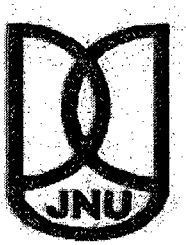
INTERPRETATION OF ISLAMIC FAMILY LAW IN COLONIAL INDIA: A REVIEW OF THE PRIVY COUNCIL'S DECISIONS

Dissertation submitted in the Jawaharlal Nehru University
in partial fulfilment of the requirements
for the award of the degree of

MASTER OF PHILOSOPHY

MD. ANISUR RAHMAN



CENTRE FOR THE STUDY OF LAW AND GOVERNANCE
JAWAHARLAL NEHRU UNIVERSITY
NEW DELHI- 110067
INDIA
2011

Jawaharlal Nehru University
Centre for the Study of Law & Governance
New Delhi-110067, India

25 July 2011

Declaration

I declare that the dissertation titled **"Interpretation of Islamic Family Law in Colonial India: A Review of the Privy Council's Decisions"** submitted by me for the award of the degree of *Master of Philosophy* in the Jawaharlal Nehru University is my own work. This dissertation has not been submitted for the award of any other degree in this university or any other university.

Md. Anisur Rahman

Certificate

We recommend that this dissertation be placed before the examiners for evaluation.

Prof. Amita Singh
(Chairperson, CSLG/JNU)

Prof. Amita Singh
Chairperson
Centre for the Study of
Law and Governance
Jawaharlal Nehru University
New Delhi - 110067

Pratiksha Baxi

Dr. Pratiksha Baxi
(Supervisor)

Office: Tel.91-11-26704021, 26742506. Telefax: 91-11-26742506. Email: dir_cslg@gmail.com

person at this moment had he not been taken by God from us forever during this study.

I owe a lot to all my family members, relatives and friends who helped me to accomplish this study abroad. Of whom I should mention Ms. Lutfun Nahar, Ms. Ainun Nahar Shine, Towhidul Mowla Shahin, Sirajul Mowla Selim, Salah Uddin Ahmed, Mahmudul Hassan and Azizul Huq. I am also indebted to Ms. Taznahar Begum for her blessings.

I have personal debt to Dr. Mohammad Ullah Firoze of Heart Foundation, Dhaka and Dr. J.N. Pande of Sitaram Bhartia Hospital, New Delhi. Their support and care did not allow me to leave this beautiful world. I am also grateful to Dr. Nupur Das and Priti Lata for their support and encouragement during my bad days in Delhi.

I have also personal debt to Mehar Nigar Suchona. She had gone through innumerous pain and suffering due to my study abroad. I will never forget her support to me and to my family. I have no words to express my gratefulness especially for her generous support when I was extremely sick during this study.

'A friend in need is a friend indeed'-the proverb became true during my study abroad. I have no words to express my gratefulness to Dr. Saifullah; without his support this study could have been incomplete. I cannot find suitable words to express my sincere thanks to Aksadul Alam and Zahidul Islam for their support and company. I will never forget the beautiful days we passed here in JNU during our study.

I often say that law is love: one cannot understand what love is without falling in it; similarly one cannot understand what law is without going through the process of law. This occasion came to my life few years ago when my elder brother Abdullah Al- Mamun, a Professor of Rajshahi University, broke the law to establish justice during the military regime of 2007-2009 in Bangladesh. He surrendered in the court and had been convicted to imprisonment for two years. After a journey in the legal domain for almost a decade I could do nothing for a person who never tells me 'no' for anything; without his support I might not come to this position. Hence, this study dedicated to him as a little compensation of my inability.

Anisur Rahman

Abbreviations

MIA - Moore's Indian Appeals
IA -Indian Appeals
AIR -All India Reports
DLR -Dhaka Law Reports
PLD -Pakistan Legal Digest
BLC -Bangladesh Law Chronicles
BLD -Bangladesh Legal Decisions
AD - Appellate Division
HCD - High Court Division

List of Vernacular Words

Usūl al- fiqh'

Ijmā

Qiyās

Hadīth

Isnad

Istihsān

Istishāb

istislāh

Table of Cases

Mirza Himmut Bahadoor V. Mussumat Sahebzadee Begum, 1 (1873-4) IA, 23.

Mitar Sen V. Maqbul Hasan, 57 (1930) IA, 313.

Mohabbat Ali Khan V. Muhammad Ibrahim Khan and others, AIR (1929), PC, 135; 46 (1928-29) IA, 201.

Mohammad Ejaz hussain and another V. Mohammad Iftikhar Hussain and others, AIR (1932), PC, 76.

Moonshee Buzul-ul-Rahim V. Luteefut-oon-Nissa, 8 (1861) MIA, 379.

Mst. Atwia Begum V. Muhammad Ibrahim Rashid Nawah, AIR (1916), PC, 250.

Muhammad Allahdad V. Muhammad Ismail, 10 (1888) All (FB), 289.

Mulkah Do Alum Nowab Tajdar Bohoo V. Mirza Jehan Kudr, Nowab Mirza Zuman Ara Begum and Rufaatoonissa Begum, 10 (1865) MIA, 252.

Mussumat Bebee Bachun and others V. Sheikh Hamid Hossein and another, 14 (1871) MIA, 379.

Nawab Mirza Mohammad Kazim Alli Khan and another V. Nawab Mirza Mohammad Sadiq Ali Khan and others, AIR (1938), PC, 169.

Nawab Muhammad Azmat Ali Khan V. Mussumat Lalli Begum and others, 9 (1881-2) IA, 8.

Nuh-Ullah Khan and others V. Mohammad Shafiq Ullah Khan, AIR (1929), PC, 212.

Prince Mirza Suleman Kadr V. Nawab Mehdi Begam Surreya Bahu, 20 (1892-93) IA, 144.

Rajah Deedar Hossein V. Ranee Zuhoor-oon-Nissa, 2 (1841) MIA, 441.

Ranee Khujooroonissa V. Mussamut Roushun Jehan, 3(1875-6) IA.

Saiyad QasimHusain and others V. Habibur Rahman and others, AIR (1929), 175.

Saiyid Rashid Ahmad and others V. Mt. Anisa Khatun and others, AIR (1932), PC, 25; 49 (1931-32) IA, 21.

Shoharat Singh and others V. Mt. Zafri Bibi, AIR (1914), 63.

Skinner V. Orde, 14 (1871) MIA, 309.

Syed Sadakut Hossein V. Syed Mahomed Yusoof, 11(1883-84) IA, 31.

Syed Habibur Rahman Chowdhury and others V. Syed Altaf Ali Chowdhury and other, AIR (1922) PC, 159.

Syed Sabir Husain and another V.Farzand Hasan and others, 65 (1937-38) IA, 126.

Syud Bazaywr Hoaawin and others V. Dooli Chund, 5 (1887-8) IA, 211.

Cases of the Supreme Court of Bangladesh

A.L.M. Abdullah V. Rokeya Khatoon and another, 21(1969) DLR, HCD, 217.

Abdus Sobhan Sarker V. Md. Abdul Ghani, 25(1973) DLR, HCD, 227.

Ahmad Ali V. Sabha Khatun Bibi, PLD (1952), Dacca, 385.

Introduction

The years 1765 and 1774 are, one might say, landmarks for the beginning of a new administrative as well as judicial history of India: the former being historical as year of commencement of direct participation of the British East India Company (henceforth Company) in the civil administration of India while the latter is for establishing a route to import principles of the English law in India. A great transformation was witnessed in the governance of Bengal, Bihar and Orissa with assuming the authority of *Diwan* by the Company; the Company became a governing body from a mere trading corporation and its servants assumed judicial power (see Metcalf 1995). It appears that soon after assuming the governing authority of Bengal, Bihar and Orissa, the Company took charge of the civil judicial administration, unlike the criminal judiciary and sought to appoint English judges within a very short period of time at least in the district courts (see Sinha 1969). While the administration of criminal justice was "tied up with earlier institutions and personnel" (Singha 2000: x) a significant change had been brought in the administration of civil justice through, a so called, re-organisation of the existing set up. The re-organisation of the administration of civil judiciary resulted in withdrawal of the "native" law officers in 1864 from the civil courts, who were attached to the court to provide interpretation of the religious laws (Mufti, Pandit). In addition, it contributed to establish absolute control of the Company over the civil judiciary.

In 1774 the Supreme Court was established in India to protect, allegedly, Indians from sufferings caused by the Company officials as well as from the tyranny of the Company government. The influence of the English law over the "native" laws, allegedly, began with the commencement of the Supreme Court in India. Though there were many other Company's courts but these courts did not have, it appears, much capability to influence "native" law due to two reasons: limited jurisdiction and non-capacity of the judges of these courts. Neither did the Mayor's courts of three presidency towns. Therefore, establishment of the Supreme Court furnished by the English judges and lawyers marked the beginning of a new era in the judicial history of India (see Pandey 1967).

One of the fundamental objectives behind Hastings's effort to establish a systematic judicial arrangement in India, notably, was to extend British judicial sovereignty over Indians. It is important to note that though the Supreme Court was established in 1774 its original jurisdiction was not extended over Indians in the true sense. A shift from this policy has been noticed from the later part of the eighteenth century when the colonial authority, as a governance policy, extended judicial sovereignty over Indians. Finally, codification of the "native" laws in the western model during the whole nineteenth century as well as establishment of the High Courts contributed to complete the mission by two ways: having codified laws in English model and extending the supervisory authority of the Privy Council over Indians (see Pandey 1967). Therefore, from middle of the nineteenth century the Privy Council became the sole agency to interpret laws and was acted as the fountain pen of 'justice' for Indians (see Rankin 1939).[1] The Privy Council was to become an important forum where the Islamic law in the realm of the "personal" was re-framed. The aim of this project is to trace the stabilisation of specific judicial interpretations of the Islamic law by the Privy Council.

From the late eighteenth century there had been a growing demand around the world to reform the Islamic law which contributed to codification of the Islamic law especially the Islamic public law, i.e., criminal law, commercial law in the line of European model (see Anderson 1971). Against the backdrop of growing allegations that the Islamic family law is discriminatory towards women codification of Islamic family law also began to take place in the Muslim world to make it equitable towards women. In addition, colonialism enhanced the process of codification of Islamic law in the most Islamic countries. Ottoman *Law of Family Rights, 1917* was, one might say, the first codification in the sphere of family law. Though it was a short lived law it could be said to commence intrusion of the modernised,

[1] The judicial Committee of the Privy Council was established by an Act of Parliament in 1833 which was the highest court of India up to January 1950. It was presided over by the same judges who heard appeals in the House of Lords. The Privy Council did not pronounce a judgment instead it merely advised the Crown to give a decision on a particular issue (see Rankin 1939). Appeals were filed to the Privy Council from the Sadar Diwany Adawlut, Supreme Court and High Courts respectively. Sadar Diwany Adawlut, presided over by Governor General and Council was the highest court before establishment of the Supreme Court in 1774. The rift between the Governor General and Council and the Supreme Court culminated in establishment of the High Courts in 1861 by abolishing the Supreme Court (see Sinha 1969). Therefore, after 1861 only decisions of the High Courts travelled to the the Privy Council.

allegedly European, human legislation in the sphere of family life dominated by sharīa. The Ottoman Code is followed by the *Jordanian Law of Family Rights, 1951*; *Syrian Law of Personal Status, 1953*; *Tunisian Code of Personal Status, 1956*; *Moroccan Code of Personal Status, 1958* and *Iraqi Code of Personal Status, 1959* (see Anderson 1971).

The Indian sub-continent is not far behind from this race of the codification of the Islamic family law. Throughout the twentieth century codification of the Islamic family law has been witnessed in the Indian sub-continent; especially in Pakistan and in Bangladesh. There have been two major developments, worth mentioning, in the area of the Islamic family law in these two countries. Firstly, more statutory laws have been enacted to make the Islamic family law more equitable towards women. For example, the *Dissolution of Muslim Marriages Act, 1939* and the *Muslim Family Laws Ordinance, 1961* have been enacted in order to bring Muslim women on a more equal footing by empowering women to repudiate the marital tie on the one hand and to restrict unilateral authority of men to repudiate the marital tie on the other. These legislations are two of the most discussed laws in the Indian Sub-continent which, one might say, have clearly established the supremacy of the state made legislation over the Islamic sharīa law.

Secondly, judges, especially, of the highest judiciary, have been interpreting the Islamic law in a more liberal way than the earlier judges did. Judges of the Supreme Court of Bangladesh and Pakistan as well as India (to some extent) have come up with the agenda of reforming the Islamic legal norms through judicial interpretation (see Hoque and Khan 2007). The judiciary in these countries has adopted two principles: (a) elective selection of laws from different schools and (b) fresh interpretation of the divine text in the light of present day circumstances (see Serajuddin 2001).

Despite the alleged assumption that the gate of *Ijtihād* (re-interpretation of divine texts) is closed from the tenth Islamc century, judges of the said three countries have come up with very progressive interpretation of the Islamic law. Subject to some limitations, judicial activism in the area of the Islamic family law in the said countries has been noticed more sympathetic towards the rights of the women. Courts of the said countries have applied their prudence to explore the

Islamic family law in order to interpret it in relation to the present context. In addition, judicial activism in these countries now seems to bring 'humanistic hermeneutics'[2] of the Islamic family law with international legal norms as well as national constitutional guarantees.

However, it appears that though these highest judicial authorities have come up with a lot of new principles, traditional understanding of the Islamic law remains largely untouched. In addition, though these courts have put forward the liberal understanding of law in order to foster legal empowerment of women they have hardly been seen sympathetic towards economic rights of women. Where economic rights of women is the fundamental issue i.e., maintenance, guardianship and so on the highest courts of the said countries have taken recourse to the orthodox approach of interpretation of the Islamic law with a questionable plea that the gate of *Ijtihād* is closed. In most of the cases these courts have taken recourse to the good old colonial interpretation arguing the case of closure of *Ijtihād* and thereby foreclosing further secular development of the Islamic law.[3]

There appear three mentionable features of the interpretation of the Islamic family law in India today. Firstly, judges are applying constitutional principles as well as international legal norms to interpret the Islamic law. Secondly, there has been a growing tension between conservative and progressive judges over the human interpretation of sacred law. It is significant that conservative group usually takes recourse to the Privy Council as their authority to claim that human interpretation of the Islamic law is closed from the tenth Islamic century. Thirdly, there are a host of instances of personal construction of law which caused heavily on equal rights of women as well as true Islamic legal traditions (see Rahman 2008). These trends of interpretation of the Islamic family law are thought of as the legacy of the Privy Council which influenced the administration of Islamic law a great deal, allegedly, in British India.

---

[2] I borrow this term from Zayd (2004).

[3] *Hefzur Rahman V. Shamsun Nahar and another*, 51(1999) DLR, AD, 172. A similar question arose in the Shah Bano (1985) case in Indian jurisdiction where the court sought to open the gate of independent judicial activism in Islamic law which culminated in a communal tension and the Indian Government had to annul the decision of the Indian Supreme Court through promulgating legislation in the parliament. Interestingly, in Bangladesh it did not trouble the government since the Supreme Court took its position against the human interpretation of Islamic law defying established principles of hundreds of years.

Anderson (1993), however, sought to defend the allegation against highest colonial judicial body for hybridising the Islamic law in India by saying that it was an outcome of encountering different problems by the colonial authority in India. His proposition appears insufficient to rescue the colonial judges from their not paying any heed to or abstaining from, intelligently, improving the administration of the Islamic law in India. For example colonial judicial authority adopted the principle of *taqlid* (imitation of the decision of previous jurists) and applied it till the end of the British rule in India while interpreting the Islamic law.[4] It is noteworthy that still the highest courts of India, Pakistan and Bangladesh are in a mood of war over the application of the principle of *Ijtihād* and *taqlid*.[5] Therefore colonial understanding of the Islamic law, it appears, still has its influence over the judicial activism in this sub-continent. Hence, interpretation of the Islamic law by the highest colonial judicial body requires reassessment to evaluate the judicial activism of the present day.

It appears that the highest colonial judicial body hindered exploration of the Islamic law as a modern and secular law by different ways. Firstly, judges of the Privy Council while settling a dispute offered more importance on the legal rules of a particular school of the litigants without taking the plural legal characteristics of the Islamic law into account (see Menski 2006). It is significant that finding the best possible solution of a legal problem by intermarrying different opinions of jurists in a school of law as well as by intermarrying different schools is possible.[6] The Privy Council, instead of taking into account the pluralistic character of the Islamic law applied rules of a particular school of the litigants in the court of law. As a result Islamic law became more rigid and static in nature.

Secondly, colonial judges interpreted the Islamic law from a narrow perspective, i.e., textual interpretation. A textual interpretation means to interpret the Islamic law without taking into account its philosophical and historical development. Literal understanding of Islamic law of the colonial judges, absence of Muslim

---

[4] *Aga Mahomed Jaffer V. Koolsoom Bee Bee and others*, (1897) 24 IA 196..

[5] *Mst. Rashida Begum V. Shan Din and others* (1960), Lah, 1142. Also see *Hefzur Rahman* (1999); *Shah Bano* (1985).

[6] The *Dissolution of Muslim Marriages Act, 1939* in undivided India could be cited as the best example. It was promulgated to empower the Muslim women to divorce her husband for various grounds by inter-marring the rules of Hanafi as well as Maliki school of Islamic law.

judges in the Privy Council and overwhelming dependency on some secondary texts contributed significantly to the textual interpretation of Islamic law.

Therefore the argument of Anderson (1993), it appears, is not convincing enough that the abysmal administration of the Islamic family law in colonial India was just the result of encountering different problems by the highest colonial judicial body. One might say, on the contrary, that colonial authority did not take any commendable initiative to improve the administration of the Islamic family law. Instead, they tried to interpret it in their own style depending on some traditional texts which led to the personal construction of law. Therefore, re-assessment of the interpretation of the Islamic family law by the Privy Council is called for.

