law." 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." For further details, see Bryan A. Garner, *Black's Law Dictionary,* 8th ed. (St. Paul, MN: Thomson/West , 2004), 413; Inayat Ali Sheikh, *Commentary on the Customary Law* (Lahore: Law Times Publication, 1980), 1; P. J. Fitzgerald, *Salmond on Jurisprudence* (New Delhi: Universal Law Publications, 2006), 190; Stephen Guest et al, *Jurisprudence and Legal Theory* (London: University of London Press, 2004), 213.

[3] Harish C. Sharma, "Custom, Law and Women in the Colonial Punjab," *Proceedings of the Indian History Congress* 62 (2001): 685.

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 ensured 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.[4] This assurance was also codified in section 15 of regulation IV of 1793, which provided that in all suits among Muhammadans regarding inheritance and succession, Muhammadan law would be considered as general rule. However, with the passage of time, the intention of the legislature changed and it allowed the courts to apply custom or usage while deciding the matters among Muslims, through series of enactments like Bombay Regulation IV of 1827, Punjab Law Act IV of 1872[5] relating to civil courts of the Punjab, Madras Court Act III of 1873,[6] the Central Provinces Act XX of 1875,[7] the Burma Court Act IX of 1887, and the Oudh Act XVIII of 1876.[8] In 1825, section 2 of regulation XI made the intention of the British legislature clearer by making custom as a primary rule of decision "where any custom existed." This raised disputes of personal legal issues whereas personal law of Muslims and Hindus would only be applied in matters where no such customary law existed.[9] There were various customs prevailing at that time in Muslim community with reference to inheritance and succession. Some of them are as follows:

1. The land of the deceased devolves on sons even in the presence of the widow and daughters.
2. The daughters of the deceased were excluded from inheritance.[10]

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[4] Syed Ameer Ali, *Mohammedan Law* (Lahore: Law Publishing Company, 1976), 2:15.
[5] David Pearl, *A Text Book on Muslim Personal Law* (London: Croom Helm, 1979), 34.
[6] Ibid., 35.
[7] Section 5 of Act XX of 1875 provides that "in questions regarding inheritance, special property of females, betrothal, marriage, dower, adoption, guardianship, minority, bastardy, family relations, wills, legacies, gifts, partition, or any religious usage or intuitions, the rule of decision shall be the *Mahemmodan* Law in cases where the parties are *Mahemmodan* . . . 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." Ali, *Mohammedan Law*, 2:18.
[8] Ibid, 2:16.
[9] William Henry Rattigan, *A Digest of Customary law*, ed. Omprakash Aggrawala (Allahbad: University Book Agency, 1989), 1.
[10] Sharma, "Custom, Law and Women in the Colonial Punjab," 685–92.

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 inherits the property. If she gets married, the property of her father is divided equally between deceased's male descendants.[11]

In all the above instances, the female heir had no right to alienate her inherited property. One of the arguments to justify the above customs was that a woman was entitled to her proper dowry according to the rank or status of the family. Therefore, she had no other rights of inheritance to the property of her paternal relations.[12] In fact, it was widely acknowledged that any effort to include women in inheritance would lead to the fragmentation of local estates and, ultimately, a sharp decline in the productive capacity of the land.[13]

Sir Lawrence Jenkins held 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 British India, however custom plays a large part in modifying the ordinary law, and it is not established that there 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.[14]

## Customary Law in British India

In many parts of Indian subcontinent, local customs were in practice, which either repudiated or contradicted Islamic law. For instance, in many areas, customary law was enforced which excluded the daughters from inheritance in favour of sons. This local custom contradicted the Islamic law according to which a daughter held the right to inherit property from her father.[15] The role of custom and customary law earned judicial importance during colonial rule in British India, especially in Muslim majority areas such as the Punjab. Here, the primary interest of the colonial power lay in the concerns of administrators about revenue collection and consequently in establishing

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[11] Ibid.
[12] Asaf A. A. Fayzee, *Cases in the Muhammadan Law of India and Pakistan* (Oxford: Clarendon Press, 1965), 99.
[13] Nelson, J. Matthew, *In the Shadow of Sharī'ah: Islam, Islamic Law, and Democracy in Pakistan* (London: Hurst & Company, 2011), 11.
[14] *Mahomed Ibrahim Rowther v Shaikh Ibrahim Rowther* (1922), I.L.R. 45 Mad. 808.814.
[15] Shahnaz Huda, "Anglo-Mohammedan and Anglo-Hindu Law: Revisiting Colonial Codification," *Bangladesh Journal of Law* 7, nos. 1–2 (2003): 5.

regular landholding rights and patterns of inheritance.[16] As early as 1847, customary practice was acknowledged as being appropriate in circumstances where the tribunals were directed to enforce personal law of the parties as a governing law.[17]

In British India, legislature and courts mostly allowed custom as the rule of inheritance. This fact is evident from the pattern of legislation[18] and series of case laws. Main factor which gave rise to the customary practice was that majority of Muslims in that area were previously Hindu. Though Islam provided a complete code of law in matters of inheritance but due to strong Hindu cultural influence, it could not be completely practiced.

In case of *Rup Lal Chaudhry v Latu Lal Chaudhry,*[19] the court decided that when one Muslim changed the persuasion of one school of thought and started following the other his practices and disposition observed also converted to the rules defined by the new school of thought. However, later on the court recognised the observance of custom. In case of *Jawala Bukhsh v Dharam Singh,*[20] judicial committee allowed adherence of Hindu custom though parties in that case were Muslims converted from Hinduism. The basic rule of law was that on conversion to Islam, Islamic law was applicable.[21]

Islamic law provides the concept of absolute ownership[22] of property, does not distinguish between self-acquired and ancestral property in any matter of deposition, and eliminates all types of customs. Some of the judgments by superior courts considered Islamic law in this regard. For instance, in *Hakim v Gul Khan*[23] it was held by the court that Islam rejected every custom, which was in conflict with or contrary to its prescription. But in Indian subcontinent the overwhelming majority of Muslims were converted

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[16] William R. Roff, "Customary Law, Islamic Law, and Colonial Authority: Three Contrasting Case Studies and Their Aftermath, *Islamic Studies* 49, no. 4 (2010): 460.

[17] George Rankin, "Custom and the Muslim Law in British India," *Transactions of the Grotius Society* 25 (1939): 89.

[18] For details, see *Gasiti v Umrao* Jan 1893 20 IA 193; *Abdul Hussain v Bibi Sona Dero* 1917 45IA 10; *Mirabivi v Vellayanna* ILR 8 Mad 464; *Nawab Sultan Maryam Begum v Nawab Sahib Mirza* 1889 161A 175; *Beg v Allah Ditta* 1917 44 Cal 749.

[19] *Rup Lal Chaudhry v Latu Lal Chaudhry* 187.8.3. Cal. L.R. 97.

[20] *Jawala Bukhsh v Dharam Singh* 1866 10 Moo. IA 516, 536.

[21] Asaf, *Outlines of Muhammadan Law,* 66.

[22] The word as used by jurists covers a wide range of ideas. For details, see ʻAlī b. Muḥammad b. ʻAlī al-Jurjānī, *al-Taʻrīfāt* (Beirut: ʻĀlam al-Kutub, 1996), 284; Muḥammad b. Abī Sahl Aḥmad al-Sarakhsī, *al-Mabsūt* (Beirut: Dār al-Maʻrifah, 1993), 24:157; Abū ʻAbd Allāh b. Muḥammad b. Aḥmad al-Qurṭubī, *al-Jāmiʻ li Aḥkām al-Qurʾān* (Cairo: Maṭbūʻāt Dār al-Kutub al-ʻIlmiyyah, 1952),10:247; Muḥammad Amīn b. ʻUthmān b. ʻAbd al-ʻAzīz b. ʻĀbidīn, *Radd al-Muḥtār ʻalā ʾl-Durr al-Mukhtār Sharḥ Tanwīr al-Abṣār* (Beirut: Dār al-Turāth al-ʻArabī, 1998), 6:466; ʻAlī b. Abī Bakr al-Marghīnānī, *al-Hidāyah fī Sharḥ Bidāyat al Mubtadī*, 2 vols. (Beirut: Dār al-Arqam, 1997).

[23] *Hakim v Gul Khan* 1882 IL 8 Cal 826.

from Hinduism, who continued adhering to Hindu customs. The court in these cases recognised that observance. In *Mirabivi v Vellayana*,[24] Madras High Court decided the matter where the female heir was ousted from succession on the basis of custom by accepting and applying the principal of custom as law, held that the custom must fulfil all requirements of a valid custom and must be acceptable for having force of law. Supreme Court of Bombay in *Hirbae v Gorbai*,[25] *Rahim bai v Hirbai*,[26] *Ashaba v Haji Tyeb*,[27] and *Muhammad Sadik v Haji Ahmad, and Haji Abdul Sattar*[28] also allowed observance of Hindu law in matters of inheritance for Khojas and Memons where no custom contrary to Hindu law existed in these communities. In *Bai Baiji v Bai Santo*,[29] the same principle was applied in case of Borah's Sunni Muslims, who were converted to Islam few centuries ago. The Chief Justice, Sir Erskine Perry considered, in the first instance, the enforceability of the customary rule in principle. He concluded that if a custom had been proved to exist "from the time whereof the memory of man runneth not to the contrary", if it is not injurious to the public interest, and if it does not conflict with any express law of the ruling power, such a custom was entitled to receive the sanction of a court regardless of the general Muslim law to the contrary.[30]

## Customary Law in the Punjab

In the Punjab, customs relating to succession, transfer of property, and other land related matters were recorded at the time of making the early settlement—in the fifties and sixties of the nineteenth century—in every village administration on a paper called the *wājib al-arḍ*.[31] A document called *wājib al-arḍ* was prepared by British rulers in consultation with every village administration, which was partly a declaration of facts and partly a written agreement.[32] About 1864, Mr. E. Prinsep started the practice of interrogating villagers of the tribes or part of a district collectively and in this way a record

[24] *Mirabibi v Vellayana* 1885 IL 8 Mad 464.
[25] *Hirbae v Gorbai* 1875 12 Bom HCR 294.
[26] *Rahim bai v Hirbai* 1877 IL 3 Bom 34.
[27] *Ashaba v Haji Tyeb* 1882 IL 9 Bom 115.
[28] *Muhammad Sadik v Haji Ahmad and Haji Abdul Sattar* 1885 IL. 10 Bom.1.
[29] *Bai Baiji v Bai Santo* 1984 IL 20 Bom 53.
[30] Rankin, "Custom and the Muslim Law in British India," 101.
[31] For details, see David Gilmartin, "Customary Law and Shariat in British Punjab," in *Shariat and Ambiguity in South Asian Islam*, ed. Katherine P. Eving (Berkeley CA: University of California Press, 1988), 33–62; cf. Gilmartin, *Empire and Islam: Punjab and the Making of Pakistan* (Berkeley CA: University of California Press, 1988), 13–18; Prem Chowdhry, "Emerging Patterns: Property Rights of Women in Colonial and Post-Colonial South-East Punjab," *Journal of Punjab Studies*: 20, nos. 1–2 (2013): 111–134.
[32] Rankin, "Custom and the Muslim Law in British India," 109.

of tribal customs came into being, which was known as the *rivāj-i ʿāmm*. The *wājib al-arḍ* was given by a legislative act a special importance,[33] and the presumption of truth was attached to entries through section 46 of the Punjab Land Revenue Act 1887.[34] Later on section 82(4) of the Indian Evidence Act recognised the entries of *rivāj-i ʿāmm* as sufficient evidence to prove some fact relating to the existence of some custom. These official records had a high significance as evidence, though their value had sometimes been impaired by the settlement officers shaping them in a form, which they approved, disregarding that they were confined to statements as to customs, which were in fact observed as distinct from endeavours to legislate for the future.[35] In the Punjab, custom was given statutory recognition by the Punjab Laws Act (1872) section 5, which states,

> In questions regarding . . . [a list of matters pertaining to family law][36] the rule of decision shall be (a) any custom applicable to the parties concerned, which is not contrary to justice, equity and good conscience, and has not been by this or any other enactment attired or abolished, and has not been declared to be void by any competent authority, (b) the Mohammedan law, in cases where the parties are Mohammedans . . . 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.[37]

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.[38]

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 in section 16 similar to the Punjab Laws Act. The problem whether the 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 community is the decision of Tyabji J in *Kunhambi v*

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[33] The compendiums on customs were compiled during the colonial period. The meticulous recording of *rivāj-i ʿāmm* and Punjab customs by British administrators, particularly C. L. Tupper, Charles Roe, and W. H. Rattigan are extremely useful to understand the practice of customs and tradition. Sharma, "Custom, Law and Women in the Colonial Punjab," 685.

[34] Rankin, "Custom and the Muslim Law in British India," 109.

[35] Ali, *Mohammedan Law*, 2:15.

[36] For details, see Punjab Laws Act (1872), section 5.

[37] Ibid.

[38] Rattigan, *Digest of Customary Law*, 11.

*Kulanthar* decided by the Madras Court in 1915.[39] 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 the facts "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, Bombay, and the Punjab, custom was not granted statutory recognition in other areas of British India. This was particularly the case in Bengal, the United Provinces, and Assam. The Allahabad High Court at first read the lack of a statutory protection of custom in the Civil Courts Acts of these areas and implied that no customary deviation should be permitted from the purity of the personal laws. These early cases were overruled in 1913 in *Muhammad Ismail v Lala Sheo-mukh Rai*.[40] From this case, the position is that custom has no 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. In undivided subcontinent, there was a desire by the religious communities 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*,[41] 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.[42]

The basis of the most important rules of the 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, a 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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[39] *Kunhambi v Kulanthar* 1915 ILR 38 Mad 1052.
[40] *Muhammad Ismail v Lala Sheo-mukh Rai* 1913 15 Bom LR 76.
[41] *Abdul Hussein Khan v Sona Dero* 1918, L. R. 45 I. A. 10, 13–14.
[42] Ibid.

the power of permanently alienating parts of the common property is vested in the whole body.[43]

The main feature of the Islamic law of inheritance is that it gives the females their share in inheritance. Yet in the Punjab, custom was imposed on the Muslims who were subject to the customary law principles, which were not only foreign and contradictory to their personal law but modified versions of Hindu rules. The custom banned females (e.g., married daughters) from inheriting in the presence of collaterals. Moreover, it imposed limits upon the women right to deal with the property, which they inherited, restricting it to a right to merely enjoy the profits for her own life. In some villages inhabited by Muslims, a widow was allowed larger powers. The general rule against alienations by a widow was applied to Muslims and Hindus without distinction. Custom denied her any right to claim partition or sell save for necessity; or it recognised a limited right in her to make a gift of it to a nephew or a son-in-law.[44] As regards the right of a male proprietor to alienate, village custom followed closely neither a Hindu nor a Islamic idea. Rather it recognised that a man's male descendants had right of inheritance to his ancestral property and that it was necessary to prevent the intrusion of strangers into the proprietary body by rules as to pre-emption. The distinction between ancestral and acquired property, which is foreign to Islamic law, is of great importance under custom. The right of alienating ancestral property was sometimes restricted even in the absence of direct descendants in the interests of collaterals (e.g., nephew). In some cases, gifts to daughters or sisters or their sons could not be objected to; in others they could be cancelled.[45] 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. Alienations of non-ancestral immovable property could not be contested as being contrary to custom. Since the Punjab legislature in 1900 passed the Alienation of Land Act, the sanction of the Deputy Commissioner is required to permanent alienations of land made by a member of an agricultural tribe unless consensus was developed in a member of the same tribe or a tribe in the same group.