Objective

The objective of this study is to assess the nature, extent and outcomes of the interpretation of the Islamic family law by the Privy Council between the period of 1833 and 1949. For this study I have reviewed around fifty judgments of the Privy Council on Muslim personal law published in the different law digests. It is significant that though the jurisdiction of Privy Council was extended in 1833, the flow of filing appeal to the highest colonial court started only after the establishment of the High Courts in the different provinces (see Jain 1966). The jurisdiction of the Privy Council was abolished in 1949; hence the timeframe for the study.

I wish to be attentive to how colonial judges constructed 'native' Muslim women and the realm of 'personal law' as the site of colonial rule and ideas of difference. In addition, the study will evaluate whether interpretation of Islamic family law of the highest colonial judicial body was thought of as a process of hybridisation of Islamic law. It has been argued by scholars that Anglo-Islamic law altered the notions of family law in Islamic law – which was by no means a homogenous category in colonial India – and these categories had a profound impact on the evolution or transformation of Islamic law in the post colonial Bangladesh, Pakistan and India.

It has been observed that judicial legislation (case law) in colonial India has escaped the attention of most legal historians (see Parker 1994). Though there are

many writings on the colonial legal history, the lack of study based on judgments of the Privy Council, particularly, is a lacunae. Sharafi (2009) has conducted a study on administration of cases relating to dower and delegated divorce[7] in colonial India but her study was based on the reported decisions of the High Courts only. Singha (2000) has conducted a study on the administration of criminal law in colonial India but it does not take into account the case law; nor does Nair (1996) and Chatterjee (1999). Chandra (1998), however, attempted to describe the role of media, civil society and of course the court on the issue of restitution of conjugal right under Hindu law in British India. Besides, there are a host of essays on the 'anglo-Muhammedan' law but there is still an absence of a case based study on administration of Islamic law in colonial India. This study, I hope, therefore will fill the gap.

Methodology and chapter plan

The methodology of this study comprises a survey of the reported decisions of the Privy Council on different issues of the Islamic family law like marriage and its dissolution, guardianship, custody of children, maintenance and so on. For this study I have surveyed the reported judgments of the Privy Council on Islamic family law from 1833 to 1949 published in the *Moore's Indian Appeals* (MIA), *Indian Appeals* (IA) and *All India Reports* (AIR). Journal articles and books are also consulted as secondary sources. For the background study I have also studied reported judgments of the Supreme Court of Bangladesh on the Islamic family law. On the rationality of a study based on case review, Sharafi argues that "in the Common law system survey of leading cases produces a significant pictures that will shape the future judicial decisions" (2009:60); hence is the rationale of the study.

In the first chapter I have discussed fundamental principles which one has to take into account while interpreting the Islamic law. In addition, it details the colonial encounter with the judicial administration which they inherited from Muslim rulers in India. In the second chapter, I have surveyed cases relating to

[7] Popularly known as 'talaq-e-tafwid'-is an authority to terminate the marital tie by the wife if it is delegated to her by the husband at the time of marriage or after the marriage. In undivided Pakistan a provision for delegated divorce was inserted in the *talaqnama (*clause 18 of the *talaqnama)* after promulgation of the *Muslim Family Laws Ordinance* in 1961.

legitimacy of child which demonstrates how the highest colonial judicial body imported the idea of precedent and applied it in India. The third chapter of this study is based on cases related to rights of women which aims to demonstrate how the Privy Council's judges projected women and whether they sought to eliminate the inherent inequality, allegedly, within the Islamic family law. Finally, in the fourth chapter I have discussed cases related to family endowment, application of personal law and post-divorce maintenance. The aim is to look into, particularly, how interpretation of the Islamic law by the Privy Council corresponded to colonial policy. The aim is also to look into how Privy Council contributed to develop an idea of religious based 'class' and the notion of domestic life of Indian Muslim women. I conclude the dissertation by reflecting on the colonial legacies and its impact on present day judicial interpretation, very briefly.

Chapter One

Islamic Law and the Colonial Encounter[1] in India: An Overview

Introduction

The kernel of British legal system appeared in India long before the acquisition of *diwany* rights by the East India Company in Bengal, Bihar and Orissa with the acquisition of Bombay from the Portuguese under a Marriage Treaty of 1661 (see Fyzee 1963). The Charter which was given to the Company authorised the local Governors and Council to administer justice for the Company's personnel as well as dependants according to the laws of the land (see Dutta 1981). Later in the Charter of 1688, by which Bombay was transferred to the East India Company, it was required that the law promulgated by the Company should be, in the words of Dutta, "consonant to the reason and not repugnant or contrary to the English Laws and that the courts and their proceedings should be like unto those that are established and used in England" (1981:174). Later a Court of Judicature was established in Bombay by the East India Company in 1672 to administer justice for Indians. The striking feature, notably, is that the Portuguese civil laws that were allowed to continue in order to avoid the conflicts of laws ceased to apply with commencement of the Court of Judicature (see Fawcett 1935). Dutta (1981), however, sought to argue that the seed of the British justice was sowed in India in 1639 when Raja of Chandragiri granted 'Madraspatnam' to the East India Company and allowed the Company to punish its servants for committing an offence against the backdrop of Company's demand to punish an offender according to the 'laws of the England'.

It is worthy of mentioning that despite their acquisition of the Bombay Island the British East India Company (hereinafter Company) did not get in on the administration of justice in India. This dream became true after a century; the acquisition of *diwany* rights of Bengal, Bihar and Orissa in 1765 brought an

[1] I borrow this term from Anderson (1993).

occasion for the Company to participate in the administration of India officially. With these *diwany* rights the Company assumed the authority to administer civil justice too. Initially the Company did not take major initiative to bring any change in the existing administration of justice system. In the later period between 1772 and 1861, however, a significant change was brought by the Company in the administration of justice system through reorganisation of the courts, codification of laws and so on. Primarily the Company officials sought to administer civil justice with the assistance of the native law officers, i.e., *Mufti*, *Pandits* but gradually they tried to influence the decision of the *Mufti* or *Pandits* . Particularly after withdrawal of the native law officers from the courts in 1864 the British judges sought to influence the indigenous laws, i.e., Islamic law and Hindu law. The highest judicial body of the British India, i.e., Privy Council assumed the sole responsibility to this influenced, allegedly, the administration of Islamic law which culminated in a hybrid legal system as well as hybrid Islamic law in India, 'Muhammedan law' as it is well known today (see Powers 1989; Zaman 2002).

Looking at the way the Privy Council dealt with the Islamic law and evaluating how it affected the administration of Islamic law as well as supported the British policy in India is then the fundamental objective of this study therefore we require to have an idea of pre-British laws and administration of justice system in India. Since the British colonial authority inherited Islamic law as the law of the land from Mughal rulers as well as sought to interpret it themselves the way it dealt with Islamic law we will briefly unfold this history. Therefore, this chapter primarily concerns the rule of interpretation of Islamic law. The aim is also to look into the existing set up of the Mughal administration of justice system, i.e., court and law at the time of the Company's accession to the *Diwan* of Bengal, Bihar and Orissa.

Section 1: Pre-British administration of justice system in India

It is well known that the Company inherited the Mughal administration of justice system while assumed the authority of *Diwan* of Bengal, Bihar and Orissa. A systematic court system, i.e., civil and criminal, it appears, existed at the time of Company's acquisition of *diwany* rights. Jain (1970) classifies the Mughal courts into three categories: (a) revenue courts settling disputes arising out of complaints on rights in the land, (b) Qazi's court dealing with the matter regulated by religion,

i.e., marriage, inheritance, and (c) secular courts headed by administrative officers dealing with non-religious as well as undefined offences. In addition, there were caste Panchayats and village Panchayats outside the formal judicial set up. Sarker (1952), however, classified the Mughal courts into Courts of religious law presided over by a Qazi, Courts of common law presided over by Governors and other presiding officers, and Courts of political cases presided over by the Emperor himself or his agents. The Qazi's court applied the canon law, i.e., law of Qurān and traditions while the secular courts being independent from Qazi court applied customary law, i.e., Hindu law, common law or tribal codes (see Jain 1970). The organization of the courts was as the same as laid down by Muslim jurists (see Jain 1970). In the words of Jain:

> ...territorially the courts formed a concentric organisation 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 Diwan-Ala and the Qazi-ul-Qazat (chief Qazi). In the province were the Subedar, the Diwan and the Provincial Qazi. In the Sarkar the Faujdar, the Karori and the Kazi and the Siqdar, Amin and the Qazi dispensed justice in the Parganah (1970:81-2).

It is important to note that in the Mughal judicial structure there was no hierarchy of the court system and as a result there existed no idea of precedent (see Fyzee 1963). Whether a court is higher or lower was dependent on the rank of the presiding officers of the court. There was no division of jurisdiction on the value of the suit. Therefore a person could go for redress either court: from the Panchayat to the Capital courts of first instance. Though the court of appeal is not mentioned, it appears that a court which presided over by a superior officer was a court of appeal and it had an authority to reverse the judgment of the officer of inferior rank, i.e., lower court (see Jain 1970). It also appears that the Mughal courts bore the resemblance to the British courts of justice in the matter of formation, jurisdiction and procedure (see Jain 1970). Therefore, the Company had to invest a little effort to establish a new judicial set up except changing the name of the courts as well as the procedure of the same (see Hussain 1977).

Regarding law, it appears that the Mughal administration of justice system inherited Islamic law and traditions introduced in India long before the establishment of the Mughal dynasty. Fyzee (1963, 1965) argued that Islamic law

was introduced in India by Muhammad b. Qāsim soon after his conquest of Sind in A.D. 712; but "it was firmly established only after the Sultān Qutbu'd-din Aybak early after thirteen century" (Fyzee 1963: 401). It is significant to mention here that people from both *Sunni* and *Shia* sects had found their destination in India. However majority people belonged to the *Sunni* sect while Bohras and Khojas were representing the *Shia* sect in India (see Agnes 2011). Among the four *Sunni* Schools of Islamic law, Hanafi schools had its prominence in India while the Shafi school seconded the place. Hanbali School as well as Maliki School were, perhaps, not able to gain supports in India when British took over the administration (see West 1900). Despite their difference of opinion on the interpretation of texts and religious practices, of which I shall come back later, these four schools together constitute the *Sunni* School of law in Islamic jurisprudence (see West 1900).

It appears that the Mughal rulers applied Islamic law only to Muslims and thereby left the other non-Muslims to have recourse to their own laws (see Fyzee 1963; Jain 1970; West 1900). There were two sets of Islamic law: religious being purely personal law applied only to the Muslims relating to marriage, inheritance, guardianship, will, endowment and secular which were applied to trade, contract, sale and so forth. A clear division of the application of the criminal law[2] is also manifest: religious law deals with the matter which infringes the religious belief, i.e., drinking, marrying person within prohibited degree while in the case of theft, adultery, murder, robbery the secular criminal law was applied both for Muslims and non-Muslims (see Hussain 1977; Fyzee 1963; Jain 1970).

Crime during the Mughal regime was of classified into three types, i.e. offence against God, offence against the sovereign and offence against private persons. Since crime was not considered as an offence against society there was no state prosecution system and therefore there was enough space to declare pardon for the offender. For example, murder was not considered as offence against state, as it is today in India, and therefore was considered compoundable by paying compensation, i.e., blood money (see Jain 1970). As it is stated above that for crime Islamic law was applied both for Muslims and non-Muslims there existed clear

[2] This division of law was also popularly known as 'canon law' being the religious law for Muslims only and 'secular law' applicable to both Muslim and non- Muslims.

guidelines based on Islamic legal traditions regarding the punishment of a crime. Moreover, during the reign of Aurangzeb a clear guideline was issued regarding the punishment of a particular crime and this has been characterised as the first Penal Code in India[3] (see Jain 1970; Singha 1998).

Section 2: Colonial encounter of Islamic law in India

With the set up of Mughal justice system, i.e., law, courts and procedure (see Fyzee 1963)[4] the Company took over the administration of civil justice after assuming the authority of *Diwan* of Bengal, Bihar and Orissa in 1765 as well as the criminal justice after assuming the Nizamat by 1790 (see Fyzee 1965; Kugle 2001). Soon after the acquisition of *diwany* rights, Hastings's Plan of 1772 brought a significant change in the administration of justice system. A court of civil nature, i.e., Diwani Adalat and a court of criminal nature, i.e., Nizamat Adalat were established in each Collectorate being presided over by the Diwan or Collector in the former case and by the Qazi subject to supervision of the Collector in the latter case. The chief civil court being the Sadar Diwani Adalat was presided over by the Governor General and Council and the chief criminal court being the Sadar Nizamat Adalat was presided over by a Darogah Adalat appointed by the Nazim of Bengal but superintended by the Governor General and Council (see West 1900). 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. Provision was made to allow litigants to file an appeal from these High Courts of India to the Privy Council. Therefore the re-organisation of the court system brought an occasion for the Privy Council to interpret "natives" laws (see Jain 1966; Agnes 2011).

---

[3] The most striking feature of Aurangzeb's *farman* (like ordinance in the modern sense) of 1672 was that it extended prosecutorial role of the state. In addition, it encouraged discretionary punishment for offences where evidence did not fulfill the legal requirments for fixed penalty. For example, the fixed penalty for homicide associated with shedding of blood was death; but if it does not followed by blood the Qazi's had an option for discretion to choice blood money instead of death. Similarly for theft a fixed amount was stipulated for which the offender might put to imprisonment; for repeated theft the offender might be put to death (see Singha 1998:13-6).

[4] Fyzee observed that though there was no excellent account of the procedure of the Mughal courts, i.e., how cases were filed, how appeal were determined or what was the procedure of evidence but the Mughal courts had followed the principle of equity.

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 law and Muslim law (see West 1900; Agnes 2011). However, it is worthy of mentioning that the Regulations of 1772 did not clarify whether the sharīa law or both the sharīa and customary law will be applied (see Agnes 2011; Kugle 2001). 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 (Kugle 2001: 262).[5]

This reservation was also re-iterated in the Impey's Code of 1781 in a more clear way: the law of the Qurān should be administered to Mohammedans in suits relating to inheritance and succession, marriage and caste, and other religious usages or institutions (West 1900). This was further reiterated at the time of establishment of Supreme Court at Calcutta, Madras and Bombay (see West 1900). However, this position was to change. While the Governor General and Council was invested absolute power for legislation for British India by Statute 24 & 25 a provision was inserted in some provinces that local custom will be allowed in competition to Islamic law. The *Contract Act of 1872* which allows transactions in many cases opposed to the provisions of the Islamic law is also clearly manifest in the changing position of the British colonial authority (see West 1900).

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 (see

[5] 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. .

Agnes 2011).[6] It has been argued that the system of personal law is a creation of colonialism in India (see Agnes 2011). Agnes argues that the term 'personal law' was first introduced in Calcutta, Bombay and Madras during the late eighteen century when the 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" (2011:5).

Moreover, as I have argued earlier that initially the British judges, who were ignorant of the Islamic legal traditions, were assisted by the Muslim legal officers, i.e., *Mufti* to come to a decision (see Fyzee 1963). The official position of the native law officers was abolished in 1864 and thereby the British judges assumed the sole authority to interpret the Islamic law in India. It is also stated earlier that the Muslim rulers in India applied the Islamic law in *toto*. Therefore one might say that the Mughal administration of justice system adhered to the rule of interpretation of Islamic law developed by the jurists (see Hallaq 2005). Despite the existence of different schools of Islamic law the application of sharīa in an Islamic jurisdiction did not depend on the particular school of the parties rather on the school of the Qazi. Since Hanafi law was predominant and applied by the Mughal judges, its doctrines influenced the interpretation of Islamic law in India a great deal (see Fyzee 1963; Agnes 2011). It is important to mention that Islamic tradition has a specific rule of interpretation of its own, though there exists difference of opinion among jurists on it, which differs from English law. Therefore before going on to assess the work of the British judges let us briefly detail the general rule of interpretation of Islamic law.

Section 3: Rule of interpretation of Islamic law

Piecemeal interpretation of Islamic law, it appears, had existed until the middle of the fourth century of Islam when Muslims witnessed appearance of the legal theory popularly known as '*Usūl al- fiqh*' as well as doctrinal schools (see Hallaq 2005; Kamali 1996). *Usūl al-fiqh,* also called methodology, includes sources of law as

[6] Agnes (2011) *argues* that the popular idea that the personal law is based on religious texts is a misconception as it is either developed by human beings or comes from the social customs.

well as their order of priority, methods by which legal rules will be deducted from source materials popularly known as sharīa and regulation of the judicial activism or *Ijtihād* . It does also include the analogy (*Qiyās*), juristic preference (*Istihsān*), presumption of continuity (*Istihsāb*) and so on (see Kamali 1996). Kamali argues that the methodology of interpretation of Islamic law does not claim permanency "as it was developed in the end of revelation of the the Qurān as well as the *Sunnah* and most of it are propositions advance by scholars of the different period of history while addressing different issues" (1996:3).

Traditional understanding requires one to take this *Usūl al-fiqh* into account while interpreting Islamic law. In addition to this, the nature of Islamic law deserves special attention too while interpreting Islamic law since a debate has been going on around the world whether Islamic law is purely divine and beyond human interpretation. In this section I shall discuss the material sources of Islamic law along with the debate among jurists over their acceptance. I am not going to evaluate the ongoing confrontation between the rationalists and traditionalists over the regulation of judicial *Ijtihād* considering the objective of the study in hand.[7] Since *Istihsān*, *Istihsāb* and *Ijtihād* are the species of *Qiyās*, one of the major sources of Islamic law, it would be repetition to discuss them separately. Hence I shall discuss the *Qiyās* only. The section will be concluded with a summary of development of the Islamic law to have an idea about its nature, i.e., humanistic or divine.

3.1. Sources of Islamic law and their priority

There exist two views, it appears, regarding the development of the Islamic law. One view put forward by most western scholars, that the development of the Islamic legal structure is devoid of early Islamic legal principles as well as influenced by foreign elements (see Coulson 1997; Goldzihar 1981; Schacht 1997). Another view, one might say contrary, of the oriental scholars is that Islamic law did not borrow any foreign elements and developed systematically with the progress of territorial jurisdiction and by the end of the fourth Islamic century it

[7] Hallaq (2005) *argues* that rationalists belief that law does not come from textual sources directly, i.e., Qurān, sunnah while the traditionalists belief that law must come squarely from *hadīth hadīth* . Here by the word traditionalist I, however, wish to mean the group who belief that the door of freedom of independent interpretation of texts is shut down from the tenth century of Islam.

reached to a complete legal system (see Hallaq 2005). It appears that Islamic legal doctrines were developed by the specialist jurists even in the first century of Islam during the Umayyad regime in the different garrison towns, i.e., Kufa, Mecca, Medina, Basra, and so forth. However, their interpretation was devoid of any particular methodology and depended on personal skill of a particular Qazi on the theology. Existence of local customary law and legal reasoning were also mentionable feature of Islamic law of this time. Though the development of Islamic legal doctrines began sometime later in the last quarter of the first century of Islam, an organised sources of Islamic law did not appear until the end of the fourth century of Islam popularly known as *Usūl al-fiqh*.[8] In this Usūl al-fiqh the Qurān was placed in the top followed by *Sunnah*, *Ijmā* and *Qiyās*. Therefore I shall discuss them here accordingly.

3.1.1. *Qur'ān*

The Qurān gets the highest position in the *Usūl al-fiqh* and has been considered, undoubtedly, the primary source of Islamic law (see Rahman 1966). Qurānic revelations revealed within twenty two years during the lifetime of the Prophet and the transmission of Qurānic revelations ended with the death of the Prophet. It is important that Qurānic directions that were revealed in Madina is different in nature than that of Mecca since the type of guidance Muslims needed in Madina was not the same as they required in Mecca. In Medina Mohammad, as a leader, formed a new community and the Qurānic revelations here, therefore, were relating to social, economic and political problems while in the latter case it was simply basic beliefs of Islam. Therefore, the Qurān has not been considered by Muslims simply a legal code in the modern sense. It provides rules to maintain relationship between human beings and between human beings and God (see Hassan 1988; Dien 2005). Hassan (1988) further argues that all legal rules of Islamic jurisprudence are not derived from the Qurān due to its nature as a book of spiritual as well as moral guidance.

[8] Coulson (1997) advanced the proposition that it is ash-Shāfʿī who must be credited for developing the sources of Islamic law, i.e., *Usūl al-fiqh* first in an organised way and called him 'Master Architect'. Hallaq (2005) after refuting this proposition argues that the complete Usūl al-fiqh came into being after half a century of Shāfʿī's death. Ash- Shāfʿī would be credited, according to Hallaq (2005), for his project of making the prophetic *hadīth* central to the *Usūl al-fiqh* which contributed to develop an upsurge for the prophetic *hadīth* and decline of the rational reasoning.

Doubts have been raised by jurists about the nature of the Qur'ānic revelations: whether it is a complete code of law. There has existed confusion too on the number of the Qurānic revelations relating to law.[9] Despite the debate over number of the legal verses it appears that the Qurān is no longer the Napoleonic legal code rather a compendium of ethics which has been compared with the western concept of 'natural law' (see Menski 2006). Menski (2006) also argues, in contrast with Schacht (1997), that Qurānic revelations did not modify any pre-Islamic custom and the legal rules were developed by the jurists including the Prophet himself.

There remains another confrontation between the traditionalists and the modernists on the question of the divinity of the Qurānic law: whether it is possible to interpret Qurānic revelations by applying human reasons. Zayd, one of the modern scholars, considers the Qurān not as a text but the outcome of "dialoguing, debating, argumenting, accepting and rejecting" (2004:9-27, 53-61). Having considered the living phenomenon of the Qur'ān, Zayd has advocated for the humanistic hermeneutics of the Qurānic revelations:

> I have argued that Qurān is a living phenomenon. A humanistic hermeneutics of the Qurān has to take seriously the living phenomenon and stop reducing the Qurān to be only as a text (2004: 62-3).

Suffice to say, it appears that there is room to question the divinity of the Qurānic law of which I shall get back later. However, it can be said that though Qurānic revelations have been considered by Muslims generally as divine text the fact that Islamic legal rules are explored by the jurists is little contested.

3.1.2. *Sunnah*

Etymologically the *Sunnah*, the second source of Islamic law, is known as the exemplary conduct or behaviour of some persons. It was used in the pre-Islamic Arabia, according to Rahman (1966), to mean the established behaviour of the forefather of a tribe. Rahman also states two characteristics of the *Sunnah*: (a) historical context and (b) normative approach for future generations (1966:44). Though second in category the *Sunnah* provides the bulk of materials from which legal rules have been derived (see Hallaq 1997).

---

[9] According to Coulson (1997) it is not more than 80 verses but Hallaq (2005) *argues* that it is near about 500 legal verses.

It is worth mentioning here that though the word '*Sunnah*' and the word '*hadīth*' are coeval and co-substantial there have existed few differences between them on their use and acceptance. The word *hadīth* which literally means a tale or communication has been used, after the advent of Islam, to refer to exclusively the sayings or attitudes of the Prophet. Whereas '*Sunnah*' which Islam inherited since early days from the pre-Islamic Arabian society, has been used to mean the exemplary practices of the community. After the advent of Islam, however, *Sunnah* used to mean exemplary practices of the Muslim community, especially in Medina. Therefore, the fundamental difference between these two is that the former used to mean the exemplary communications or practices of an individual, i.e., Prophet while the latter used to mean the exemplary practices of the Muslim community as a whole (see Rahman 1966).

There exists, however, a tension in the Islamic *usūl al-fiqh* regarding acceptance of the *Sunnah* in a broader sense since it includes the utterance as well as ideal practices of the Prophet Mohammad and his companions. There exist two views: one is that *Sunnah* includes only the ideal practices of the Prophet which has been recognised by the Qurānic revelations. The supporters of the first view opined that there are no extra-Qurānic practices left by the Prophet which might be treated as *Sunnah*. There were nothing, they went on, except the Qurānic revelations in the hands of the Muslims at the time of death of the Prophet and the nascent muslim community was governed by the Qurānic revelations only. During the medieval time, they alleged, practices of the companions had been taken into account to have solution of a legal problem and was endorsed as the *Sunnah*. With the expansion of the territory of the Islamic state the practices of the companions of the Prophet were, allegedly, forged and distorted which led to the development of the local *Sunnah*, for example in Madina and in Iraq. Therefore, according to them, practices of the companions are outside the purview of the *Sunnah* since it was not existed at the time of death of the Prophet and it was developed locally as practices of the community (see Schacht 1997; Goldzihar 1981; Coulson 1997; Rahman 1966). The other, one might say opposite, view is that the *Sunnah* does include the utterances as well as practices of other which the Prophet had heard and had approved tacitly. Even actions that he did not see may be considered as *Sunnah* if it can be

established that a companion had behaved and the Prophet had not disapprove it (see Hallaq 1997; Dien 2005).

It is significant that most of the available texts state that the idea of the Prophetic *Sunnah* is the later development of Islamic law (see Coulson 1997; Goldzihar 1981). It appears, however, that '*Sunnah*' firstly developed as the ideal practices of the Prophet (see Rahman 1966). The ideal practices of the Prophet had been treated as inviolable source of Islamic law during the first century of Islam due to repeated Qurānic revelations to follow the Prophet. Two reasons, according to Hallaq (1997), led to consider the ideal practices of the Prophet or the Prophetic *Sunnah* as a source of law: (a) approval from the Prophet became fundamental to practice pre-Islamic Arabian customs in the post-Islamic era, and (b) Qurānic revelations were translated into law of the community through the practices of the Prophet. Therefore, ambiguity about existence of the prophetic *Sunnah* during the early days of Islam and the opinion that the prophetic *Sunnah* was developed sometime later in the period of the development of Islamic law is not tenable (see Rahman 1965). Hallaq (1997) also doubts the proposition that Muslim community did not follow the ideal practices of the Prophet during the first century of Islam.

Actually after the death of Muhammad the prophetic *Sunnah* was heavily contested that required approval from the companions for its veracity. There were two available ways to approve the *Sunnah* of the Prophet as authentic: (a) to determine whether it was practiced by the Prophet at all, and (b) under what circumstances it was practiced by the Prophet. The latter involves careful scrutiny of the application of a prophetic *Sunnah* in a particular situation and a subsequent consensus among the jurists on it. When the consensus established it was treated as a true practice of the Prophet and was applied accordingly. Consequently, approval of the companions as well as their reasoning behind application of a prophetic *Sunnah* became fundamental to Islamic jurisprudence later (see Hallaq 1997; Rahman 1965). Therefore, the proposition that *Sunnah* includes ideal practices of the Prophet as well as the companions of the Prophet cannot be simply overruled (see Rahman 1966). Goldziher, however, treated *Sunnah* as the practices and views of the early generations of the Muslims since it is difficult to sift the *Sunnah* of the Prophet from that of his companions (cited in Rahman 1965:44).

It appears that the idea of divinity of the prophetic *hadīth* was encouraged by ash-Shāf'ī who invented the method of 'transmission' to establish a link between the narrators of a *hadīth* with the prophet.[10] According to him, the *hadīth* which have a direct chain from the Prophet through a narrator will be treated as source of law irrespective of it's acceptance by the people. Having established the chain of analogy ash-Shāf'ī actually, allegedly, bypassed the opinion of the companions of the Prophet tacitly as well as established superiority of a *hadīth* over the traditions of the companions of the Prophet even if it is described by a single narrator. Hassan (1988) states that Malik ibn Anas, the great Medines scholar, preferred the opinion of the companion especially the Caliphs than any reported tradition on the ground that they were the nearest to the Prophet. Shāf'ī, however, allowed those practices or sayings of the companions of the Prophet in the category of *Sunnah* in support of which there is explicit tradition of the Prophet (see Hassan 1988).

Shāf'ī's project, however, triumphed over the rationalists and a movement to collect the *hadīth* was commenced by the early third century of Islam. As a result, in the end of the third or early of the fourth century of Islam a number of compendiums full of *hadīth* s came into being (see Rahman 1966).[11] However, the confusion is still prevailing as to the transmission of *hadīth* without taking into account the practices of the companions of the Prophet. Transmission of a *hadīth* minus the companions of the Prophet might raise a substantial question of worthiness of its being true. However, the triumph of the *hadīth* movement had led the succeeding generation to endorse and apply it literally.

The application of the classical *hadīth*, it appears, has been challenged by the modern scholarships on three grounds: (a) whether it is true reflection of the words and deeds of the Prophet, (b) how far the method of transmission is reliable and how much the transmitter is trustworthy, and (c) whether the method of sorting the reliable *hadīth* from the unreliable is authentic. It is important to mention that the critical study of *hadīth* culminated in a reform movement in India during the nineteenth century under the leadership of Shah Wali Allah of Delhi. He had

[10] A typical chain of transmission runs like this: A (last narrator) says he heard it from B on the authority of C who said this on the authority of D that the Prophet of god said..so on.

[11] Sahih of al-Bukhari, Sahih of ibn al-Hijjaj are treated as most authentic as well as next to the Qur'ān. The others are the works of Abu Daud, al-Trmidhi, al-Nasai and Ibn Maja.

rejected the application of classical *hadīth* blindly and had advocated re-introducing *Sunnah* as a sole Islamic legal tradition. Whether he was right or wrong and whether his movement was successful is not the purpose of this study. Therefore I am not going to opine on his reform movement here except mentioning that his movement called for re-emergence of *Sunnah* to interpret Islamic law (see Brown 1996).[12]

3.1.3. *Ijmā*

The consensus of the mujtahids on a legal ruling, technically called *Ijmā*, is considered as the third source of Islamic legal doctrines. Having considered as certain as any verse of the Qurān as well as stipulations of any *Sunnah* this legal ruling is required, traditionally, to be followed in future to dissolve a similar case. In other words, the consensus or *Ijmā* is being treated as the sanctioning authority which guarantees infallibility of the legal rules as well as the methodological principles that are accepted universally by the *Sunni* jurists (see Hallaq 1997). The *Ijmā* on a particular legal issue, practically, requires one to look to the past to be certain whether the mujtahids came to an agreement unanimously. Theoretically the *Ijmā*, however, requires a formal procedure: whether those who are capable to form legal opinion unanimously pronounce a solution or whether they unanimously act upon it (see Hallaq 1997).

Dien (2005:40-1) opines that the *Ijmā* or consensus is not a new concept in the Islamic history nor was it developed later. In the Islamic history the *Ijmā* was practiced by the companions of the Prophet right after his death to determine authenticity as well as to approve application of a particular *Sunnah* of the Prophet (see Hassan 1988). However, a systematic form of the *Ijmā* or consensus, it appears, developed to endorse the different legal doctrines of the different geographical schools of Islamic law later (see Hallaq 2005).

There are a host of differences among the jurists on the nature of the formation, capacity to form an opinion and authoritativeness of the *Ijmā* (see Hassan 1976). The classical understanding is that the *Ijmā* represented the opinion of the community of the Muslim *in toto*. Those who are in favour of the universal

[12] My introduction to the works of Shah Wali Allah is from Baljon (1986).

acceptance of the *Ijmā* opined that all Muslims whether scholar or laymen could take part in the formation of the consensus. In their support they took recourse to a tradition of the Prophet: 'my community will not agree on an error' (Coulson 1997:59). They went on to say that there is a strong possibility of consensus of the majority to fall into an error and there are numerous examples where the majority opinion was discarded since the time of the companions of the Prophet.

The modern understanding, however, is that only that person who can understand legal rules can partake in the formation of the *Ijmā*. In addition, advocates of the modern understanding of the *Ijmā* have argued that the idea of consensus of the whole Islamic community is not tenable since the consensus of the whole Muslim community is practically impossible (see Hallaq 1997; Kamali 1991). They went on by saying that the tradition of the Prophet 'my community will not agree on an error' did not use to mean the agreement of the community on a legal issue. It was, according to reformists, used to mean the unity of the Muslim community on other matters such as rituals, wars and so on (see Kamali 1991).

On the authoritativeness of the *Ijmā,* the classical understanding is in favour of universal application as well as authority. The veracity of the Qurānic revelations, authenticity of traditions, even acceptance of legal structure, according to them, depends on the consensus of the Muslim community (Coulson 1997). In addition, they advocated for eternality of an *Ijmā*, meaning that the *Ijmā* will have to be followed in all future cases literally: where there is an *Ijmā* the door of judicial *Ijtihād* will be shut. Reformists, however, rejected universal application of the *Ijmā* due to its being opinion of the scholars of a generation. They went on by saying that since *Ijmā* is consensus of the jurists of a generation it has no binding authority on the jurists of the later generation. Even the jurists of later generation might reject the *Ijmā* of former generation. Allama Iqbal, the eighteenth century reformist, (who divided the *Ijmā* into two parts: *Ijmā* on fact and *Ijmā* on law) also argued:

> ...in the matter of the *Ijmā* on fact we have to follow the *Ijmā* of earlier generation especially the *Ijmā* of the companions as well as Caliphs but we are free to decide legal issues ignoring the *Ijmā* of earlier generations (cited in Hassan 1976: 241).

On the authoritativeness of the *Ijmā* , Hallaq (1997), another modern scholar, pointedly argues that two hadīths; 'my community shall never agree on a falsehood' and 'he who departs from the community ever so slightly would be considered to

have abandoned Islam' led some Muslim scholars to consider consensus as infallible even superior to the Qurānic revelations as well as *Sunnah*. Hallaq, however, rejects this assumption on numerous grounds: firstly, the authoritativeness of consensus is not supported by any Qurānic revelation as well as *sunnaic* practice; secondly, the centrality of consensus in Islamic jurisprudence does not empower the community of Muslims to legislate since it is decided which portion of revelation is to be accepted and what is to be rejected; thirdly, there is a host of disagreements among the scholars on it; and fourthly, consensus of the community is not possible since it requires one to possess the quality of doing *Ijtihād* (1997:76-9).

Suffice to say, there remain much differences among jurists on the definition as well as application of the *Ijmā*. Though *Ijmā* represents the consensus of the community in practice, it is restricted to the consensus of the jurists. It also appears that the arguments of the classical jurists based on a tradition of the Prophet only, cited above, in favour of their claim of universality of *Ijmā*. The reformists, however, have rejected the classical understanding considering the changing circumstances as well as changing dimension of legal issues. They are of the opinion that had the *Ijmā* claimed its authority over the future generation the progress of the Muslim society would have been stuck (see Hassan 1976). They are also of opinion that *Ijmā* took place in the Islamic history only two times: to determine the veracity of codification of Qurān in the regime of Uthman and at the time of election of Abū Bakr as the first caliph of Islam. On the other matters there is no consensus of the jurists and therefore the infallibility of the *Ijmā* is a misunderstanding of Islamic legal history. It is significant that the idea of infallibility of the *Ijmā* has been contested heavily in Bangladesh, India and Pakistan.[13]

3.1.4. *Qiyās*

The *Qiyās*, the fourth source of Islamic law, is a legal method to deal with new cases solution of which are not covered by the Qurān or the *Sunnah* and even by the *Ijmā*. Technically it means the legal analogy which assists one to understand the

[13] *Hefzur Rahman V. Shamsun Nahar Begum and another*, 51(1999) DLR, AD, 172; *Mohd. Ahmed Khan V. Shah Bano Begum*, AIR (1985), SC, 945; *Mst. Rashida Begum V. Shan Din and others* (1960), Lah, 1142.

injunction of one case to be used in another case which shares similar facts and circumstances. Therefore, in a simple way *Qiyās* indicates a tool to compare two cases and applying the sanction of the original case to the case in hand. *Qiyās* examines the elements as well as shared the common reasoning of two cases. In other words the *Qiyās* is a process by which mujtahids apply human reasoning to transform legal rulings (see Hallaq 1997).