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[43] *Gujaar v Sham Das*, 107 P. R. 1887. A person, who is not an agriculturalist or a member of an agricultural 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 a member of an agricultural tribe and also a member of a village community people who for generations have drifted away from agriculture or taken to live in cities will be presumed to be governed by customary law. Rankin, "Custom and the British Law in India," 110.

[44] Sharma, "Custom, Law and Women in the Colonial Punjab," 685–89.

[45] Roland Knyvet Wilson, *Anglo-Muhammadan Law*, ed. Abdullah Yusuf Ali (Lahore: n.p., n.d.), 179.

The Muslim Personal Law (Shariat) Application Act, 1937 (Act XXVI of 1937) was introduced in 1937. Section 2 of this act stated, "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)."[46] This law was only applied to intestate succession and had no application to testate succession.

This significant enactment, Muslim Personal Law (Shariat) Application Act, 1937 enforced dealing with the application of Islamic law in British India. According to this enactment, the customary law contrary to Islamic law was abrogated with the exception of the agricultural land contained in the act of 1937.[47] Muslims of the Punjab did not strictly follow Islamic law of inheritance especially in rural areas and there were some Muslim communities who followed Hindu law of inheritance as a customary practice like Khojas and Memons. In this way, Muslim personal law and customary law existed side by side. Notwithstanding, legally the latter had priority over the former.[48] Therefore, the exclusion of agricultural land took away a very large part of the scope of the enactment of 1937.[49]

## 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 women became entitled to inherit the property. Section 2 of the West Pakistan Muslim Personal Law (*Shariat*)

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[46] Ibid.
[47] Fayzee, *Outlines of Muhammadan Law*, 58.
[48] Muhammad Zubair Abbasi and Shahbaz Ahmad Cheema, *Family Laws in Pakistan* (Karachi: Oxford University Press, 2018), 14.
[49] M. Farani, *Manual of Family Laws in Pakistan* (Lahore: Law Time Publications, n.d.), 426.

Application Act, 1962, was further amended in 1983[50] when Article 2-A was included in the above-mentioned section, which stated,

> 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, inexecutable 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.[51]

It seems from a plain study of section 2-A that the law did not abolish all types of customs nor did it fulfil all the purposes of making amendments in section 2-A.

First, section 2-A of the West Pakistan Muslim Personal Law only emphasised one aspect of the problem related to the abolishment of the custom of reversionary right and restriction on the alienation of property inherited under custom in which the grandson of the "last male full owner" challenged the alienation of property by his father. 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 ignored the right of women guaranteed in the Qur'ān relating to succession in their fathers' estates prior to 15-3-1948, which was 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.

Second, as no law is based on presumptions so the words "deemed to or presumed" used in section 2-A by the legislature wipe out the certainty of law of succession ordained by Allah in the Qur'ān and do not give any clear picture nor do they intent to abolish the custom relating to the right of a widow or daughter in her husband or father's estate prior to 15-3-1948 where

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[50] Farani, *Manual of Family Laws in Pakistan*, 427; Pearl, *A Text Book on Muslim Personal Law*, 206.

[51] Farani, *Manual of Family Laws in Pakistan*, 430.

daughter challenged the main mutation passed prior to 15-3-1948.

Third, as 2-A is 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 nineteenth century in an undivided subcontinent, deciding the cases of succession among Muslims under section 26 of Bombay Regulation IV of 1827, lay on the proof of customary law in the concerned family or tribe in order to override *sharī'ah*. If the custom was proved to be the rule of inheritance among a Muslim family, customary law prevailed 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 are deprived of their legal (*sharī'*) right of inheritance. Reliance is placed on dozens of decisions few of which are mentioned below.

## *Precedents Recognising Custom as Rule of Inheritance*

In 1917, Abdul Hussein's[52] case distinguished and defined the criteria of applying custom as rule of governance in matter of inheritance. Mir Hussein Ali Khan Talpur died on January 30, 1907 as intestate (having 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 a Baloch tribe and in the matter of inheritance the family was governed by custom. According to the prevailing custom, females were excluded from the share of inheritance of paternal relations. He further claimed that the deceased belonged to the Sunni school of thought. Therefore, giving all the property to deceased's sister in inheritance was detrimental to his vested right. The Privy Council observed that it was hard to define some one's personal beliefs but both Muslim sects—Sunni and Shi'a—were so sharply differed from each other in beliefs and performance of prayers that it was not hard to identify the sectarian affiliation of the deceased. Therefore, the evidence of defined actions, observance, and conduct of the deceased and his family was taken into account. On the basis of this, both the below courts were unanimous that the deceased belonged to the Shi'i 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 the district of Sind and argued,

> 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

[52] *Abdul Hussein Khan v Bibi Sona Dero* 1917 45 IA 10.

> the law of defendant; and in the absence of specific law and usage, justice, equity and good conscience alone.[53]

The Privy Council relied upon the ratio of the case in deciding application of custom in India as discussed in *Daya Ram v Sohal Singh* and held that it lay 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 was also declared that the claimant had to prove what the custom was. Section 5 of the Punjab Act did not create presumption that custom prevailed as the rule of governance straight away.[54]

Custom as the rule of governance was alien to the legal system of Indian subcontinent. In England, the custom which was claimed in a particular district if proved to be followed outside, it would lose its authority as law. The court also mentioned the authenticity of custom by referring to the case law of *Ramala Kshmi Ammal*,

> 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.[55]

In this case, the plaintiff alleged the existence of custom in suit and appeal and more than sixty witnesses testified the custom as governing law. But the Privy Council gave preference to one oral testimony of Rustom Khan, head of Rustomani tribe who confirmed that deceased's family was governed by Islamic law in matters of inheritance and that there was no custom that excluded females from their share. This oral account was strengthened by the revenue record in which mutation of inheritance of one Mir Ghulam Ali Khan (family member of the deceased) was entered according to Islamic law. The Privy Council thus rejected the claim that parties were ever governed by custom.

The case *Mst. Sardar Bibi v Haq Nawaz Khan*[56] in 1934 paved the way for the *Shariat* Act. Karim Bokhsh, the last male owner died in 1921, leaving behind two daughters, a minor son, and a widow. He belonged to a Gishkori

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[53] Ali, *Mohammedan Law*, 2:18.
[54] Asaf, *Cases in the Muhammadan Law of India and Pakistan*, 99.
[55] B. B. Mitra, *Indian Succession Act* (Calcutta: Eastern Law House, 1940), 79.
[56] *Mst. Sardar Bibi v Haq Nawaz Khan and ANR* ILR 15, 1934 LAH, cited in Rankin, "Custom and the British Law in India," 113.