There are four constituents of the *Qiyās*: (a) there must be two cases in the hands of the mujtahid of which one is original case and the other is a new case requiring a legal solution, (b) original case is embedded in the primary sources, i.e., Qur'ān, *Sunnah* and *Ijmā*, (c) the legal reasoning is common to both of the cases, and (d) legal rule which attached to the original case is transferred to new one due to similarity of the two cases (see Hallaq 1997; Dien 2005). The most popular example of this analogy, according to Hallaq (1997), was the case of prohibition of date wine since it bore the similar attributes of intoxication like the grape wine which is prohibited by the *argued* text.

The legal reasoning may be explicit or implicit. It might also be causally connected with the rules in a more implicit way. Between explicit and implicit legal reasoning there is another namely a legal reasoning determined by consensus (Hallaq 1997). Hallaq (1997:88) argues that a full brother will get preference over the half-brother in the matter of inheritance is a ruling determined by the consensus and has gained the status of original case and all new case like this will be solved according to this ruling. Dien argues few features of legal reasoning: firstly, legal reasoning must be specific as well as it has to contain a clear meaning: specific stipulations in the text prohibiting the grape wine for its being intoxicating lead to the prohibition of all sorts of stuffs which causes intoxication later; secondly, it must be commensurate with the aim of the legislation; and thirdly, it has to be extendable and should not be for a particular situation (2005:55-6).

The legal reasoning may be verified by numerous ways. Suitability, concomitance and classification as well as elimination are the most important three methods to verify rationality of the legal reasoning (Hallaq 1997). Among these first, and perhaps most important, comes the suitability, which means verification whether the legal reasoning is rational or not. For example, though there is no

explicit reason mentioning in the Qurān behind prohibition of drinking wine, one can assume that drinking wine causes intoxication which might lead to negligence in performing the rituals. Therefore one might form an opinion that the reason behind prohibition in the Qurān is for the harmful consequences of the act.

The second method to verify the legal reasoning is called as the method of 'concomitance' which means the rule must be concomitant with the reason. That is the rule must be present when the reason is present and will be absent when reason is absent. When concomitance of the relationship between these two exists the jurist might confirm that the rule is necessarily entailed by the reason. Hallaq (1997) argues that inebriation of grape wine led to a legal sanction. Finally, the legal reasoning might be verified through the method of classification and elimination. This method consists of sorting all the reasons out and by a process of elimination strict to one. More clearly when there exists many reasons the jurist will prefer one among others and strict to it by the process of elimination (see Hallaq 1997).

A problem might arise when two or more reasons seem equally valid and when such method as classification and subsequent elimination does not provide a *ratio* preponderant over the other. A host of considerations, according to Hallaq (1997), might be taken into account by the scholars to overcome the situation: (a) a reason derived from a text which leads to certainty will bear more importance over the one derived from a text whose language and transmission only lead to a probability, (b) where two texts are subject to consensus and enjoys equal status the jurists might distinguish them in terms of precedence, (c) the text which has not been particularised will get preference over a particular text, (d) a text that has been stipulated in the Qurān or the *Sunnah* has precedence over the text which does not and so on.

Now a question might arise about the authoritativeness of a legal reasoning since there are no clear stipulations in the Qurān about legal reasoning. According to a small group of scholars since Qurān has provided with the solution of every problem of human life there is no need of analogy of reasoning. A number of *Sunni* scholars however do not agree with this statement (see Hallaq 1997). According to them there are clear stipulations in the *Sunnah* about analogical reasoning to solve a legal dispute. In addition, the practice and consensus of the companions of the

Prophet are the most suitable example which corroborated the existence of human reasoning. The companions of the Prophet are considered the most eligible person who know the Prophet as well as his vision best and therefore are considered as most eligible to interpret the Qurān or the *Sunnah*. There are numerous occasions, it is argued, when the companions especially the four Caliphs applied their personal skill to interpret the Qurānic revelations or the *Sunnah* and thereafter came to a consensus on their application. Therefore the authority of legal reasoning cannot be overruled on the plea of absence of specific Qurānic revelation.

It is pertinent to note that though there is no controversy regarding the acceptance of the Qurānic revelations as primary and divine source of law the other three sources generate much controversy even today. The most debatable issue today, perhaps, is the universal authority of *Ijmā* and freedom of human reasoning at the time of interpretation of the Islamic law. The worthiness of the Prophetic *hadīth* has also been contested heavily today and has been called for rethinking (see Brown 1996). However, it is not the purpose of this study to go into detail of it. Therefore, what follows is the nature of Islamic law which will help one to justify the claim of the rationalists for freedom of legal reasoning in Islamic law.

Section 4: Nature of Islamic law: Divine or Humanistic?

A pertinent debate whether the Islamic law is purely divine in nature and beyond human interpretation has been growing among the scholars. The answer of this question is, perhaps, embedded in the gradual development of Islamic law. Therefore, to assess the nature and characteristics of Islamic law one has to go back to historical development of the Islamic legal traditions. It is noteworthy that there are a number of popular essays on the historical development of Islamic law. I, therefore, shall summarise these essays which will help us to examine the nature of the same.

Before advent of Islam, it appears, there existed two sets of law in the Arabian society: commercial law as well as customary law. Commercial law prevailed to maintain business dealings while human conduct was regulated mostly by the customary law (Hallaq 2005; Schacht 1997). Customary law, which flourished with the historical development of a particular tribe, was the law of the society. Law of that tribal society usually did not come from a specific political authority rather

from the society, i.e., community as a whole. Acceptance, alteration, nullity of a law was therefore the task of the community as a unit. While inter-tribal disputes were settled through force disputes among members of a tribe was settled through arbitration: a suitable ad-hoc arbitrator was, usually, chosen to settle a dispute. The old system of arbitration to settle a dispute continued, it appears, until the middle of the first century of Islam. Islam brought a change in the political and legislative authority of the Arab peninsular later by way of transforming the tribal society into a religious society where Muhammad became the sole law giver. In addition, the Qurānic revelations transmitted to law of the society and in many cases superseded the tribal customary law with the growing political and religious authority of Muhammad (see Coulsion 1997; Hallaq 2005). However, influence of the customary law in Islamic legal traditions cannot be simply overruled (see Coulson 1997).

At the beginning of the nascent Muslim society, it appears, law was not in the form of rules rather a form of certain standard of behaviour for the Muslim community. For example, the compassion to the weaker person of the society, the fairness in the business deal, the incorruptibility in the administration of justice and so on were the standards set up for the nascent community. On the similar line drinking wine was restricted and then prohibited completely later. However, these standards were not substantiated by practical legislative sanctions rather violations of which were declared as faults in the eye of God. Schacht (1997) has observed that the mission of Muhammad was not to establish a formal legal system as He, perhaps, thought if the religious ethics can be established and continuously performed by the people in their everyday life there would be no wrong and therefore there would be no need of a formal legal system. Consequently, the Qurānic revelations do not provide for specific punishment for a wrong committed except the fear of God and losing the paradise. However, specific punishment for few wrongs was introduced by Umar- I through a number of ordinances and regulations later, i.e., punishment for adultery, theft, drinking alcohol and so forth (see Hallaq 2005).

It appears that at the beginning Qurānic revelations were attempted to reform few tribal customs, i.e., norms regarding marriage and divorce (see Schacht 1997).

In the case of marriage status of the women was increased from the object to the contracting party and in the case of divorce waiting period (*iddat*) was introduced to restrict whimsical repudiation of marital tie. Another commendable reform was taken place in the matter of inheritance which is of two forth: (a) inclusion of women as the recipient of inheritance and (b) transformation of tribal system of inheritance (that only the male agnates who can establish his existence from a common ancestor will get share of the property of the deceased) to an equitable distribution of property among the nearest relatives of the deceased. While the former upgraded the status of women in the society the latter transformed the society into family centred from a tribal one. Many other initiatives to reform the old systems, i.e., homicide, polygamy are also manifested in the Qurānic legislations: personal justice system i.e., revenge was transformed to criminal punishment and polygamy was also restricted to four on conditions. Menski (2006), however, argues that the Qurānic revelations did not modify any prevailing customary practice.

Islamic law took the juristic form in the later part of the first century of Islam when Umayyad dynasty came to power (see Hallaq 2005; Menski 2006). During this time Qazies (judge), for the first time, were appointed officially to dispense justice. Qazies, who laid the foundation of the Islamic law, were used to give judgment according to their discretion or sound opinion (*ray*) taking into account the customary practices. They also took recourse to administrative regulations and letter and spirit of the Qurānic regulations as well as other recognised Islamic religious norms as much as they thought fit. In the later part of the Umayyad rule, it appears, more specialist persons were appointed in the post of Qazi who, according to Menski "developed a secular way of finding law through exploiting human faculty rather than by Islamic methodologies"(2006:305). However, the contribution of the earliest Qazies had not recognised in the Islamic legal theory later and consequently judicial precedent or authority of previous judicial decisions had not developed in the Islamic legal theory (see Schacht 1997).

Abbasid rulers, who came to power after a civil war over the Caliphate, encouraged legal scholars to develop Islamic law more systematically. As a result, a number of centres to study the texts came into being which began elaborating legal

rules by reviewing the existing customary law. Then at one stage certain doctrines came out and a consensus took place among the jurists of the different study centres regarding the doctrines. The application of human reasoning, notably, was the fundamental feature of this time which contributed to the development of the different doctrines. Two movements came into being, simultaneously, by this time: acceptance of *Sunnah* as the practices of the Prophet as well as the companions of the Prophet on one hand and rejection of the general understanding of law by the traditionists on the other. The traditionists had opposed general acceptance of the idea of *Sunnah* as the practices of the past and saw the precedents of the Prophet himself as the supreme law; having overriding authority. To establish authenticity of the prophetic *Sunnah* they introduced the process of transmission (*Isnad*) which was thought to establish direct relation between the transmitters of the tradition through succeeding generations with the Prophet. Consequently, by the end of the second century of Islam the local consensus of the different schools was heavily contested by the traditionists (see Coulson 1997).

Against the backdrop of confrontation between the rationalists and traditionists, presumably, ash-Shāf'ī devoted his labour to have a formal structure of Islamic law in order to prevent alleged diversity at the later part of the second century of Islam. Shāf'ī recognised four sources of Islamic law: the Qur'ān, the *Sunnah*, *Ijmā* and *Qiyās* (see Coulson 1997). He categorically, it appears, emphasised on divinity of the *Sunnah* of the Prophet and rule out the *Sunnah* of the companions of the Prophet including four Caliphs in absence of a clear chain (Isnad). Shāf'ī's idea of divinity of the prophetic *Sunnah* got vigour in the next century and a movement to collect the *sunnah* of the Prophet had been started and consequently a number of compilations of the prophetic *Sunnah* came into being. After Shāf'ī two other schools, based on divinity of the prophetic *hadīth*: the Hanbali and the Zahiri emerged which contributed a lot to recharge the ongoing movement against application of human reasoning in the Islamic law (see Hallaq 2005). Though the earlier schools of law, Hanafī (Kūfa) and Maliki (Medina) adhered to the legal reasoning in application of law they could not but to accept Shāf'ī's thesis. However, they continuously advocated for human reasoning and rule out an isolated tradition when it conflicts with the established practices of the community.

Confrontation between the traditionists and reformists culminated in the birth of few other principles of law, i.e., *Istihsān, Ijmā* at the later part of the development of the Islamic law (see Coulson 1997).

From the above discussion, it appears that the Islamic law began to take shape of juristic law from the middle of the first century of Islam. Though Islamic legal institutions began to take form during the Umayyad period the zenith of Islamic law might be traced from the Abbasid period when individual scholars devoted their labour to bring legal doctrines out and to separate law from ethics or moral standards. Though these doctrines of Islamic law more or less developed between the middle of the first century and middle of the second century a formal structure of Islamic law did not emerge until the middle of the fourth century. In addition to, the influence of foreign legal concepts in the development of Islamic legal doctrine cannot be overruled. Schacht (1997) opines that many foreign legal concepts entered into the Islamic law during the first century of Islam. For example the idea of 'consensus of the scholars' comes from the *opinion prudentium* of Roman law, method of *Qiyās*, *istishāb* and *istislāh* are reportedly came from the Jewish law (see Schacht 1997; Menski 2006). Therefore the traditional understanding that Islamic law is purely divine is little substantiated by its historical development (see Menski 2006).

Another significant feature of Islamic law is the use of human faculty to develop the fundamental Islamic legal doctrines (see Menski 2006). The rampant application of reasoning, allegedly, was heavily contested by the traditionists under the leadership of ash-Shāf'ī. Shāf'ī's formal structure and subsequent *hadīth* movement gradually challenged heavily the application of legal reasoning; especially application of reasoning by two earlier schools, i.e., Kūfa and Medina (see Coulson 1997). As a result the gradual declination of legal reasoning reached to stagnation in point of time. This is marked the beginning of stagnation of the Islamic law too which reached its zenith by the end of the third Islamic century through accepting the infallibility of *Ijmā* and had been continued until the

reformist came into being and challenged the infallibility of *Ijmā* as well as trustworthiness of the compendium of *hadīth* s (see Coulson 1997).[14]

Section 5: Administration of justice in India and colonial encounter

It should be evident from the above discussion that with this highly developed law as well as the legal system the Company took over the *Diwany* of Bengal, Bihar and Orissa. It is mentioned 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" (cited in Dutta 1981:178), (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 (cited in Dutta 1981:177-8). 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 Dutta 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 (1981:179-180).

Another reason is that one 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 Qazi, *Pandits* and caste Panchayats (see Dutta 1981). However, from the Hastings's time the British colonial power started taking an interest in the native 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. Dutta continues:

---

[14] Few of them are the eighteenth century reformists Shah Wali Allah of Delhi, Allama Iqbal and Abduh. Sayyid Ahmad khan also called for re-interpretation of the qur'ānic revelations applying the principles of 'reason' and 'nature' instead of traditions. Fatema Mernissi also doubts the authenticity of many *hadīths* of the compendium including the most authentic Al- Bukhari.

> ...persons like Sir William Jones and H.T. Colebrooke not merely belonged to a different age but were also from a different background and of a different outlook. 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 (1981:182).

Two incidents, it appears, had influenced the administration of Islamic law in British India a great deal 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 *sharia*, as it is mentioned earlier, to questions related only to the 'family relations and status' which culminated in development of a new branch of law later which was classified as 'personal law' (see Serajuddin 2001; Zaman 2002; Anderson 1993). Besides, the withdrawal of 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.

Unlike criminal law a reservation had been maintained on the application of "native" religious laws, from the Hastings's plan of 1772 to the whole period of the British regulations in India (see Morley 1858; Mahmood 1983). 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 (see Jain 1966).[15] Especially, the event of withdrawal of the "native" law officers from the courts in the guise of re-organisation of the court system brought an occasion for the British judges to interpret Islamic law independently. These 'semi-autonomous judges'[16] of the British India relied mostly on the translations of some traditional texts, i.e., Hedaya, Fatwa-e-Alamgiri and so on to administer justice instead of

[15] It appears that from the last quarter of the eighteenth century to the middle of the nineteenth century the colonial authority experimented different court systems, from Mayor's court in 1726 to the High Courts in 1861, to foster their policy as well as to protect their interests.

applying the Islamic law from its historical and philosophical perspective (see Anderson 1993; Powers 1989).

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 (see Anderson 1993). 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. For example, in the words of Sir William Jones:

> ... If we give judgment only from the opinions of the native lawyers and scholars, we can never be sure, that we have not been deceived by them. It would be absurd and unjust to pass an indiscriminate censure on so considerable a body of men, but my experience justifies me in declaring, that I could not with an easy conscience concur in a decision merely on the written opinion of native lawyers, in any cause in which they could have the remotest interest in misleading the court (cited in Acharyya 1914: 334).

There exists a difference of opinion on the objectives and purposes of codification of laws in the British India. Agnes sought to call it "anglicisation of religious law" (1999:41-52). According to Agnes (1999 & 2011) the codification of laws in British India contributed to more rigid and less progressive application as well as interpretation of the religious laws. Fyzee (1954), however, observed that codification of laws in the modern line contributed to great advance of the previous administration of justice system. Jain (1966), on the similar line, opined that the British colonial authority had to adopt the codification policy due to piecemeal nature of laws in the *mofussil* towns as well as in the presidency towns and which, Jain continued, culminated in uniformity of law. Despite these opinions, it appears that, one of the fundamental objectives of codification of general laws was to introduce so called principle of justice, equity and good conscience where there will be no clear text or where the native law will not be clear enough (see Mahmood 1983; Anderson 1993). We must remember that the application of the principle of justice, equity and good conscience was not inaugurated during the codification phase; rather it was used prolifically by the Privy Council while dealing with, amongst other, the suits under the Islamic family laws.

---

[16] I borrow this term from Sharafi (2009).

The influence of the English legal principles over the Indian laws has, however, been traced since establishment of the Mayor's court in 1726 in the different towns. By the charter of 1726 appeal from the Mayor's court in India to the Privy Council had been allowed and the latter, it appears, exploited this opportunity with full vigour. The charter brought, allegedly, a route to introduce English law in India in the guise of the principle of 'just and equity'. Finally, the codification of laws during the whole eighteen century as well as establishment of a number of High Courts as well as Supreme Courts contributed to accomplish the mission. It resulted in filing in a number of appeals to the Privy Council from India and the latter Council got more opportunity to influence the Indian laws (see Jain 1966). In the next chapters, I shall unfold the Privy Council's dealing with the Islamic law by reviewing the reported decisions of the Council. The aim, amongst other, is to look at how interpretation of Islamic law supports the British policy in India.