Baloch tribe. Revenue authorities attested mutation in favour of a son by excluding daughters and the widow. Sardar Bibi, the elder daughter of the deceased brought a suit in 1927, claiming that the rule governing succession at the time of the death of her father was Islamic law and that she had wrongly been deprived of her share of inheritance. She claimed 7/32 share in her father's estate. During proceedings of the case, it appeared in *rivāj-i ʿāmm* that the tribe was governed by customary law till 1920 but in 1920 all the members of the tribe appeared before the settlement officer and declared that from now onwards, the rule governing succession among them would be Islamic law and not custom.

Karim Bokhsh was one of the signatories of that dedication. The 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, the High Court dismissed the claim of the plaintiff and upheld customary law prevalent among Baloch tribes. The 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."

## *Precedents Recognising Islamic Law as Rule of Inheritance*[57]

After independence and promulgation of Shariat Application Act 1948, apex courts started adjudicating the matters of inheritance by applying Muslim Personal Law but failed to terminate the customary rule of limited estate of female heir or the right of reversion.

In *Mst. Shahzadan Bibi v. Amir Hussain Shah*[58] case, Amir Hussain Shah claimed his reversionary right by filing a suit being collateral in third 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 Zadi (daughter from predeceased wife of last owner of land).

Mutation of inheritance was sanctioned in two equal shares between widow and Hakim Zadi daughter. On the death of the widow, her share went

[57] For details of the Islamic law of inheritance, see Aḥmad b. Ibrāhīm b. al-Nujaym, *al-Baḥr al-Rā'iq*, 8 vols. (Cairo: Dār al-Kutub al-ʿArabiyyah, 1334 AH), vol. 8; Ṣāliḥ ʿAbd al-Samīʿ al-Ābī, *Jawāhir al-Iklīl Sharḥ Mukhtaṣar al-Khalīl* (Cairo: Maṭbaʿat Muṣṭafā al-Bābī, 1366 AH), vol. 2; Muḥammad al-Khaṭīb al-Sharbīnī, *Mughnī 'l-Muḥtāj Sharḥ al-Minhāj* (Cairo: Maṭbaʿat Muṣṭafā al-Bābī, 1377 AH), vol. 3; Dāmād Āfandī, *Majmaʿ al Anhur* (Cairo: al-Maṭbaʿah al-Amīriyyah al-Kubrā, 1319 AH), vol. 2; Muḥammad b. Aḥmad b. Rushd, *Bidāyat al-Mujtahid wa Nihāyat al Muqtaṣid* (Cairo: Maṭbaʿat al-Muṣṭafā al-Bābī, 1960), vol. 2.

[58] *Mst. Shahzadan Bibi v Amir Hussain Shah* PLD 1956 SC 227.

to the unmarried daughter Shahzadan Bibi. The other half was mutated in favour of Shahzadan Bibi on the marriage of Hakim Zadi under customary law. On April 10, 1949, by three different mutations 7020 kanals and twelve marlas were gifted by Shahzadan Bibi to her step sister and her husband Manzoor Hussain. The case was defended on following three grounds: (a) the plaintiff had no *locus standi*; (b) parties were not governed by custom; (c) and they persuaded *Ithnā 'Ashariyah* sect.

The trial court dismissed the suit on the ground that (a) the plaintiff failed to prove restricted right of alienation; (b) last full owner can alienate; (c) and the last full owner Shahzadan Bibi had the right to alienate the property. The plaintiff was not legal heir according to Shi'i law of inheritance.

The decision was upheld by the District Judge. But the High Court in second appeal reversed the decision of both the lower courts on the basis that parties were governed by agricultural custom and Shahzadan Bibi was limited owner and not full owner.[59]

According to *rivāj-i 'āmm*—prepared by a government officer in consultation with the concerned tribes (Sayyeds)—the widow could hold her deceased husband's property as limited estate till her second marriage or death. She could alienate the property in certain cases by giving notice of legal necessity to the male heirs of the deceased or for bearing expenses of her daughter's marriage or for payment of government revenues or fines or for discharging her husband's debts or for agricultural improvements. It was also written in *rivāj-i 'āmm* that a daughter cannot inherit as full owner in presence of the widow, son or upto 5th degree collaterals. There was no distinction between self-acquired, ancestral, moveable or immoveable property.[60]

The Supreme Court dismissed the appeal assailed against the order of the High Court, setting aside concurrent findings of both the courts below, held the decision of the High Court, and declared that the tribes of parties were consulted at the time of preparation of *rivāj-i 'āmm*. Thus existence of custom and its obedience by the parties were proved. Therefore, custom was applicable as rule of decision among parties in the light of section 5(a) of the Punjab Law Act 1872. Moreover, the section 2 of Muslim Personal Law Shariat Application Act has no effect on limited estate of female heirs as lawmakers intentionally allowed limited estate of the females to exhaust its time. Furthermore, it was held that this limited estate would be open to

[59] The Supreme Court while deciding the matter referred to answers to question nos. 11, 15, 16, 17, and 19 for *rivāj-i 'āmm* of district Mianwali from where the parties belonged and land was situated.

[60] *Mst. Shahzadan Bibi v Amir Hussain Shah* PLD 1956 SC 234.

succession when it terminates on the death of the female heir as if last male owner died at that time.

If the termination of limited estate was effected on the occasion of marriage/remarriage of the holder, she was eligible to get her legal share form last male full owner.[61]

Muslim Personal Law Shairat Application Act 1948 was silent on the subject of alienation by female before termination of limited estate and it did not even restrict the application of customary law on the subject.

The Supreme Court based these reasons on the ratio of its earlier judgment given in *Muhammad Asghar Shah v Muhammad Gulsher Khan* case.[62] On the basis of these reasons, the Supreme Court held that Act of 1948 did not extend the right of female limited owner and any alienation of property by her before termination was subject to customary law same as before March 16, 1948.[63]

In another case,[64] a suit was filed 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 fourth son. It is an admitted fact that the property was ancestral. The trial court dismissed the suit on the ground that after promulgation of the Act of 1948 and subsequent amendment in 1951, the donor of the gift has absolute right over property and plaintiffs had no *locus standi*. The High Court, however, reversed the decision on the ratio of two judgments of the superior court cited as *Basher Ahmad v Muhammad*[65] and *Abdullah v Bakhto Mai.*[66]

The main question in that case was whether by amendment in the law Muslim male holding estate under custom became absolute owner or not?

The Supreme Court in its decision considered facts and arguments advanced by the contesting counsels and analysed section 2 and 3 of the Act of 1948, along with amendment in 1951, section 5 of the Punjab Law Act 1872, the ratio of laws given in Bakhto Mai's case, and the definitions of ownership by different authors. It finally concluded that a suit under section 2 was competent by Muslim law heir (a) to protect his right in case of alienation by female holding limited estate; (b) the only difference brought by Muslim Personal Law Shariat Application Act 1948 was that *sharīʿah* will govern succession after termination of limited estate; (c) no express words provided by

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[61] Ibid., 227.
[62] *Muhammad Asghar Shah v Muhammad Gulsher Khan* PLD 1949 Lah 116.
[63] Ibid.
[64] *Khair Din v Muhammad Hussain* PLD 1961 SC 468, 321.
[65] *Basher Ahmad v Muhammad* PLD 1956 Lah 934.
[66] *Abdullah v Bakhto Mai* PLD 1956 SC 321.

the amendment to end "state 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 the Supreme Court that the plaintiffs had vested reversionary rights and Khair Din would continue to be governed under customary law.[67]

In *Aslam and another v Mst. Kamalzai* [68] case, the 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 the death of Karam Khan, the property was distributed under customary law. The two-third of the property was given to the deceased's sons Aslam Khan and Zaman Khan. The one-third share was given to the deceased's widow Mst. Rohana and daughter Mst. Kamalzai (plaintiff) as limited owner. The suit was contested by the brothers on two grounds. First, they inherited the land under customary law; and second, the alienation of the property took place before the promulgation of North West Frontier Act of 1935.