Chapter Two

Legitimacy of Child and Colonial Interpretation of Islamic Family Law

Introduction

The British colonial judicial body encountered, among others, a problem of legal status of a child born out of wedlock. There were a number of suits where the offspring being the child of an illegal sexual relationship, allegedly, claimed their share in the property after death of their father. A common problem that the Privy Council encountered was absence of specific proof of marriage between the parents on the one hand and prolonged sexual relation, allegedly illegal, which resulted in the birth of the child on the other. Therefore, there had appeared a reasonable belief that the master had prolonged sexual relationship, though not permitted in the eye of Islamic law, leading to the birth to his child. It is interesting to see that this apprehension was not rebutted by the opposite party in most of the cases. The father of the child did not deny his paternity during his lifetime either. This social problem led the highest court of the British India to import the English principle called 'acknowledgement of father of the child'. According to this principle strong acknowledgement of the father, in absence of proof of a valid marriage between the parents, legitimates the child who would be capable to inherit in the property of the father. It is significant that this principle was contested, heavily, on the ground that acknowledgement establishes merely paternity of the child; does not legitimate an 'illegitimate' child.

In this chapter, I shall look into the judgments of the Privy Council relating to legitimacy of child. One of the important sites at which this question became a legal issue was when the question of the legitimacy of a child of a master with a slave arose during the period between 1860 and 1925. These cases came before the Privy Council as a question to be determined in the suits relating to inheritance or distribution of property of a deceased. In this chapter, I would like to follow how did the Privy Council introduce as well as apply, fruitfully, a new principle called

'presumption of legitimacy of child' in India. In addition, I would argue that the Privy Council experimented the English, allegedly, principle of presumption of legitimacy of child in India which was clearly inconsistent with that of the Islamic legal traditions. In addition, I would argue on the points and the decisions of the Privy Council that a patriarchal understanding of law contributed to deprive women from their rights which arise out of marriage as well as from the legal status, as wives daughters, and mothers in India. Let us first turn to case law from the Privy Council where the 'presumption of legitimacy of the child' was introduced, by which I mean that if the father acknowledges the child is his, s/he is considered to be legitimate.

Section 1: Problem of legitimacy of child and colonial encounter

The first suit in which the Privy Council sought to introduce the principle 'presumption of legitimacy of child' in a bit unclear way is *Mahomed Bauker Hoossain Khan Bahadoor V. Shurfoon Nissa Begum*[1] The highest colonial judicial body in this suit held that legitimacy of a child[2] of Muslim parents may be presumed or inferred from circumstances in absence of any direct proof either of a marriage between the parents or of any formal act of legitimating.

The fundamental question of this appeal, which came before the Supreme Court of Madras in 1858, was whether the appellant ought to be considered as lawful brother of Shasavar Jung Bahadoor, that is to say, the lawful child of Oomdut Ool Oomrah, former Nawab of Carnatic. The point arose in a suit related to administration of estate of Shasavar Jung Bahadoor where the trial court directed, among other things, a reference to the Master of the Court to inquire into the matter and report to whether the appellant was a brother of Shasavar Jung Bahadoor.

The appellant claimed existence of a marriage between his mother Ameen Sahiba and the said Oomdut Ool Oomrah Bahadoor which took place, as claimed by the appellant, some three or four years prior to death of Oomrah Bahadoor. He

---

[1] 8 (1860) MIA, 137.

[2] In all cases cited here legitimacy of son had been contested which led, perhaps, to the Privy Council to use the word 'son' in the judgments instead of the word 'child'. I did not come across a single case where the daughter claimed legitimacy as well as share in the property of the father. However, I have used the word 'child' instead of 'son' to represent the language of the judgment accordingly even though child refers to sons, in this chapter.

claimed that he was the only issue[3] of that marriage and therefore the brother of Shasaver Jung Bahadoor, the deceased. He also claimed strong acknowledgement in his favour as child of the late Nawab. He claimed, further, that being a child of the late Nawab of Carnatic he had been enjoying, with other family members, government pension since 1801.

The respondent, daughter of the deceased, challenged the legitimacy of the appellant on the ground that Ameen Sahiba was a slave[4] of the Nawab and the appellant was their child. The respondent also denied existence of any marriage as well as marriage ceremony. The appellant had been adopted, allegedly, by one of the wives of the Nawab, Chattore Begum, being childless. The respondent, in addition, submitted a letter dated 7 October 1820 from Nawab Azeem Jah, the then Nawab of Carnatic where appellant was mentioned as the son of a concubine of late Nawab of Carnatic.

The master of the Court, however, reported in favour of the appellant which was accepted by the trial court also. The Supreme Court, on the contrary, reversed the decision later on various grounds: (a) documents submitted by the appellant did not support his claim of acknowledgement; (b) had there been a valid marriage between his parents Amin Shaiba did not reside with Chattore Begum instead of claiming a separate home like other wives of the said Nawab; and (c) oral testimony of two women in support of existence of a valid marriage were not trustworthy.

The judicial committee of the Privy Council was highly convinced that the appellant was born in the house of Chattore Begum as well as a child of Ameen Shahiba who was a dependant of the Chattore Begum. The judges of the Privy

---

[3] The word 'issue' in legal English means child.

[4] It has been argued that under Islamic traditions having sexual relationship with a slave, in the old days, was permitted (see Hasan 1972). The practice, perhaps, culminated in indiscriminate sexual relationship between slaves and master among Indian Muslims, especially in the Nawab's family. Chatterjee (1999), however, opines that different forms of slavery existed, primarily based on labour, before Muslim rulers came to India. In colonial India, a slave was categorised as 'domestic slave': slaves of the indigenous elite and Europeans were classified as 'unproductive'; agrestic slavery or productive slaves worked in agriculture; and finally slavery based on kinship': wherein owners declared a slave as one's son or daughter (see Chatterjee 1999). From the idea of 'labour' the lowest *jatis* of the Indian caste was also considered as slave-caste (see Chatterjee 1999). The master was considered to have ownership over the production of the slave and even over the body of the slave (see Chatterjee 1999).

Council were also certain that Oomdut Ool Oomrah, whether legitimately or illegitimately, was the father of appellant. Though it was proved before the Privy Council's bench that the appellant had been adopted and had been living with his mother with Chattore Begum until her death, however, the Privy Council did not get any proof of recognition or acknowledgement in favour of the appellant as the child of the said Nawab. The Privy Council's judges therefore expressed their agreement with the findings of the Supreme Court and thereby rejected the appeal. It is worth mentioning that though the appeal was rejected the Privy Council, perhaps for the first time, observed that legitimacy of a child may be presumed under Islamic law:

> ...under the Mahomedan law, the legitimacy or legitimating a child of Mahomedan parents may properly be presumed or inferred from circumstances without proof, or at least without any direct proof, either of a marriage between the parents, or of any formal act of legitimation (1860: 159).

However, in absence of circumstances sufficient to support or justify such a presumption the judicial committee of the Privy Council dismissed the appeal. It is pertinent to mention here that though the appeal mentioned above was dismissed the principle - under the Islamic law legitimacy of the child shall be presumed from direct or indirect acknowledgement of the father of the child became the judicial precedent. As an authoritative decision this principle had been applied in the later cases with full vigour. In *Ashrufood Dowlah Ahmed Hossein Khan Bahadoor V. Hyder Hossein Khan alias Achey Sahib*[5] this principle was reiterated in a straightforward way: a child born out of wedlock will be legitimate by an acknowledgement of the father of the child.

The suit was originally brought in the Civil Court at Lucknow, by the appellant claiming himself as sole joint heirs of Nawab Ameenood Dowlah, the deceased. The respondent also claimed to be a son of the deceased and as such a co-heir with the appellant. The appellant filed this suit, on the one hand, to establish his right of inheritance and for a declaration of the respondent's illegitimacy on the other. The parties were Muslim of the *Shia* sect and the respondent had based his claim on

[5] 11 (1866) MIA, 94.

existence of a Mut'a[6] marriage of his mother with the deceased and that his dead father acknowledged him, as his son. The appellants, on the contrary, denied both Mut'a marriage as well as alleged acknowledgment by the deceased of the respondent.

The suit was, first, dealt with by a Panchayat (spelt in the judgment as Punchayet) where the Mut'a marriage of the deceased Nawab with the respondent's mother was established but the fact that whether such marriage preceded the birth of the respondent was not proved. The alleged acknowledgment of respondent on the part of the deceased Nawab as his child was not established either. Therefore, the Civil Judge decreed the suit in favour of the appellants later. The respondent then appealed to the Judicial Commissioner of Awadhe (spelt in the judgment as Oude, Oudh). The two fundamental issues before the Judicial Commissioner were: (a) whether Nawab Ameenood Dowlah had contracted Mut'a marriage with respondent's mother, and (b) if respondent be not a legitimate child, was he an illegitimate child of the deceased? The Judicial Commissioner then reversed the decree of the Civil Judge and declared the respondent as legitimate child:

> ...I think it perfectly clear, that the deceased and the appellant's mother cohabited continuously together and the appellant was born during such cohabitation, and that, while no ceremony of marriage is proved, it is certain that for many years (subsequently to the birth) the deceased and the woman had lived, without doubt, man and wife, and the appellant had brought up as their son. The question then is under such circumstance; does the Mahomedan law presume a marriage before birth or rather before conception? The weight of authority goes to show that even a *sunni* regular marriage would be presumed from the cohabitation, without any subsequent proof of marriage. Infinitely stronger is the presumption of a *Shia* Mut'a marriage, backed by the undoubted subsequent existence of such a marriage. Both in fact and in law I am clear, that I must presume that there was such a relation as would constitute a *Shia* Mut'a marriage (1866:98).

The judicial committee of the Privy Council, on the contrary, held that in absence of proof of marriage or the date of pregnancy of mother of the respondent the fundamental question was whether a marriage can be presumed at a time anterior to pregnancy. The Privy Council's bench, however, expressed its disagreement on the principle of presumption of marriage since it is against the

---

[6] Mut'a marriage was a marriage contracted for a particular period which would be dissolved at the expiry of that period. In this marriage women were getting dower but no party were entitled to inherit in the property. Hallaq (2005: 32) reveals that Umar- I had declared mut'a marriage illegal by issuing an ordinance during the first century of Islam.

Islamic traditions as well as the text of the Islamic law of legitimacy. Sir James W. Colvile (1866), Judge of this suit, held that the decision of the Judicial Commissioner was founded upon presumption not warranted by the facts of the case and in some degree upon misconception of the authorities. As a result the judgment of the Judicial Commissioner had been reversed and the decision of the court of the first instance had been upheld.

The Privy Council, however, opined that instead of the principle of presumption of marriage such cases must be determined on the principle of evidence: presumptive proof being reasonable legal presumption in favour of legitimacy. Since the presumption of fact vary with different circumstances it is better to presume the legitimacy of the child for which treatment of that child might be the fundamental to acknowledgement. The bench of the Privy Council opined that 'acknowledgment of the child' and 'treatment of the child' is virtually the same thing. Sir James W. Colvile then sought to explain the principle of presumption of legitimacy of a child more clearly in the following language:

> ...presumption of legitimacy from marriage follows the bed, and whilst the marriage lasts, the child of the woman is taken to be the husband's child; but this presumption follows the bed, and is not antedated by relation. An ante-nuptial child is illegitimate. A child born out of wedlock is illegitimate; if acknowledged, he acquires the status of legitimacy. When, therefore, a child really illegitimate by birth becomes legitimated, it is by force of an acknowledgment express or implied, directly proved or presumed. These presumptions are inferences of fact. They are built on the foundations of the law, and do not widen the grounds of legitimacy by confounding concubinage and marriage. *The child of marriage is legitimate as soon as born. The child of a concubine may become legitimate by treatment as legitimate.*[7] Such treatment would furnish evidence of acknowledgment. A court would not be justified, though dealing with this subject of legitimacy, in making any presumptions of fact which a rational view of the principles of evidence would exclude. The presumption in favour of marriage and legitimacy must rest on sufficient grounds, and cannot be permitted to override overbalancing proofs, whether direct or presumptive (1866:114).

The most discussed suit where the Privy Council applied the principle, allegedly English, of presumption of legitimacy of child fruitfully is the *Nawab Muhammad Azmat Ali Khan V. Mussumat Lalli Begum.*[8] In this suit strong acknowledgement of the father in favour of the children born out of wedlock led Privy Council's judges to declare them as legitimate.

---

[7] emphasised by me.

[8] 8 (1881), IA, 8.

This appeal arose from a suit brought by Mussumat Lalli Begum, claiming her own right as widow of the late Nawab of Kurnal, Ahmed Ali Khan. In addition, as guardian she claimed to recover shares of her minor sons who were alleged to be children of the late Nawab. The defendant of this case, Nawab Azmat Ali Khan, was undoubted child of the late Nawab. Both in the court of first instance and in the first appeal court the decree went against Lalli Begum on the plea of existence of a family custom that a widow cannot inherit. However, the first appellate court, on the contrary to the first civil court declared legitimacy of the children in her favour.

There was no dispute on the facts that Mussamat Lalli Begum was a slave girl in the late Nawab's house. She had been living in the house until the death of the Nawab and their cohabitation was beyond question. So did the two minor children. The disputed questions therefore were firstly, whether there was a marriage between the late Nawab and Mussamat Lalli Begum before the birth of their children; and secondly, whether, instead of, was there any proof of an acknowledgement and recognition by the Nawab of the two children.

The direct evidence of the marriage, it appears, was not very satisfactory and in some respect contradictory. The judges of the Privy Council therefore sought to inquire the acknowledgment of the late Nawab in favour of the children instead of inquiring the existence of a valid marriage between them.

Among two children, acknowledgement in favour of the elder child, Rustam, was proved by oral testimony as well as by documentary evidence. He, it is shown, was treated by the Nawab as a legitimate child would be. He was often taken by his father on visits to the houses of Mr. Warburton, a Government official, and of Major Parsons, another British officer, both were living in the neighbourhood. He was always dressed as a legitimate child would be. In addition, a declaration of the Nawab relating to the arms belonging to his family, made to the Government, was found where Rustam was mentioned as his child. The judicial committee of the Privy Council considered it as almost conclusive proof regarding legitimacy of Rustam. The evidence of acknowledgement and recognition of Nawab towards the youngest son Umar, on the contrary, were much less than that of the elder brother. The Privy Council's Bench, however, thought that enough had been shown that Umar had been acknowledged as well as had been treated as a child.

The judges of the Privy Council, then, came to the conclusion that an acknowledgement by the Nawab of both the minors as his children had been proved. Regarding the effect of such acknowledgement, Sir Montague E. Smith, Judge of the suit, took recourse to the principle established in the *Ashrufood Dowla Ahmed Hossein Khan V. Hyder Hossein Khan (1866)* and endorsed the decree of the first appellate court on the plea that they were not establishing a new principle rather were applying the principle established earlier.

It appears that the principle of presumption of legitimacy, established by the Privy Council in the above mentioned suits, was applied in the similar suits later. For example in *Syed Sadakut Hossein V. Syed Mahomed Yusoof*[9] the Privy Council's Judges emphasised only on whether Selim had been acknowledged by his father Amir Hossein.

An important question, it appears, had been raised by the counsel for the appellant in this suit. He contended that Selim could in no way acquire the status of a legitimate child because the intercourse between his mother and the said Amir Hossein was adulterous. The appellant's counsel claimed, further, that she had been previously married to a person which was existed at the time of her cohabitation with Amir Hossein and, therefore, was adulterous. The counsel of the appellant took recourse to the rule of the Muslim law that a child of adulterous intercourse could not inherit as heir or acquire the status of legitimate son/daughter by recognition. However, the alleged marriage was not proved which relieved the Privy Council to answer the question of the appellant's counsel.

The Privy Council bench opined that though the alleged marriage is fictitious it is proved that Domni, mother of Selim, was taken to the house of Amir Hossein who, undoubtedly, cohabited with her as his wife and she became the mother of his children. The judges of the Privy Council, then, endorsed the findings of the sub-ordinate courts on the ground of acknowledgement by Amir Hossain of Selim as his child. The bench of the Privy Council held that from fact of the case an inference is fairly deduced that the father intended to recognise him and give him the status of a child capable of inheriting. Finally, it took recourse to the decision of *Azmat Ali Khan* suit and thereby declared Selim's legitimacy in an affirmative way. Having

---

[9] 11(1883) IA, 31.

discussed these cases, I will discuss how the principle 'presumption of legitimacy of child' established by the Privy Council was contested and the subsequent response of the highest colonial judicial body in the following section.

Section 2: An opposite view and aftermath

Historians tell us that the principle 'acknowledgmetn of the father of the child' was not applied in the English Common law system when it was introduced in India (see Hasan 1972). Existence of a valid marriage was one of the pre-conditions for the legitimacy of a child in the English Common law and the idea of 'legitimation' by way of subsequent marriage or adoption was unknown to it. The English common law rule was that a child is legitimate if his parents were lawfully married either at the time of conception or at the time of birth of the child. This presumption could be rebutted by proving that there was no sexual intercourse between the parents during the possible period within which the child was conceived and also by proving that though there was intercourse the husband is not the father as the wife had relation with another person at the same time. However, a new principle called 'legitimation' was introduced later in the English law by the *Legitimacy Act of 1926* which render legitimate a living illegitimate child whose parents marry at any time after his birth (see Hasan 1972).

Unlike the English Common law system the principle 'presumption of legitimacy of child' was introduced in India, perhaps, as an experiment.[10] The judges of the Privy Council, it appears, had developed their self-proclaimed principle without contestation until 1888 when the Allahabad High Court came up with the proposition that valid marriage is the precondition to the legitimacy of a child. Justice Mahmood (1888) in the *Allahdad Khan* case[11] sought to argue that a child born out of wedlock or where the marriage between his parents is disproved or is not proved or not beyond doubt will not be legitimate under Islamic law by an act of mere acknowledgement of the father. In the words of Mahmood (1888):

---

[10] We know that India was a laboratory for the British to experiment different legal norms. For instance the history of fingerprinting tells us that it was first developed in Bengal and then used in the metropolis.

[11] *Allahdad Khan V. Muhammad Ismail Khan* (1888), 10 All, 289, FB, Allahabad, 289. My acquaintance with the suit is from Mahmood (2005: 162).