According to law, inheritance of Karam Khan opened only to the extent of limited estate of Mst. Rohana and the suit was time barred. The trial court dismissed the suit on merit. The Appellate Court reversed the decision. The judgment was assailed to the High Court, which decided the appeal in favour of the appellant/plaintiff. The leave was granted by the 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. The Supreme Court based its judgment in the light of section 4 of North West Frontier Province Shariat Application Act, 1935, declined the claim of the plaintiff, and held that succession of only limited estate of Mst. Rohana would open. It was also held by the Supreme Court that it was in the knowledge of the plaintiff that the land was divided among the heirs of the deceased under customary law. The matter could not be agitated as it was barred by limitation, thus creating another ground of ouster from their inheritance. The Supreme Court recognised that the devolution of inheritance was based on customary law.[69]

In 1974, the 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 the termination of limited estate. Facts concluding the case to above *stare decises* were as follow: On the death of Phullu a Daharjutt of Multan, the land was mutated in favour of his son Allah Bukhsh under customary law who also died issueless and the land was transferred to her

[67] *Basher Ahmad v Muhammad* PLD 1956 Lah 934.
[68] *Aslam and another v Mst. Kamalzai* PLD 1974 SC MR 207.
[69] *Mst. Hussain Zadgai v Mst Bibi Rohana* 1974 SC 07.

mother Mst. Khanan (widow of the last male full owner) in preference to her sister and third degree collateral.

A 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.[70]

The claim was contested on the point of limitation for first alienation and for second alienation arguments were advanced by counsels of plantiff that Mst. Khanan alienated the property as full owner. The trial court held that: (a) parties were governed by custom; (b) properties were devolved on Khanan as limited owner; and (c) the suit was barred by time as first alienation of property was in 1930. The court allowed the alienation to the extent of one-sixth share, which was devolved on her by the *sharī'ah*. It also determined the share of the plaintiff under the Shariat Act.

The matter was assailed in appeal in which it was decided that the last full male owner was Allah Bukhsh and not Phullu, Mst. Khanan held the land as mother and as limited owner, She had no power of alienation nor was the land ancestral with respect to plaintiff no.1 to 6.

The High Court referred to the definition of ancestral properties given in Rittingan digest of customary law, which defined it as: "As regards sons, 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."[71] The Supreme Court upheld the decision of the High Court.

Apropos of the above, it seemed that British rulers purposely allowed landlords of different tribes to hold land according to their whims and wishes not only to strengthen their reign but also to collect land revenues by using custom as a tool. They also documented the custom in the form of *wājib al-arḍ* (*rivāj-i 'āmm*), passed different colonial laws, and administrated them in the courts.

## Termination of Reversionary Right based on Customary Law and Retrospective Effects of Section 2-A of Shariat Application Amendment Act 1962

Evolution of law on the subject continued its course and the Supreme Court

[70] Ibid.
[71] Ibid., 15.

started to terminate custom such as reversionary right through its judgements. In 1972, plaintiff Muzaffar Khan challenged the gift made by his nephew Muhammad Aslam Khan to his sisters Mst. Roshan Jan and Mst. Nabi Begam in 1966 registered on August 26, 1967.[72] The suit was filed on the grounds that under the customary law of inheritance Muhammad Aslam did not have the right to alienate the property and that his gift affected adversely the presumptive right of the plaintiff. The suit was decreed in favour of the plaintiff. However, the decree was set aside by the District Judge in the appeal on the following grounds: (a) the plaintiff failed to establish that the property was ancestral; (a) he also failed to prove that he was presumptive heir, and thus he had no *locus standi*.

A civil revision was filed which was dismissed on four grounds: (a) the plaintiff inherited property in 1923 from Ali Mardan, excluding other heirs and the suit was barred by limitation; (b) the plaintiff was not Muslim law heir of Ali Mardan; (c) the respondent acquired complete title of property under perception doctrine; (d) gift made by the respondent was otherwise considered as inheritance of sisters.

The petitioner/plaintiff assailed the decision in the 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, the respondent/ defendant was childless, and under custom he could hold limited interest. Petitioner/plaintiff based his case on the judgment of the Supreme Court cited in *Khatoon v Mala and 5 others*[73] in which it was held that NWFP Shariat Act 1951 did not restrict customary law of alienation to be operative in cases of inheritance of agricultural land. The case law was distinguished by the Supreme Court, which held that it was only applicable where the last male owner died before enforcement of Shariat Act 1948 unlike act of 1935.

The Supreme Court decided the case on the basis of *Mst. Sahib Jaan Bibi v Walidad Khan*[74] and in light of the amendment in Section 3 of Shariat Act and 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. The Supreme Court dismissed the appeal on the basis of *locus standi*, limitation, and retrospectivity of NWFP Shariat Act 1935.[75]

In *Abdul Ghafoor v Muhammad Sham* case after the insertion of section 2-A in Muslim Personal Law of 1948, the Supreme Court decided four appeals in

[72] *Muzaffar Khan v Muhammad Aslam* PLD 1972 98.
[73] *Khatoon v Mala and 5 others* PLD 1974 SCMR 341.
[74] *Mst. Sahib Jaan Bibi v Walidad Khan* PLD 1961 Peshawar 9.
[75] Ibid.

a single comprehensive and authoritative judgment, as similar points on the matter of inheritance were involved.[76] Facts involving the first appeal were that appellant/plaintiff in 1958 challenged the claim of ancestral property by the defendant being adverse to reversionary right under the customary law of inheritance after the death of the defendant. This suit for declaration was defended on two grounds: (a) alienation of property was permitted for good management of property under customary law; (b) under new enactment he was competent to alienate his property as absolute owner.

Following two facts were admitted in this case: (a) property in dispute was ancestral; (b) parties were governed by customary law.

Under customary law, property could only be alienated on the basis of legal necessity or for consideration. The High Court rejected the plea of the defendant and held that the property was inherited prior to promulgation of Muslim Personal Law and referred to a case decided in 1956, which entailed that the power of alienation of property after enforcement of the Shariat Act of 1948 was not changed. It only effected the subsequent succession on termination of limited estate. That case also affirmed the reversionary right to contest alienation.

The second appeal involved the assertion of Musa Khan who challenged the alienation of the 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's property in favour of two daughters of the deceased (Zenab and Shakran) made by the widow on June 23, 1953. The widow already mutated the other half to Bakhat Sawi and Basran in 1941. She died few days after the alienation of that property. The plaintiff took the 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 one-eighth share in suit property and thus could not gift more than her share. It was decreed that daughters (donees of the gift) had two contentions: (a) the impugned property was not ancestral and was purchased by the father; (b) upon amendment in the law of 1951, the widow could alienate the property as full owner.