> ...according to Mahomedan law, so far as inheritance from males or through males is concerned, the existence of legitimacy of consanguinity is a condition precedent to the right of inheritance, and that such legitimacy depends upon a valid marriage or connection between the parents. .. the Mahomedan law of acknowledgment of parentage with its legitimating effect, has no reference whatever to cases in which the illegitimacy of the child is proved and established, either by reason of a lawful union between the parents of the child being impossible or by reasons of marriage necessary to render the child legitimate being disproved. The doctrine only applies to cases of uncertainty as to legitimacy, when acknowledgement has its effect; but that effect always proceeds upon the assumption of a lawful union between the parents of the acknowledged child (Mahmood 2005:182, 186-7).

It is important to note that Justice Mahmood (1888) sought to make a distinction between two terms 'paternity' and 'legitimacy of child'; to him acknowledgement will establish merely paternity of a child when it is doubted but it in no way will legitimise a child in absence of a valid marriage between the parents of that child:

> ...not a single authority of that law has been quoted, and I am not aware of any, which would justify the conclusion that legitimacy of decent from a father is not an absolutely indispensable condition precedent to the very existence of the right of inheritance from the father (see Mahmood 2005: 186).

Three things, according to Justice Mahmood (1888), are fundamental to inheritance in the Islamic traditions: *nusub* or descent (consanguinity), special cause, i.e., valid marriage, and *wula*. 'Consanguinity of descent' according to Mahmood (1888), "means legitimate descent only, so far as inheritance from or through male is concerned, and marriage between the parents of the inheritor is a condition precedent to his legitimacy" (see Mahmood 2005:182). "The intercourse of a man and a woman" argued Mahmood (1888), "who is neither his wife nor his slave is unlawful and prohibited absolutely" (see Mahmood 2005: 182). Justice Mahmood (1888), therefore, pointedly called the principle put forward by the highest colonial judicial body as 'positively opposed' to the Islamic law.

It is notable that the Privy Council did not bother to inquire existence of valid marriage between the parents on the plea that valid marriage might be compromised as one of the essential conditions for legitimacy of a child where there exists clear example of acknowledgement of father of the child. Mahmood (1888), a judge of the Allahabad High Court, sought to demonstrate, on the contrary, the fundamental difference on the acknowledgement of the child between the Islamic traditions and other traditions, i.e., Roman, Scottish, Hindu by stating that under the Islamic

traditions lawful union of the parents at the time of conception of the offspring is fundamental to the legitimacy of that child:

> ...none of these main elements of the theories upon which the Hindu law of adoption proceeds is common to the Muhammedan law, for there, as I have shown acknowledgment of parentage proceeds upon the theory of actual descent of the acknowledged child from the father who acknowledges it, and such descent being the result of a legitimate intercourse between the parents...the Muhammedan law relates only to cases of uncertainty and proceeds upon the assumption that the acknowledged child is not only the offspring of the acknowledger by blood but also the issue of a lawful union between the acknowledger and the mother of the child (see Mahmood 2005: 191-2).

This opinion of the Allahabad High Court on the matter of legitimacy of a child led other subordinate courts, notably, to deviate from the rulings of the Privy Council. The effort of the Allahabad High Court, however, went in vain since the Privy Council's judges showed overwhelming adherence to the principle established in the *Ashrufood Dowlah(1866)* case. For example, in *Abdool Razack V. Aga Mahomed Jaffer Bindaneem*[12] a claim for legitimacy was dismissed by the trial court due to absence of a valid marriage between the parents of the claimant. The appeal was dismissed by the Privy Council, on the contrary, not for absence of a valid marriage between the parents of the claimant but in absence of proof of an acknowledgment of the father.

The fact of the suit, in brief, was that one man named Hadjee Hoosain, a Muslim belonging to *Shia* sect died in Rangoon. He, being without a child, left a will by which he purported to dispose of all his property. He had only a brother named Abdul Hadee, who died before him. The appellant claimed to be the lawful child of Abdul Hadee and as such to be the heir or one of the heirs of Hadjee Hoosain and entitled, therefore, to a share in so much of his estate as he could not dispose of by will[13] according to Muslim law. Therefore, the fundamental questions of this appeal were: (a) whether a valid marriage took place between Abdul Hadee and the appellant's mother, who was undoubtedly a Buddhist when she met her alleged husband and (b) is there sufficient evidence of legitimating the appellant by acknowledgement?

---

[12] 21 (1893), IA, 56.

[13] Will in legal language means a deed by which a person directs the distribution of his/her property after death. It is significant that according to Islamic law one can transfer not more than one-third of the entire property by making a will.

It appeared before the learned Recorder that there was no valid marriage since, Mah Thai, mother of the appellant, had not converted to Islam. The learned Recorder observed that a valid marriage between a Muslim and a woman who is not a 'kitabi' requires the woman to be converted to Islam. Taking this view, he thought it unnecessary to consider the evidence as to acknowledgement since no acknowledgement, according to the Recorder, could confer the status of legitimacy upon the offspring of a Muslim and an unconverted Buddhist.

The Privy Council also agreed with the findings of the Recorder's Court that there was no lawful marriage before their cohabitation. The only question, therefore, left to be determined by the Privy Council was the matter of acknowledgement. The counsel for the respondent argued that there was no acknowledgement in the legal and proper sense of the word, although there may have been an admission of paternity.

Unlike the court of Recorder, the judicial committee of the Privy Council re-iterated the principle of presumption of legitimacy of child established earlier in the *Ashrufood Dowlah Ahmed Hossein Khan* case. However, the appeal had been dismissed since there was no such acknowledgement on the part of the father of the child.

Like British judges in India ignorance of Islamic law of the Privy Council's judges too, it appears, contributed to put their own construction of law. In some cases they took recourse to the principle of 'equity' to cover their ignorance. Presumption of marriage from a prolonged co-habitation or legitimating a child without taking into account the valid marriage between the parents are, one might say, few examples. In *Syed Habibur Rahman Chowdhury and others V. Syed Altaf Ali Chowdhury and others*[14] the Privy Council confessed their ignorance on these issues and thereby took the observation of the Allahabad High Court on the principle of presumption of legitimacy into consideration.

In brief, the appellant of this suit, mentioned above, claimed a declaration from the court in his favour that he was the legitimate child of the late Nawab of Bogra. He based his claim on two grounds: Mozelle Cohen, mother of the appellant, was married to the Nawab and that on many occasions the Nawab acknowledged him as

[14] AIR (1922), PC, 159. Also cited in Mahmood (2005:202).

his legitimate child. The claim of the appellant, however, was opposed by the late Nawab's grandson as well as two nephews. They, on the contrary, stated that no marriage ever took place. They also denied the alleged acknowledgment on the part of the Nawab.

In the first civil court no marriage was proved. In addition, the judges formed the opinion that Mozelle Cohen was no better than a prostitute. The trial court, therefore, held that though the Nawab acknowledged the appellant as his legitimate child but in law, as the fact of absence of valid marriage was conclusively established, such acknowledgment would not confer the status of legitimacy. So was the decision of the first appeal court.

The Privy Council, however, sought to clarify a distinction between the two terms 'legitimacy' and 'legitimating': 'legitimacy is a status which results from certain facts while legitimating is a proceeding which creates a status':

> ...in the proper sense there is no legitimating under the Mohammedan law. By the Mohammedan law a son to be legitimate must be the offspring of a man and his wife or of a man and his slave; any other offspring is the offspring of Zina, that is, illicit connection and cannot be legitimate. The term 'wife' connotes marriage; but as marriage may be constituted without any ceremonial, the existence of a marriage in any particular case may be an open question. Direct proof is available but if there be no such, indirect proof may suffice. Now one of the ways of indirect proof is by an acknowledgment of legitimacy in favour of a son. This acknowledgment must be not merely of sonship but must be made in such a way that it shows that the acknowledger meant to accept the other not only as his son but as his legitimate son. But it must not be made when the ages are such that it is impossible in nature for the acknowledger to be the father of the person acknowledged, or when the mother spoken to in an acknowledgment, being the wife of another or within prohibited degrees of the acknowledger, it would be apparent that the issue would be the issue of adultery or incest. When there are no such impediments then the acknowledgment has more than a mere evidential value (Mahmood 2005: 205-6).

It is interesting to note that though the appeal had been dismissed in absence of clear and strong acknowledgment in favour of the appellant the Privy Council defended its position on the ground that Muslim marriage might be constituted without any ceremonial. As a result in absence of direct proof the indirect proof, i.e., acknowledgment of the father will create a status of legitimacy in favour of the child. Privy Council's judges, it appears, tried to strict to their proposition defying the observation put forward by Justice Mahmood (1888). It is also pertinent to mention here that the Privy Council only relied on treatment of the child by the

father; the question relating to mother, i.e., her legitimate rights did not get attention of the judges of the Privy Council due to, perhaps, the lower social status of the mother. The decision of the judges of the highest court of British India, one might say, influenced by their adherence to patriarchy as they only relied on the behaviour of the father; did not believe the mother perhaps due to their understanding that a woman of lower status should not be trusted. In addition, the judges of the British India had invented a new classificatory practice which made a distinction between: 'co-habitation in the casual nature' and 'cohabitation in the permanent nature'. The former not being a permanent sexual relationship does not allow for, according to Privy Council Judges, the presumption of marriage as the latter does. In the words of Privy Council in the *Ashrufood Dowlah V. Hyder Hossein* Khan case:

> ...at the time cohabitation, in the sense of permanent intercourse such as takes place ordinarily between man and wife is not proved to have existed between the parents of the respondent...if pregnancy occurred during that service and when she was the habit of going from the house freely into the *Bazaar*, sexual intercourse then in that state between her and her Master would not have the character of cohabitation of a permanent nature, such as under this head of law distinguishes concubinage from casual intercourse (1866:73).

In other words, children born of a casual sexual encounter with a woman of a lower status than the man were not to be treated as legitimate.[15] In Islamic legal traditions, however, there is no such distinction on the basis of the duration of the co-habitation. Islamic legal traditions maintain sexual relation very strictly and therefore the duration of co-habitation is not the fundamental consideration to determine the legitimacy of a child. A child will be legitimate as well as will be entitled to inherit the property of the father if a valid marriage is established between his parents at the time of his conception; so does the mother since legitimacy of child as well as that of mother is integral in the Islamic legal traditions (see Hasan 1972).

The judges of the Privy Council, one might say, tried to put forward the idea of sexual relation only instead of taking into account the socio-economic character of

---

[15] The Privy Council used the term concubinage, perhaps, to mean absolute control of the master over the body of the dependant; meaning that the master had access to have cohabitation as he wished with the dependant. Access of the dependant to go outside was considered as loss of possession by the master over the body of the dependant on an apprehension that she might have sexual relation with other persons. In this circumstance the Privy Council refused legitimacy of the child on the plea that the cohabitation was of casual nature.

marriage. Also they did not take into consideration that marriage is not simply a contract to legalise the sexual relationship rather it related to women's economic rights, i.e., dower, inheritance, and maintenance (see Agnes 2000). Under Islamic marriage women are considered as party to the contract, as I have stated in Chapter one, who has enjoy certain economic rights even the right to repudiated marital tie if their economic right is denied. The Privy Council, it appears, failed completely to understand it and contributed to project women as the object of the contract; also contributed to cover the economic right of women by establishing a myth that marriage under Islamic law is only to establish a legal sexual relation.

The principle of presumption of legitimacy of child introduced by the Privy Council had been translated into law later in colonial India. A section on paternity and legitimacy (section 112) had been incorporated in the *Indian Evidence Act, 1872* to give the intention of the Privy Council, it appears, an effect. This new legislation finally contributed to replace the principle of Islamic law on presumption of paternity and legitimacy of child by that of the English legal traditions (see Mahmood 1983). Hasan (1972) also reiterates that western concept of presumption of legitimacy of an illegitimate child, as it was introduced in India through section 112 of the Evidence Act of 1772, is not accepted at all in the Islamic legal traditions being fundamentally different from the former on the matter of date of conception of the child. In the western traditions marriage of the parents after the conception of the child will legitimise the offspring which is unknown to the Islamic legal traditions. Islamic legal traditions maintain enforcement of strict sexual relationship and any offspring born outside legal marriage is considered as illegitimate child (see Hasan 1972). The Privy Council, however, failed to recognise this fundamental difference between the English principle of legitimacy of a child and that of the Islamic traditions. Moreover it sought to declare section 112 of the *Indian Evidence Act, 1872* as the 'substantive law' which might supersede other laws including Islamic law.

Conclusion

In this chapter, I have argued that the Privy Council introduced the principle of 'presumption of legitimacy of child' as an experiment much before it was introduced in English legal system. The colonial authority incorporated it in the

Indian Evidence Act, 1872 easily, perhaps, in absence of any civil society agency in the codification process as they introduced harsh punishment in India for various criminal offences (see Singha 2000). I have also argued that the Privy Council avoided tacitly, the question involving legitimate rights of mother of the child. It also took into account only the behaviour of the father to legitimate the child perhaps due to their adherence to the old notion that women are not trustworthy.

Chapter Three

Women and Colonial Interpretation of Islamic Family Law

Introduction

In the fledgling British Empire in India, the question regarding principles of governance got the central place in the colonial governance policy. Rule of law as well as the right to property, which the contemporary British intellectual currents considered as the most important elements for a "civilized" society, were the basic ideals considered to be essential to prolong the colonial domination in India (see Metcalf 1995; Nair 1996). The western concept of "oriental despotism" (Inden 1986) being that the Indian society has no law or property and consequently the Indians have no rights at all influenced the British colonial authority to establish rule of law in India (see Metcalf 1995; Nair 1996). As a remedial measure the British colonial power sought to establish a legal system in English style in order to institute from the very beginning its governance in India. As a result, by the middle of the nineteenth century a systematic legal system, allegedly English, had appeared which replaced the native legal system completely. The codification of native laws was also justified as a remedial measure to establish rule of law in India. It appears that the British orientalists invested their effort to explore the religious laws of Indians and by way of codification of some religious texts they tried to establish their claim that women do not enjoy any right under the indigenous law (see Nair 1996). As Mill, the leading British utilitarian, observed that "in a state of dependence more strict and humiliating that which is ordained for the weaker sex...they are held in extreme degradation, excluded from the sacred books, deprived of education, and in the paternal property" (cited in Nair 1996:35). Therefore, a reform of the indigenous religious norms was called for to rescue "native" women from this situation and it was none but the colonial authority to take the duty (Nair 1996). The woman's question became central to the colonial rule at a certain point of time.

In this chapter I shall discuss the decisions of the Privy Council on different issues relating to women in the domestic realm of life, i.e., divorce, dower, maintenance and so on. The fundamental aim is to have an idea about how the Privy Council projected women under the realm of Muslim personal law. The aim is also to examine how the highest judicial body of the colonial India constructed Muslim women and thereby, reshaped Muslim personal law. It is pertinent to note that although the colonial rhetoric was concerned with rights, they were not really concerned about Muslim women's rights. They wanted the "natives" to accept the legitimacy of their judicial system and therefore law became an important technique of governance, especially in the realm of the intimate and domestic. The reported decisions of the Privy Council, I am going to review, will unfold this colonial rhetoric.

Section 1: Dissolution of marriage

In this section, I look at different issues that confronted English judges while interpreting Muslim personal law. I begin with the question of whose word was privileged – the husband is or the wife is - in order to discern the legality of divorce or dissolution of marriage. Through an analysis of the case law, I will show how the colonial judges interpreted the meaning of *talaq* and how this changes over time. Germinal to the issue of divorce among Muslims was the question about who could initiate a lawful divorce and whether Muslim women have similar rights, as Muslim men to dissolve an unworking marital relationship. That who has this kind of authority, the husband or wife, it appears, is fundamental to dissolution of marriage as well as guardianship of minor children under the Islamic legal traditions. There had been a long debate on the authority to repudiate marital tie in the Islamic legal traditions and it is apparently illuminating that provisions of Islamic law are discriminatory to women. Men can divorce, by way of *talaq* without showing any reasonable ground, while the women had to go through a process called *khula*, where, according to traditional understanding, she had to relinquish her dower to buy her freedom from the husband.[1] In this section I look at the case law from the

[1] After passing the *Muslim Family Laws Ordinance, 1961* all types of divorce, however, become single form; that is to say any one who wishes to divorce has to send a notice to the local administrative body and a copy thereof to the opposite party; after three months the *talaq* will be effective if there is no conciliation has taken place between them in the mean time.

Privy Council to examine how the colonial judges interpreted *talaq* and *khula*. Let us turn to *Moonshee Buzul-ul-Raheem V. Luteefut-oon-Nissa*[2] where the Privy Council held that the sole authority to pronounce a divorce lies with the husband be it by way of *talaq* or *khula*.[3]

This suit was instituted in the Civil Court of the Twenty Four Pergunnahs of Bengal by the respondent, Luteefut-oon-Nissa to recover her dower amounting to sum Rs. 26,000/-. This sum was payable by her husband to her in the event of dissolution of the marriage. She alleged the marriage had been dissolved by the husband who divorced her by giving her *talaq*. In addition, she contested the *khulanama*[4] as fraudulent which was produced by her husband in the court to establish a *khula* divorce. Luteefut-oon-Nissa's husband in response contested her assertion that he gave her talaq. Instead he claimed that she executed a *khulanama*, thereby releasing herself from the marital tie.

The first civil court (court of the first instance) decided that the *khulanama* could not be proved without the admission of the wife but since the husband has the authority to *talaq,* the divorce could not be disputed. It further held the deeds fraudulent and void. Therefore the marriage being dissolved, Luteefut-oon-Nissa was entitled to recover her claim. This decision then travelled to the Sadar Diwany Adalat,[5] which upheld the decision. Dissatisfied, the husband appealed the Privy Council.

In the Privy Council, the appellant's counsel made two points: firstly, that the deeds executed by the respondent were valid and, secondly, that if the *Khulanama*, executed by the respondent, is dismissed as fraudulent there would exist no evidence at all of the claimed divorce and then the marriage would not shown to be dissolved. The Privy Council, however, opined that "this objection, however plausible, is founded on a misconception of real nature of the divorce" (Mahmood 2005:130). The bench of the Privy Council then sought to explain it in the following way:

---

[2] 8 (1861) MIA, p. 379. Also cited in Mahmood (2005:123).

[3] Spelt in the judgment as *khoola.*

[4] Sspelt in the judgment as *khoolanamah;* which means the deed of agreement between husband and wife to repudiate the marital tie at the instance of the wife.

[5] Spelt as *Sudder Diwany Adawlut* in the judgment.

> ...divorce is the sole act of the husband, though granted at the instance of the wife and purchased by her. The *Khoolanamah* is a deed securing to the husband the stipulated consideration but it does not constitute the divorce. It assumes and is founded upon it. The divorce is completed by the husband's repudiation of the wife followed by separation (Mahmood 2005:130).

In absence of satisfactory evidence the bench of the Privy Council dismissed the claim that Luteefot-oon-Nissa executed the *khulanama* with knowledge of its contents. Therefore, the Privy Council opined that the *Khulanama* was obtained by using force and upheld the decision of the Sadar Diwany Adalat.

In addition, the Privy Council bench observed that the divorce under Islamic traditions is an arbitrary act of the husband and the wife has only an option of bargaining on the agreement to get her release. I quote:

> ...it appears that by the Mahomedan law divorce may be made in either of two forms; *talaq* or *khoola*. A divorce by *talaq* is the mere arbitrary act of husband, who may repudiate his wife at his own pleasure, with or without cause. A divorce by *khoola* is a divorce with consent, and at the instance of the wife, in which she gives or agrees to give a consideration to husband for her release from the marriage tie. In such a case the terms of the bargain are matter of arrangement between husband and wife, and the wife may, as consideration relinquish her dower and other rights, or make any other agreement for the benefit of husband (Mahmood 2005:129-130)

This position was to be further developed in subsequent judgments. For instance, in *Ma mi and another V. Kallander Ammal* [6] the Privy Council held that mere clear intention, in absence of clear words, is sufficient to constitute a *talaq*. This case is of interest since the issue of lawful marriage becomes important after the death of the husband who may have two or more wives, without or without divorcing one of them to marry the second woman. This case is therefore a litigation between two women over the dead husband's property.

In this case, the suit was originally brought to the civil court by the respondent Kallander Ammal, to recover the whole, or in the alternative, a part of the estate of her deceased husband Sheikh Moideen who died in 1920. Kallander Ammal's claim was contested by the appellant Ma Mi on the ground that the responded (Ammal) had been divorced earlier. In addition, the appellant claimed herself as the lawful wife as well as the sole heir of the deceased. She also claimed that the respondent (Ammal) falsely claimed to have been his lawful wife who was divorced according

[6] AIR (1927), PC, 15.

to Muslim law. The said divorce was also claimed to be communicated to the respondent and she thereafter ceased to be the wife of the deceased.

The *talaknama (* deed of divorce), which was executed about two years before the death of the deceased, was found genuine by the district court while the High Court opined that the divorce by *talaknama* or writing had not been proved. The High Court, in addition, held that no oral divorce was proved by the evidence on record either. In the further appeal the Privy Council, however, held that in absence of clear words clear intention is required for a divorce to be proved. The appeal, however, was dismissed as there was no sufficient proof that the divorce was pronounced clearly or that the deceased expressed his intention to divorce to the witnesses clearly. Hence, the claim of the respondent in the property was upheld.

The significant feature of the two cases discussed above is that the Privy Council institutionalised the unilateral authority of the husband to repudiate marital tie under the Muslim personal law. In the first suit[7] the Privy Council without any hesitation held that except *talaq*, which is the sole prerogative of the husband, no repudiation of marital tie, be it a *khula*, is possible. It implies that though the wife is enjoying some freedom to seek divorce by way of *khula* the pronouncement of the husband is a must to constitute a divorce. Therefore 'pronouncement' became the central point to be determined in a case of divorce later on. It is significant that the judges of the Privy Council in the *Kallander Ammal (1927,*case, emphasised overwhelmingly on the 'clear and unambiguous pronouncement'- meaning that clear and unambiguous pronouncement will show the intention of the husband in favour of divorce. This idea of clear and unambiguous 'pronouncement' perhaps led the Privy Council judges to institutionalise the triple *talaq;* to Privy Council's judges triple declarations in one sitting is similar to 'clear and unambiguous pronouncement'. I shall now discuss how the triple *talaq* can be to be stabilised in legal interpretation as the valid form of divorcing wives.

[7] It is important to note that the mother of the Lutefoot-oon-Nissa went to the Faujdari adalat to institute a claim against her son-in-law in 1848, much before the establishment of the high courts in India.

1. 2: *The case of Triple Talaq*

Besides approving the husband's absolute authority to repudiate the marital tie, tacitly, the Privy Council in *Saiyid Rashid Ahmad and another V. Mt. Anisa Khatun and others*[8] institutionalised the traditional practice of triple *talaq*[9] and the idea of the '*hilla*'[10] marriage. This appeal was related to the right to inherit the property of Ghiyas-ud-din who died in 1920 and the appellants of this suit were brother and sister of the deceased. The deceased's siblings claimed that the marriage between Ghiyas-ud-din and the respondent was invalid since she had a husband then living. They also claimed that in any case Ghiyas-ud-din validly dissolved the marital tie in 1905.

The judgment records that the respondent had married one Manzur Husain in 1901 prior to her marriage with the deceased. She argued that the marriage was not valid since both of them were minor at the time they were married to each other. The appellants' claim of non-existence of divorce based on the the ground that Manzur Hossain had not attained the age of discretion at the time of divorce claimed by the respondent. This argument was accepted by the first civil court but rejected by the High Court. The appellants further contended that on September 13, 1905 Ghiyas-ud-din pronounced *talaq* three times in the presence of witness, though in absence of the respondent, and Rs. 1000/- was paid as dower money. The respondent, however, denied the fact of divorce and claimed that the payment of Rs. 1000/- was a payment of the prompt dower.[11]

The first civil court decreed the suit on the ground that pronouncement of *talaq* three times in one sitting constituted an irrevocable divorce and therefore, the

---

[8] 49 (1931-2) IA, 21.

[9] There was a traditional understanding that if the husband pronounced '*talaq*' thrice in one sitting it will be treated as irrevocable divorce at once. Though this type of *talaq* is against the philosophy of Islamic law as well as the procedure of *talaq* provided under Islamic legal traditions, it had been continued until passing of the *Muslim Family Laws Ordinance*, 1961.

[10] *Hilla* marriage is a temporary marriage which was traditionally required when the same party wishes to get married again after a divorce has been taken place three times subsequently. In this situation it was required that the wife will have to get married to another person, then will get divorced, to be competent to get married to his previous husband. It is worthy of mentioning that both the triple *talaq* and *hilla* marriage has no room in the Islamic law. It was rather a local tradition, perhaps continued from long before the British colonial authority assumed the administration of justice in India.

[11] Prompt dower is the amount payable at the time of marriage or immediately on demand after marriage by the husband. Usually the half of the entire amount of dower is considered as prompt.

respondent ceased to be the wife at the time of the death of Ghiyas- ud-din. In addition, it held that other respondents, who were admittedly their offspring, were not legitimate being born after the date of divorce. The High Court, however, came to a contrary conclusion that the divorce was fictitious and inoperative since the pronouncements of divorce was a mock ceremony performed by Ghiyas- ud-din to satisfy his father but without any intention on his part that it should be real or effective. The High Court emphasised on the fact that their cohabitation continued for fifteen years after the pronouncement of divorce which, according to High Court, shows absence of intention of Ghiyas-ud-din to dissolve the marriage.

In contrast, the Privy Council, like the court of the first instance, upheld the validity of the triple *talaq*. It took recourse to the Baillie's Digest to opine that in the *bidaat* form (pronouncing *talaq* three times in one sitting) the divorce at once became irrevocable irrespective of the *iddat*[12]. It also, seems, relied on the observations of Wilson:

> ...the divorce called *'talaq'* may be either irrevocable (bain; also known as bidaat) or revocable (raja). A *talaq* bain, while it always operates as an immediate and complete dissolution of the marriage bond, differs as to one of its ulterior effects according to the form in which it is pronounced. A *talaq* bain may be effected by words addressed to the wife clearly indicating an intention to dissolve the marriage either (a) once, followed by abstinence from sexual intercourse, for the period called *iddat*; or (b) three times during successive intervals of purity, (c) three times at shorter intervals or even in immediate succession or (d) once, by words showing a clear intention that the divorce shall immediately become irrevocable (49 IA: 27).

The Privy Council's bench came to several conclusions from the fact of the case: (a) firstly, as the words of divorce addressed to the wife, though she was not present, had been repeated three times by Ghiyas-ud-din clearly it shows an intention to dissolve the marriage, (b) secondly, pronouncement of the three *talaq* by Ghiyas-ud-din constituted an immediately effective divorce, (c) thirdly, upon divorce by way of pronouncing *talaq* three times, Ghiyas- ud-din could not lawfully remarry Anisa Khatun *until she had married to another and the latter had divorced*

---

[12] *Iddat* is the waiting period, usually three months (three menstrual courses) in duration, requires for a divorce to be effective. Traditionally during this period hausband and wife are required to abstain from co-habitation; if there is any co-habitation taken place during this time it would be considered as withdrawal of 'pronouncement' of the divorce by the husband. The wife will be entitled to maintenance during this period. It is worthy of mentioning that whether divorce is given by husband or wife performing *iddat* is a must.

her or died[13]; (d) fourthly, validity and effectiveness of the divorce would not be affected by mental intention of the husband, and (e) fifthly, a *talaq* actually pronounced under compulsion or in jest is valid and effective.

It appears from the cases mentioned above that the Privy Council had categorically approved as well as institutionalised the traditional understanding that wife has no authority to repudiate the marital tie under the Islamic legal traditions. Even in the matter of *Khula* divorce the actual authority to repudiate the marital tie, according to Privy Council, lies with the husband. The deed, i.e., *khulanama* is a deed, according to the Privy Council, to secure stipulated consideration for the husband but it does not constitute divorce'. In addition, the Privy Council took recourse to the traditional texts and thereby put forward the idea of 'irrevocable divorce or immediately effective divorce' which seems inconsistent with the procedure of divorce under Islamic legal traditions. It is noteworthy that observing *iddat* is a part and parcel of the divorce under Islamic law. The intention is to encourage reconciliation; to prevent divorce if it is pronounced on the spur of the moment. Therefore until the end of the *iddat* period the marriage will not be repudiated and the husband and wife are free to live together. The idea of irrevocable divorce or immediately effective divorce, one might say, is a misunderstanding of the procedure of divorce under Islamic traditions. It is rather a pre-Islamic practice (see Engineer 2004).

It is important that Umar, the second Caliph of Islam, declared a divorce irrevocable and immediately effective in a situation where one found to divorce his wife three times. It was for a special situation followed by the conquest of Mecca which resulted in indiscriminate practice of divorce and subsequent revocation by men in order to marry the women prisoner. This punitive measure for a special situation was widely accepted, according to Serajuddin (2001), by the jurists.[14] The

---

[13] Emphasised by me.

[14] The Commission on Marriage and Family Laws, constituted in the undivided Pakistan to reform provision of family laws in 1956, opined that pronouncing triple *talaq* in one sitting was considered as single pronouncement during the lifetime of the Prophet as well as at the time of first Caliph and the early years of second Caliph Umar. The Commission also reported that Hazrat Umar used irrevocable divorce against persons who misused the provisions of three *talaq*. The Commission therefore opined that the idea of irrevocable divorce is un-Islamic and recommended for a legislation to declare pronouncement of triple *talaq* in one sitting as single pronouncement (see Sirajuddin, 2001). It is significant that according to recommendations of the Commission the

Privy Council could have declared that since observing the period of *iddat* is a part and parcel of a divorce under Islamic legal traditions the immediately effective divorce, i.e., the triple *talaq* cannot be justified on the plea of cultural practice (see Navlakha 1994). To suffice, one might say that the triple *talaq*, which has occupied a number of political debates about the nature of law reform to uphold women's rights can be traced back to early colonial rule and that its history allows us to show that the meanings ascribed to the triple *talaq* are really the product of colonial judicial interpretation.

Section 2: On the question of guardianship

In this section, I will briefly look at the way in which women's right to guardianship was constructed by early colonial law. The question of a mother as a legal guardian of a minor child is a contested issue. In Islamic law (Hanafi school) women are vested with only the guardianship of child until a certain age depending on the sex of the child while guardianship of property vested with male (see Pearl 1987). It appears that in the *Imambandi and others V.Haji Mutsaddi and others*[15] the Privy Council clearly endorsed this traditional understanding that in no way a mother could be the legal guardian of a child.

In the year 1911, a widow of one man Ismail Ali Khan appealed a judgment of the High Court of Calcutta to the Privy Council challenging the legal authority of Enayet-uz-Zohra, another widow of Ismail Ali Khan, to transfer certain property on behalf of her minor children. The suit was originally filed in the civil court in 1909 by Haji Mutsaddi claiming title and possession of certain property which he purchased, allegedly, from Enayet –uz-Zohra. The fact shows that by executing a deed Zohra conveyed to the respondent the shares of her minor children as well as hers. In the first civil court the present appellant contested the claim of the respondent on the ground that Zohra being from lower social status could not be the wife of Ismail Ali Khan. The fact shows that Ismail Ali Khan too was maintained little relation with his father- in- law's house. This allegation, however, disproved in the first civil court and it decreed the suit in favour of the respondent. The

---

Muslim Family Laws Ordinance came into being in 1961 which abolished the practice of triple *talaq* (section 7) by providing clear procedure for divorce.

[15] 45 (1918), IA, 73. Also cited in Mahmood (2005: 213).

present appellant then appealed to the High Court of Calcutta on the ground that Zohra does not have legal authority to transfer the claimed property on behalf of her minor children which was dismissed on the ground that this question did not arise in the first civil court. Finally, the suit came to the Privy Council. The Privy Council however opined that the question is an important one because if the respondent obtains any possession of the minor's share must do so on the strength of their own title. Therefore whether Zohra possessed any authority to transfer title of the property is a vital question to be determined.

The judicial committee of the Privy Council held that "though the question how far or under what circumstances according to Muslim law, a mother's dealing with her minor child's property are binding on the infant has been frequently discussed in India there is no uniform rule on it" (Mahmood 2005:217). The judges of the Privy Council further observed that the mother is not the natural guardian of the children and therefore has no larger authority to deal with the property of her minor children than an outsider. Having consulted Baillie's Digest and Hamilton's Hedaya the Privy Council's bench observed:

> ...under the Mahommedan law mother is entitled only to the custody of the person of her minor child up to a certain age according to sex of the child. But she is not the natural guardian; father alone, or, if he be dead, his executor (under sunni law), is the legal guardian... in absence of father, under the Sunni law, guardianship vests in his executor. If father dies without appointing an executor and his father is alive, guardianship of his minor children devolves on their grandfather. Should he also be dead, and has left an executor, it vests in him. In default of these de jure guardians, the duty of appointing a guardian for the protection and preservation of the infant's property devolves on the judge as the representative of the sovereign (Mahmood 2005:217).

The judges of the Privy Council further observed that mother will enjoy the *de jure* authority only if she has been appointed by father or by the courts; in absence of such authority her act will not bind the children. In the words of the Privy Council:

> ...when mother is the father's executrix, or is appointed by the judge as guardian of the minors, she has all the powers of a *de jure* guardian. Without such derivative authority, if she assumes charge of their property of whatever description and purports to deal with it, she does so at her own risk, and her acts are like those of any other person who arrogates an authority which he does not legally possess. She may incur responsibilities, but can impose no obligations on the infant. This rule, however, is subject to certain exceptions provided for the protection of a minor child who has no de jure guardian (Mahmood 2005:219).

The Privy Council's bench further took recourse to the Hedaya which classifies the acts that may be done for an infant under three heads. It says:

> ...acts in regard to infant-orphans are of three descriptions: (a) acts of guardianship, such as contracting an infant in marriage or selling or buying goods for him, a power which belongs solely to the *wallee*, or natural guardian, whom the law has constituted the infant's substitute in those points; (b) acts arising from the wants of an infant, such as buying or selling for him on occasions of need, or hiring a nurse for him, or the like, which power belongs to the maintainer of the infant, whether he be the brother, uncle or taker-up, or mother, provided she be the maintainer of the infant; and these are empowered with respect to such acts, the *wallee*, or natural guardian; (3) *nafa mahaz*, acts which are purely advantageous to the infant, such as accepting presents or gifts, and keeping them for him, a power which may be exercised either by a brother, or an uncle, and also by the infant himself, provided he be possessed of discretion, the intention being only to open a door to the infant's receiving benefactions of an advantageous nature (Mahmood 2005:119-120).

The judges of the Privy Council held that though under the second category an un-authorised person can deal with a minor and his property but nowhere it empowered the un-authorised person to sale the immovable property of the minor. The Privy Council further held:

> ...even where the mother believes that she has been vested with authority as her husband's executrix and in that belief purports to deal with the minor's property, a purchaser let into possession by her is liable to be ejected at the instance of the minor. (Mahmood 2005:224).

The Privy Council's bench, finally, held that under the Muslim law a *'de facto'* guardian has no power to convey to another any right or interest in immovable property. The transferee, therefore, should not be allowed to enter into the possession of a property under such an unauthorised transfer being obtained title from a person who does not have the title either.