In third appeal, the standing of the parties can be understood by following pedigree table.[77]

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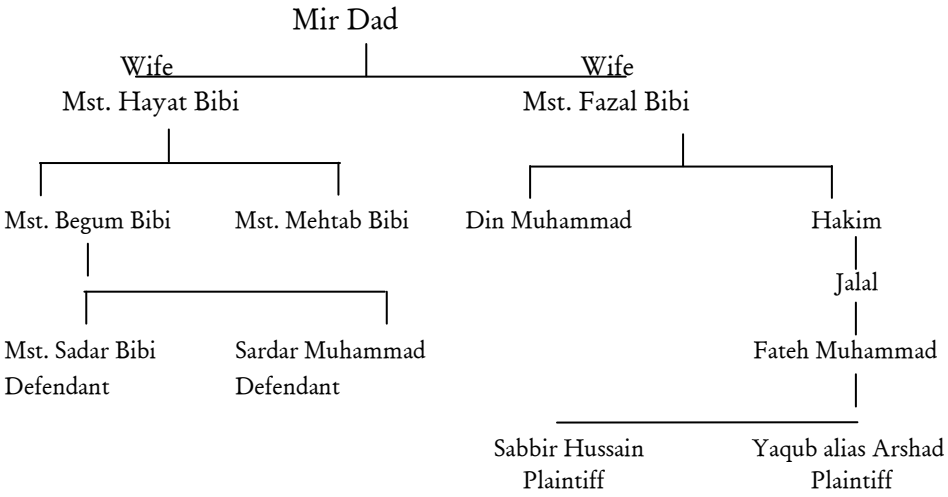
[76] *Abdul Ghafoor v Muhammad Sham* PLD 1985 SC 407.
[77] Ibid.




Yaqub and Sabbir great-grandsons of Hakim, who was the son of Mir Dad from Mst. Fazal Bibi, instituted a suit in March 1958, challenging a mutation attested in favour of the children of Mst. Hayat Bibi second widow of Mir Dad on the basis that half of the property of the deceased Mir Dad was held by Mst. Hayat Bibi for limited interest/maintenance under customary law. Alienation of property to the progeny of Mst. Hayat Bibi deprived the plaintiffs from their rightful ownership.

The trail court decided the suit in favour of the plaintiffs on the ground that (a) property was ancestral; and (b) parties were governed by custom and there was a custom that on the death of the widow property would be reverted back to the male heir of the family.

The appellate court, however, reversed the decision on the point that Mst. Hayat Bibi died after the promulgation of the Shariat Act and the succession in that case was opened on the death of Mst. Hayat Bibi. The High Court, interestingly set aside the decision of the appellate court and restored the decree of the trial court.[78]

The Supreme Court heard the matter on following points: (a) whether the deceased widow was limited owner according to custom; (b) whether respondents/plaintiff discharge their onus to prove that (deceased) widow was only maintenance holder; (c) whether the High Court ignored compilation of *rivāj-i ʿāmm* of Sialkot district, just because of omission in written statement.

The suit was decreed on the ground that the vender was limited owner and he could alienate only on the grounds of legal necessity, which was proved only to the extent of Rs. 12,500/-. The decree was passed with a condition that the plaintiff shall obtain possession of the land not compassing legal necessity

[78] Ibid.

on paying back the amount to the vendee. Appeals of both the parties were dismissed by the district court as well as the High Court.[79]

The Supreme Court before imparting its judgment discussed the factors and background which led the law of inheritance to the Shariat Act and subsequent insertion of the section 2-A. The British made laws according to their needs to govern different territories. The section 5 of the Punjab Law Act IV of 1872 along with the Punjab Limitation (Custom) Act I of 1920, and the Punjab Custom (Power to Contest) Act II of 1920 clause (b) of section 5 of 1872 empowered Muslims to practice Islamic law in matters of inheritance. The case law was developed which set the principle that whenever the law was modified by custom, the rule of decision would be customary law. Muslims made efforts for enforcement of the *sharīʿah* and got first breakthrough in the form of North-Western Frontier Province (Shariat Application) Act 1935 and a central statue of Muslim Personal Law (Shariat Application) Act 1937, which removed overriding effects of custom in different matters including inheritance except in matters relating to agricultural land, charities, charitable institutions, and religious endowment other than *waqf*.

After partition, first enactment to make *sharīʿah* as a rule of decision among Muslims was made in the form of West Pakistan Shariat Application Act 1948 in matters related to inheritance in the Punjab. Major changes were incorporated by inserting section 3 of MPL (SA) Sind Amendment 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, however, did not fulfil the required purpose. As the case law developed by various courts, it was continuously spelled out that no alienation could take place without the consent of the concern reversioner unless it was for consideration and necessity. Females/widows inheriting the estate in different forms were also dealt with on somewhat similar lines. The Supreme Court cited a dozen of case laws of this issue.

Therefore, a new law in the form of the West Pakistan Shariat Act V of 1962 was enacted along with the Punjab Muslim Personal Law (Removal of Doubts) Ordinance 1972. The Shariat Act of 1962 had introspective nature and terminated limited estates held by Muslim females under customary law.

In spite of all these efforts, customary law still prevailed till 1981 when Federal Shariat Court in Muhammad Ishaque case[80] declared customary law

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[79] Ibid.

[80] Shariat Petition No. 13-B of 1980, decided on 19-5-1981.

repugnant to the injunctions of Islam and a new ordinance inserting section 2-A was approved, which undoubtedly removed various short comings.

The Supreme Court also emphasised the implication of Section 2-A as

(1) Power of alienation was given to Muslim heir who had 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 nullified all customs, usages, all orders, judgments, and decrees of courts with its overriding effect.
(5) It retrospectivity went prior to 15-3-1948 when it was put in "juxtaposition" with Shariat Act of 1962. It makes a person acquiring agricultural land under customary law, by its deeming clause, an absolute owner as if the land had devolved on him under Shariat.
(6) It not only neutralised the pending suits but also culminated decrees and even cases pending execution.

The Supreme Court decided the appeals filed by the plaintiff seeking reversionary rights, in the light of section 2-A on two grounds: (a) the new law provided full power of alienation and imposed no restriction on male heir who inherited land under custom before 15-03-1948; (b) under clause (c) all suits and other proceeding on the subject had been abated.[81]

In another case,[82] Ghulam Ahmad Shah died in 1903 leaving behind three 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 Islamic share but also her name was omitted from the list of legal heirs on impugned mutation dated July 20, 1963.

The main argument of the counsel for petitioner-defendant in the 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 the court about her becoming 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 constituted ouster and plea of co-sharers' right became infructuous.

The court while imparting its judgment on these legal points relied on its three decisions given on these points. This judgment also set a yardstick for

[81] *Abdul Ghafoor v Muhammad Shafi* 1985 SC 407.
[82] *Ghulam Ali v Mst. Ghulam Sarwar Naqvi* PLD 1990 SC 1.

the court that in similar cases the suit is treated to be based on title and not for correction of revenue record.

In *Anwar Muhammad v Sharif Uddin*[83] it was held that wrong mutation confer no right in property as the revenue record is maintained only for the purposes of ensuring the realisation of the land revenue. In Anwar Muhammad case, inheritance of Lakhwera was in dispute. Mutation was attested in 1907–08. The petitioner resisted the claim on the ground that the suit for declaration was not competent as they were not in possession of the land and it was barred by time.

The learned counsel for the petitioner also reiterated his point on the ground that before enforcement of the Land Revenue Act in Bahawalpur, settlement was recorded with regard to payment of the land revenue and persons who were in cultivating possession of the land excluded altogether others who were not in possession. The counsel wanted to transform this scenario into principal of inheritance. The Supreme Court held that this claim was based on custom and not on the *sharī'ah*: "The possession of one co-sharer is for the benefit of all other co-sharers. Impugned mutations conferred no right in the property of one co-sharer excluding Lakhwera."[84]

In 1982, the Supreme Court discussed the views of different Muslim and non-Muslim jurists about the rules of inheritance and position of females in succession in Hindu, Roman, English, and Islamic legal systems, and emphasised that Muslim law of inheritance was derived from the Qur'ān and the *sunnah*.

The Supreme Court also elaborated female position in Muslim law, emphasising that blood relation was the cause of title to succession, referring to the Qur'ānic verse of *al-Nisā*, and concluded that Islam gave the position to those heirs who were previously excluded by custom. Female property and personal independence in Roman law were limited and the court referred to Sir Henry Maine's observation about it.[85]

Muslim law recognised individuality of Muslim women to own or alienate property at their will before and after marriage. Concluding this comparison, the Supreme Court held that Muslim women enjoyed a superior right in comparison to English or Hindu women. Muhammad (peace be on him) affected a paradigm shift in recognising the right of women from

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[83] *Anwar Muhammad v Sharif Uddin* 1983 SCMR 626.

[84] Ibid.

[85] English law gave the concept of unity of personalities and did not consider a married woman separate individual. Therefore, 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 their lives. At first, they were dependent on their fathers, then on their husbands, and after husbands' death on their sons.

complete servitude to complete enjoyment and privilege of rights equal to that of men. The Supreme Court referred to the constitutional amendment and the addition of article 2-A. In the case in hand, a woman becomes absolute owner of her share of property without intervention of revenue officials. The Supreme Court also noticed that in impugned revenue record female's existence as a daughter was denied.

Is so-called relinquishment of a woman's right in inherited property—even under Islamic dispensation—permissible in Islam? Addressing this question, the Supreme Court referred to the last sermon of the Prophet (peace be on him) in which he said, "Men have rights quo women and women have similar rights qua men." The Supreme Court also raised the question whether recognition and protection of rights of female heirs were the matters of public policy. The Supreme Court's answer to this question was in affirmative, referring not only to the following Prophetic tradition, "The most complete of the believers in faith, is the one with the best character among them and the best of you are those who are best to your women,"[86] but also to the Qur'ān 4:34. The Supreme Court held that relinquishment was against public policy and contrary to section 23 of the contract Act, which stated that the consideration or object of an agreement was lawful unless it was forbidden by law. Thus, women's consent to the relinquishment was declared to be against public policy. The very act of agreement and contract constituting the relinquishment were declared void.[87]

The Supreme Court based its findings about the above two issues (i.e., relinquishment and public policy) on three judgments of the superior courts, cited as *E. A. Evans v Muhammad Ashraf*,[88] *Sibtain Fazli v Muhammad Ali Khan,*[89] and *Atlas Industrial Corporation v Dr. Jalil Asgher.*[90] The Supreme Court held that in the present legal framework of Pakistan and after insertion of the Objectives Resolution new principles of public policy with Islamic spirit would have to be applied, besides considering section 23, 25, and 16 of the Contract Act while deciding the issues on relinquishment.[91] The question regarding the exception of section 25 of the Contract Act hits the case of respondent-petitioner adversely on the ground of sister's relinquishment of her share in inheritance to her brother being without consideration on account of natural love and affection with her brother. Such agreement between the

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[86] Muḥammad b. 'Īsā al-Tirmidhī, *Sunan*, Kitāb al-raḍā', Bāb mā jā'a fī ḥaqq al-mar'ah 'alā zawjihā.

[87] *Ghulam Ali v Mst. Ghulam Sarwar Naqvi* PLD 1990 SC 1.

[88] *E. A. Evans v Muhammad Ashraf* PLD 1964 SC 536.

[89] *Sibtain Fazli v Muhammad* 1964 SC 337.

[90] *Atlas Industrial Corporation v Dr. Jalil Asgher* 1970 PLD kar 241.

[91] *Ghulam Ali v Mst. Ghulam Sarwar Naqvi* PLD 1990 SC 1.

brother and the sister was declared to be void on the basis of public policy and under section 23 of the Contract Act. Such relinquishment is based on social constraints. Moreover, the flow of love cannot be so unnatural. In present case, the claim of spending money by brothers on sister's maintenance, intervening divorce, and pursuance of criminal case against her are against the injunctions of Islam as the Qur'ān declared "men as protectors/maintainers of women."[92] The right of sister will be equated with the right of daughter.

Thus, the contract of relinquishment of right of inheritance by women is void. First, it is against public policy. Second, it lacks consideration. Third, it is neither recognised in Islam nor is it valid transfer under the Transfer of Property Act. Lastly, it does not meet the requirements of a gift.

The question of estoppels, adverse possession, and wavier was decided against petitioner-defendant on the basis that in Islam, brothers were required to protect the rights of sisters and even otherwise the main ingredient of hostility in adverse possession was missing in that case. Moreover, the principle of public policy and accrual of the right of inheritance on the death of father would negate the wavier and estoppel plea. The Supreme Court in the above circumstances dismissed the petition in favor of the sister.[93]

In *Mst.* Ghulam *Jannat v Ghulam Jannat*[94] 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 one-sixth share of inheritance from her deceased father. She claimed that it came to her knowledge in 1991 that they were not included in mutation of inheritance. Both brothers filed written statements separately. Ashiq Hussian replied that he gave the share of produce to his sister Bakhto Mai regularly whereas maintaining Mst. Jannat was the responsibility of Ghulam Hussian.

The court decided the case on point of law that custom among the heirs of Ghulam Sarwar in the matter of inheritance was not proved and newly introduced section had retrospective effects. The learned defending counsel from the side of brothers argued that the legislature only intended to remove restrictions of the power of ownership viz., alienation, and did not re-open the inheritance of last male full owner who died prior to 1948. Muslims after induction of section 2-A will enjoy full rights over the property under Islamic law to the extent of their share and not the entire property. The Supreme Court decided that the admission of Ashiq Hussian about paying the share of

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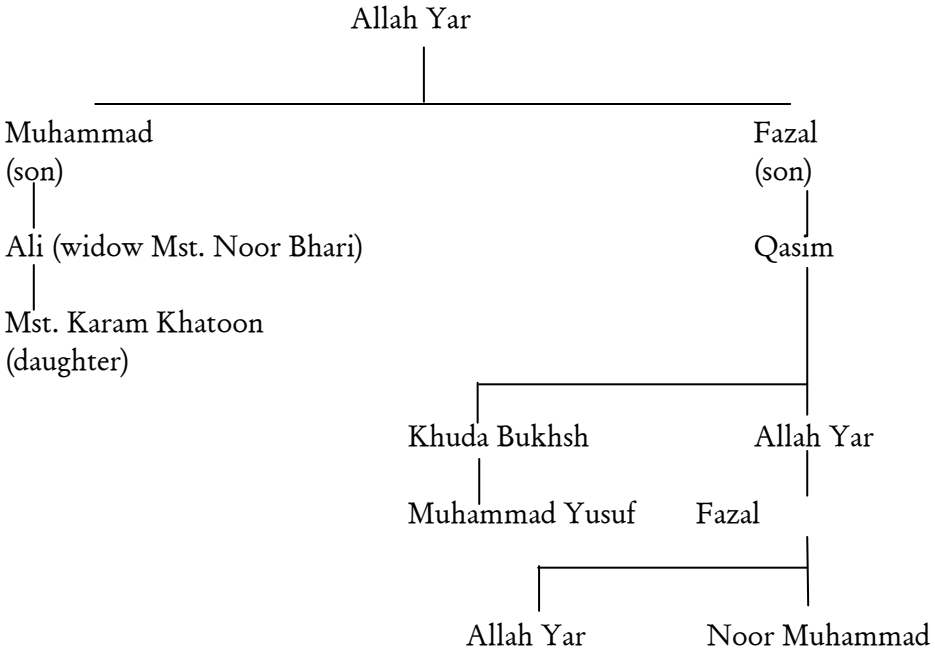
[92] Qur'ān 4:34.
[93] *Ghulam Ali v Mst. Ghulam Sarwar Naqvi* 1990 SC 1.
[94] *Mst. Ghulam Jannat v Ghulam Jannat* 2003 SCMR 362.

produce to her sister, the divorce of Ghulam Jannat's daughter from the son of Ghulam Hussian just before the institution of the suit, and the ratio of law discussed in Abdul Ghafoor's case merited the decision in favour of the daughter.

In *Muhammad Yusuf v Mst. Karam Khatoon*[95] case, Karam Khatoon—daughter of the 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 the widow of Ali (mother of the plaintiff). The mutation was attested under customary law in 1946.

The relation between the parties is shown in the pedigree table below:




The trial and district courts dismissed the suit on the basis that customary law was prevalent in Bahawalpur state when the mutation was attested. The High Court reversed the decision and decreed the suit in favour of the daughter. Varies of the decision were challenged by preferring an appeal before the Supreme Court, which decided the suit in the light of section 5 of the 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.

[95] *Muhammad Yusuf v Mst. Karam Khatoon* 2003 SCMR 1535.

The Supreme Court held that before the enforcement of the Shariat Act, in Bahawalpur the parties were governed by the Punjab Act, which provided, "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." The Supreme Court rejected the plea of considering entry into *wājib al-arḍ* as evidence and proof of custom and declared that collateral failed to prove custom as governing law of the parties in their personal matters.

It was also held that after the insertion of section 2-A in Muslim Personal Law Shariat Application Act, even if Mst. Noor Bhari widow of Ali was supposed to be the limited owner, she would inherit her *shar'ī* share and the residue would go to her daughter and the collateral. The Supreme Court decided the matter in favour of the respondent-plaintiff and entitled her 9/16 share.[96]

The most relevant case in the history of the evolution of that law was decided by the full bench of the Supreme Court with a split view in *Ghulam Haider and Others v Murad through Legal Representatives*[97] in 2012. Facts constituting the list were that Lal son of Janan died in 1943/44 leaving behind property in two revenue estates, situated at Mouza Chabri Bala Sharqi and Bala Gharbi. His heirs included a son Murad, a daughter Bano, and a widow Sehati who died twenty-four or twenty-five years after his demise.

Mutation of inheritance of almost all the land was sanctioned on October 29, 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 the land was mutated under Islamic law of inheritance on February 28, 1959 in favour of the son, daughter, and widow of the deceased.

A suit was filed on October 15, 1973 by Murad challenging the mutation No. 5631 on the ground that Lal was governed by customary law and the mutation attested in 1959 under Islamic law of succession was void. By that time, the widow of the deceased had also passed away. Bano daughter of the deceased contested the suit on the point that her father was governed by the Islamic system of inheritance and the land was fraudulently transferred under customary law in 1944 to Murad. The subject land was subsequently transferred in the name of Kattu son of Murad.

A separate suit was filed by Bano on March 6, 1974 for this purpose. The civil court dismissed the suit of Murad and decided in favour of Bano. Two appeals were filed by Murad. The district court raised following questions: (a) whether property was ancestral; (b) whether Lal was governed by customary law.

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[96] Ibid.

[97] *Ghulam Haider and others v Murad through Legal Representatives* PLD 2012 SC 501.

In 1980, the civil court reversed the decision in favour of Murad and dismissed Bano's suit. After death of Bano in 1980, her legal heirs preferred an appeal, which was allowed by Additional District and Session Judge in 1984 on the ground that parties were governed by Islamic law.[98]

A civil revision was filed in the High Court by legal heirs of Murad, which resulted in restoration of the decree of the civil court. It was held that the parties were governed by customary law at the time of attestation of mutation and all the land of Lal would devolve on Murad. Leave to appeal was sought in 2001 by legal heirs of Bano, which was granted by the Supreme Court to examine the scope of the related section of the Muslim Personal law Shariat Application Act.

Majority view of this five-member bench of the honorable Supreme Court was based on the *ratio decidandi* of Abdul Ghafoor's case given by this court on the same legal point.[99]

Majority view also set aside the interpretation of law given by this court in *Mst. Ghulam Jannat v Ghulam Jannat* case. While giving decision on the scope of section 2-A, the Supreme Court in the above referred judgment held that section 2-A covers all matters 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 made 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 deemed to have been under Islamic law of inheritance."

The Supreme Court also reviewed—while dissenting from its previous judgment—the question of devolution of property only to the extent of the legal share of the male heir on the ground that it was contrary to the express words and spirit of section 2-A. Section 2-A Islamised an un-Islamic act through a legal fiction.

The Supreme Court held that the law given in Mst. Jannat's case—if applied—would create complication and generate more litigation. All acquisitions under customary law from a Muslim before 15-03-1948 were Islamised 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.

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[98] Ibid.
[99] Ibid.

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.[100]

The honourable judges were of the view that when predecessor-in-interest (last male full owner) of the parties died, the act in field in the case of succession was the Punjab Law Act 1872. Section 5 of the act has two points: (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 Muhammadan Law.

According to Justice Ejaz Afzal, Muhammadans have 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" is 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, is not just, equitable, and based on good conscience. Honourable justice also interpreted words "equity and justice" to support his reasoning. He referred to the 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 argument on Muhammad Jan's case decided by the Privy Council and the judgment of Justice Robertson of the Punjab Chief Court reported in Punjab Record (vol. 41, page 39), which was also endorsed by the Supreme Court in Mst. Qaiser Khatoon's case in 1971. The section 5 of PLA 1872 does not create presumption that someone falls directly in the domain of custom. To fall within the preview of section 5(a) of the Punjab Law Act 1872, the assertor has to prove two things: (a) he was previously governed by custom; (b) what is the particular custom?

While interpreting section 5, minority view relied on T.G. Bhoja's case decided in 1916. It was held by the Privy Council that "where the words of statute are clear, even a long and uniform interpretation of it can be overruled, if it is contrary to the meaning of enactment."[101]

The Supreme Court on the basis of above reasons held that it was mandatory in the Punjab Law Act 1872 that rule of decision among Muslims was Muslim Personal Law.

The learned justice held that section 2-A nowhere approved or approbated custom as a rule of decision. In present circumstance, Murad failed to discharge his onus in proving custom as a rule of inheritance among his

[100] Ibid.
[101] Ibid.

family. Lal was directly governed by section 5(b) of the Punjab Law Act. Majority view, however, prevailed and Murad continued to cultivate the land by fiction of law.[102]

## Conclusion

The course of purifying law of inheritance from the shadows of customary law and implementing the *sharīʿah* in its classical form stretched over four decades. Pakistani courts continued to announce dissenting judgments on this issue. In *Ghulam Haider and Others v Murad through Legal Representatives*, majority of honourable judges based their decisions on the existence and non-existence of custom among parties. *Rivāj-i ʿāmm* was recognised as the main source of proving custom. Honourable Justice Afzal Zulla (late) and Honourable Justice Ejaz Afzal, however, considered prevalence of custom as bar on rights of females and emphasised deciding the case on the basis of classical Islamic texts. Insertion of section 2-A in 1983 cleared most of doubts but its retrospectivity always remained ambiguous. The article also sheds light on the role of the legislature in responding to the rising issues of the law of inheritance. It concludes that due to these judicial efforts Muslim women are in much better position with respect to the law of inheritance today than five decades ago.

[102] Ibid.