It is mentioned above that the traditional understanding of Islamic law does not empower women to be legal guardian of her child instead requires her to be a mere custodian up to certain age, depending on the sex of the child. In the above case the Privy Council had clearly endorsed the orthodox understanding that in no way a mother could be the legal guardian of a child even in absence of male relatives, i.e., father, grandfather and so forth. Even the Privy Council had not recognised mother as *'de facto* guardian of a minor child by observing that the concept of *'de facto'* guardian under Islamic traditions is misleading. She had been considered merely as

a custodian. It is interesting to see that though in some cases, cited later, the Privy Council had applied the principle of equity in this matter it endorsed the orthodox understanding in *toto*. This decision of the Privy Council had also been followed in the later cases.[16]

Section 3: Economic right[17] of women and the Privy Council

Unlike the issues relating to legal authority of women the Privy Council acknowledged that Muslim women ought to be granted their economic rights arising out of marriage under Islamic law. The later laws following codification which allowed for maintained to divorced wives under the *Code of Criminal Procedure, 1898* seemed to have been enacted with the view to prevent divorced women from destitution and prostitution. In early colonial law, we see that in the suits relating to dower the highest court of colonial India repeatedly declared that dower is the right of the wife and she can retain the property of the husband after his death if the dower demand is not satisfied. In addition, the Privy Council held that a wife would be entitled to take recourse to the court any time to realise her dower and her right will not be barred by the law of limitation. In this regard *Ameer-oon-Nissa and others V. Moorad-oon-Nissa and others*[18] might be the leading suit where the Privy Council encountered the question whether a woman can retain the property of the deceased husband to satisfy her dower demand. It was brought by one named Seyud Abdoollah in 1843 (after his death he was represented by his heirs in the Privy Council) in the Zillah court of the Principal Sadar Ameen of Moradabad against Moorad-oon-Nissa and other respondents. The appellant argued that he was the full brother of Seyud Moostefah, the husband of Moorad-oon-Nissa. He sought to obtain possession of the Zamindaries: estates and tenements, gardens and lands of the deceased in the District of Mooradabad. He alleged that the respondents had taken possession of the whole of the moveable as

---

[16] *Mohammad Ejaz Hussain and another V. Mohammad Iftikhar Hussain and others*, AIR (1932) PC, 76.

[17] I borrow this term from Agnes (1996) who mentioned that dower is a right of woman provided by Qurān. In addition, I would like to call it economic right of women in the sense that dower is considered as personal debt of the husband to the wife as well as right of the wife. There are numerous judicial decisions in the post-colonial South Asian countries where dower has been recognised as right of the wife (see Rahman 2008).

[18] 6 (1855) MIA, 211.

well as immovable property. In addition, the appellant preferred a claim that Moorad-oon-Nissa was not the wife of Seyud Moostefah.

Moorad-oon-Nissa alleged, on the contrary, that she had had a deed of dower executed in her favour by the deceased on a stamp paper stipulating a dower of Rs. 46,000/-. She further, claimed that there is a rule which the *Shia* sect observes, that if an endowed widow took possession of the estate of her husband a residuary claim could not be entertained; it was also a maxim that, as the dower gave the wife a lien on the property a residuary claim, therefore, could not be entertained by a court. She, further, submitted that the disputed property constitutes the estate of the deceased, and that the plaintiff as the heir would have been entitled to take the same had she not had a claim for her dower.

The court of the first instance decreed the suit and the plaintiff appealed to the Sadar Diwany Adalat. Benjamin Tayler, the judge of this suit, called for a fatwa from the *Mufti* on this point. The *Mufti* replied that in Islamic law if any person has claim against another and the debtor did not pay the debt the creditor is competent to take the possession of the property of the debtor. Under this doctrine of Islamic law, according to the *Mufti*, a widow is competent to hold the property to satisfy her dower claim by using the effects of the property (IA 1855:220). The Sadar Diwany Adalat endorsed the opinion of the *Mufti* in *toto*: "as the *Mufti* of the court has given his fatwa, clearly and distinctly, declaring that the respondent is competent to hold possession of the property, the court cannot interfere" (IA 1855:221).

In the appeal to the Privy Council the appellants raised few objections: (a) the respondent failed to establish two material facts: her marriage with the deceased and the genuineness of the deed of dower executed, allegedly, in her favour, (b) the dower was not demanded within twelve years as required by the law, and (c) the amount of dower was excessively mentioned in the dower deed. Therefore, in no circumstance, according to the appellant, the decree stands. The appellant further claimed that the Court ought to have directed a portion of the real estate to be sold and after payment of the dower to the defendant and other creditors the surplus ought to have been handed over to the appellants. A total dismissal of the suit was, therefore, probably, wrong.

The existence of marriage was proved before the Privy Council but it was dubious about the amount of dower considering the social status of the respondent. The sum of Rs. 46,000/- for dower seemed, according to Privy Council, excessive. Nonetheless, the Privy Council's bench held that "it is not absolutely improbable that he should make a very liberal provision for her by way of settlement" (IA 1855:226). Finally, after considering the deposition of the witnesses the judges of the Privy Council opined that the marriage and the deed must be held to be established. As a result the Privy Council upheld the decision of the first appeal court that the respondent is competent to hold possession of the property of the deceased.[19]

On the point of limitation the Privy Council's bench sought to make a distinction between a dower deed and other promissory note being commercial in nature in the following language:

> ... and it is important to consider how inconvenient it would be if a married woman was obliged to bring an action against her husband upon such an instrument; it would be full of danger to happiness of married life; and we think, upon the true construction of this settlement, she had a right to sue without a previous demand, and that she was not obliged to sue her husband immediately or in his lifetime (IA 1855:229).

The Privy Council explained the nature of dower, extent of widow's right of dower more clearly in the later cases. For example in the *Hamira Bibi V. Zubaida Bibi*[20] the highest judicial body of the British India held dower to be considered as debt of the husband. It not only empowered the wife to keep possession of the land of the deceased husband until her dower demand is satisfied but also advocated for interest on the dower money if payment of that is delayed. Let us turn to a case published in Indian Appeals in 1916.

The fact of the suit, in short, was that one Shaikh Inayat Ullah, an inhabitant of the district of Gorakhpur, in the United Provinces of India died in 1892 leaving a widow and daughter, named respectively Zubaida Bibi and Najm-un-nisa, a sister

---

[19] It is important to note that the interpretation given in this judgment that dower is like debt of the husband and the wife is entitled to retain the property or sale the property to satisfy her dower demand was given as fatwa by the Mufti (spelt in the judgment as Mooftee) who was attached to the court. Therefore the allegation that "native" law officers were misleading the court, as it is mentioned in the first chapter, is little substantiated.

[20] 43 (1916) IA, 294. Also cited in Mahmood (2005:109).

named Hamira Bibi and two brothers. Since Zubaida Bibi was entitled to her unpaid dower, in addition to widow's share, other heirs of Inayat Ullah allowed her to remain in possession of the whole property to satisfy her claim. This suit was instituted in 1906 in the court of the Subordinate Judge of Gorakhpur by Hamira Bibi and others for (a) a decree in favour of the plaintiffs to recover their respective shares if the dower debt was found to be discharged and (b) for an award to the plaintiffs of any sum found to have been received by Zubaida Bibi in excess of her dower. Zubaida Bibi in her defense, among others, pleaded that the income of the property was less than the interest she had claimed and therefore the dower debt is still unsatisfied. As a result the plaintiffs were accordingly not entitled to recover possession of the said estate.

The subordinate Judge, who tried the suit in the first instance, considered that the defendant was entitled to interest at 6 per cent per annum on her dower. Since the interest exceeded the annual net income from the estate no portion of the debt, according to the subordinate court, was discharged. As a result he dismissed both the suits. In the appeal the High Court at Allahabad expressed the same view as to the right of the widow to receive interest but did not agree on the point of total dismissal of the suits. It, instead, modified the decree of the subordinate court to hold that the plaintiffs should recover possession of their respective shares in the estate provided they paid to the defendant their quota of the dower debt proportionate to such shares.

From this decree the appellant filed this appeal to the Privy Council and the sole question for determination was whether the defendant Zubaida Bibi was entitled to any interest or compensation in respect of her dower unpaid at the time of her husband's decease. The judicial committee of the Privy Council, first, sought to discuss the term 'dower' in a more extensive way:

> ...dower is an essential incident under the Muslim law (spelt in the judgment as Mussulman law) to the status of marriage. Regarded as consideration for the marriage, it is, in theory, payable before consummation; but the law allows its division into two parts: 'prompt'-payable before the wife can be called upon to enter the conjugal domicile; and 'deferred' payable on the dissolution of the contract by the death of either of the parties or by divorce. Naturally the idea of payment of interest on the deferred portion of the dower does not enter into the conception of the parties. But the dower ranks as a debt, and the wife is entitled, along with other creditors, to have it satisfied on the death of the husband out of his estate. Her right, however, is no greater than that of any other unsecured

> creditor, except that if she lawfully, with the express or implied consent of the husband, or his other heirs, obtains possession of the whole or part of his estate, to satisfy her claim with the rents, she is entitled to retain such possession until it is satisfied. This is called the widow's lien for dower (Mahmood 2005:112-3).

On the issue of interest of the dower debt the Privy Council's bench observed that in absence of clear agreement that the widow will not get any sum in excess of her dower she will be entitled to a reasonable compensation at least for her labour as well as responsibilities that were imposed on her for proper management of the estate:

> ...when a widow is allowed to take possession of her husband's estate in order to satisfy her dower debt with the income thereof, it is either on the basis of some definite understanding as to the conditions on which she should held the property. If there is an agreement, express or implied, that she should not be entitled to claim any sum in excess of her actual dower, she must abide by its terms. But where there no such agreement and a claim is made as in the present case, the question arises whether, on equitable considerations, she should not be allowed some reasonable compensation, not only for the labour and responsibility imposed on her for the proper preservation and management of the estate but also for forbearing to insist on her strict legal right to exact payment of her dower on the death of her husband (Mahmood 2005:113).

The judicial committee of the Privy Council therefore upheld the decision of the subordinate courts.[21] It is pertinent to mention here that this decision of the Privy Council has been followed still today in the courts of this subcontinent (see Rahman 2008). Having recognised the widow's right to retain the possession of property of the deceased husband if the dower is unpaid, the Privy Council also in *Syed Sabir Husain and Another V. Farzand Hasan and Other*[22] required the father of the husband, as natural guardian, to meet the dower demand. Having considered Muslim marriage as a civil contract the highest British judicial body held that father has liability to pay the dower in the case where his son is not able to pay the dower to his wife.

Let us turn to the suit which was filed by the parents, as heir, to realise the dower on behalf of their deceased daughter. Fact of the suit, in brief, was that the

---

[21] It is important that in this suit the idea of dower and the widow's right to lien had been discussed elaborately. Nevertheless by this judgment the Privy Council's bench had considered dower debt of the husband like other commercial debt, i.e., debt to a bank. It is further noteworthy that no where in Islamic law dower is considered as a commercial debt of the husband upon which an interest may be calculated. It is rather a token of gift from the husband which shows the respect to the wife.

[22] 65 (1937-38) IA, 119.

appellants as heirs brought a claim in the trial court for recovery of one-third share of the dower money payable to their deceased daughter who was married to one S. Farzand Hasan. At the time of marriage the husband was a minor having no independent means to pay the dower. The appellants brought the action after death of the father of Farzand Hasan and claimed share of the property of the deceased with other co-shearer as the dower demand was unpaid. The question therefore arose whether under *Shia* law dower debt due to the wife was payable out of the father's property.

The court of the first instance answered the question in the negative, so did the High Court. In addition, the High Court, interestingly, held that though there is a rule in the *Shia* law that if the child is poor the obligation to pay the dower lies entirely to the father it had no application in the present case since it ceased to be determined under the Islamic law due to section 37 of the *Bengal, Agra and Assam Civil Courts Act* (XII of 1887). It, further, held that the question being not related to 'any religious usage or institution' it would be inequitable to hold a guardian or his assets responsible for a liability arising from a civil contract in absence of an express agreement to that effect (IA 1937:124-5).

The Privy Council, however, expressed its disagreement with the view taken by the High Court by observing that the right of the wife to her dower is a fundamental feature of the marriage contract and has a pivotal place in the domestic relation affecting the mutual rights of the spouse. It also observed that the mere principles of the *Indian Contract Act,* 1872 are insufficient to account for the law of dower (IA 1937:126). The judges of the Privy Council further opined that none but the Islamic law which gives a guardian power to bind his infant ward by a personal covenant; as a result all the sharers were ordered to pay the dower debt in proportion to their share in the property. In the words of the Privy Council:

> ...the father's power as natural guardian to do so in respect of dower is the creature of the Mahomedan law of marriage and the judges of the High Court invert the true position when they proceed upon the view that there is no rule of general law which makes a guardian liable as surety when he enters into a contract on behalf of his minor son at the time of marriage (IA 1837:128-129).

However, in few cases the Privy Council reduced the amount of dower on the plea that it was stipulated in the dower deed excessively as well as against the principle of justice and equity. For example, in *Mulkah Do Alum Nowab Tajdar*

Bohoo V. Mirza Jehan Kudr, Nowab Mirza Zuman Ara Begum and Rufaatoonissa Begum[23] the Privy Council reduced the amount of dower on the ground that it is common in India to stipulate huge amount as dower in the marriage deed.

This was an appeal brought by the widow of late Mirza Secunder Hushmut, a brother of the late King of Awadh against certain decisions which had been pronounced by the Judicial Commissioner of Awadh on a claim preferred by her for dower. The marriage between the appellant and Secunder Hushmut took place in the year of 1838 and dower was fixed at a crore of rupees. Secunder Hushmut came to England after overthrow of the Awadh dynasty and died there. He left a son, an adopted son and two daughters surviving him. The widow claimed that her dower ought to be treated as a debt due from her husband's estate and to be paid simultaneously with the debts of the other creditors. The respondents however claimed that property of the deceased should be distributed equitably in a way that they would get their share of inheritance. It is noteworthy that total amount of property of the deceased, allegedly, was less than the dower claim.

The suit came first to the Deputy Commissioner and to the Assistant Commissioner in the Lucknow District Court which held that the deed of dower is genuine and the dower debt will take precedence over the claim of inheritance. In addition, the court opined that under the *Punjab Code of 1854* the court was at liberty to distribute the property according to equity: a sum should be paid to other heirs as their maintenance and then the rest of the property should be given to the appellant in lieu of her dower. The appellant then appealed to Colonel Abbott, the Commissioner Superintendent of Lucknow division, objecting that the case had not been decided according to the Islamic law. In addition, she also preferred a claim that she was entitled to the whole estate of her deceased husband unless her dower claim is satisfied. Colonel Abbott, however, dismissed the appeal after expressing his discomfort with the idea of dower:

> ... I regard these dowers as a very great evil. There is no doubt that large sums are specified in these dower deeds with a view to preventing separation on trivial occasions...by the Mahomedan law, however, there can be no doubt that the claim of dower will take precedence of all claims of heirs and must be satisfied before any claims of the sort can be admitted. They rank with debts and would be paid in proportion to assets available. The Punjab Code makes a deviation from this, and

[23] 10 (1865), MIA, 252.

> leaves it in equity and justice to make some provision for the heirs. This is undoubtedly a most humane and just provision for heirs...in Oude (as spelt in the judgment) we are not bound to law, but to equity and justice; and I think the arrangement proposed by the Deputy Commissioner for providing for members of this family is most just and reasonable (MIA 1865:263).

Again an appeal was preferred to Campbell, the Judicial Commissioner of Awadh who directed to divide the property among the heirs of the deceased after paying the debts of the deceased: that one-half of the remaining property should be paid to the widow against her dower claim and the other half to the other heirs, i.e., respondents. This decision was appealed to the Privy Council. A great question, i.e., whether the provisions of the *Punjab Code of 1854* will supersede the Islamic law had been raised. The arguments of the Attorney-General and Mr. Leith for the appellant are worthy of taking into account:

> ...the Kingdom of Oude being a Mahomedan country and the Mahomedan law the *lex loci* at the time when it was annexed to the British dominations, the Judicial Officers appointed ought to have administered that law and that the Government had no power to import into Oude a Code made for another Province in which the Mahomedan law is not in force, until such law was formally abrogated and some other law substituted by competent authority. ...the Kabeenamah or deed of dower, sued on by the appellant, was made in consideration of marriage while Oude was still a Mahomedan Kingdom; and so, even if, after annexation by the British Crown, a new law had been introduced by the competent authority and substituted for the *lex loci*, it would have been unjust to the appellant to give a retrospective effect to such new law, so as to deprive her of her rights as a Mahomedan widow, or so as to alter or limit the effect and operation of the deed under the l*ex loci* or Mahomedan law (MIA 1865:264).

Mr. Forsyth, Q.C. and Mr. Ayrton for the respondents, however, opposed the propositions of the appellant's counsels and argued in favour of the application of the provisions of the *Punjab Code 1854*:

> ...it cannot be disputed that the kingdom of Oude is a conquered country. It was occupied by the British army, and by Proclamation declared vested in the British Crown, which constituted a complete act of sovereignty. That being so, it is a cardinal principle of the law of nations that the conquering power has a perfect right to alter the law of the conquered country. Here the Government of India in the Dispatch of the 4th of February, 1856, exercised the power of conquerors in extending to Oude the provisions of the Punjab Code and directed that the law to be administered by the Judicial Officers in Oude should be the Punjab Code of 1854, except in certain cases of local usage. That Code has been acted upon in other cases in regarding questions of Mahomedan law (MIA 1865:266-7).

It is significant that the *Punjab Code of 1854* provided that "among Mahomedans it is usual, as a safeguard against capricious divorces to stipulate for

an amount of dower far beyond the means of the bridegroom to pay, that as such contract if enforced by a Court would ruin a defendant, damages should be awarded to the wife in proportion to the means of the husband" (MIA 1865:267). The Privy Council opined that nothing but that the Punjab Code should be the basis for the administration of justice in the Awadh:

> ...the effect of these clauses is that the principles of law as well as the rules of procedure laid down in the Punjab Code are to be adopted as the basis of the administration of justice in Oude and to be applied as far as they may appear to the Commissioners to be not unsuited to the circumstances of the country; but that as far as they are founded upon local customs, varying the general law, whether Hindoo or Mahomedan, they are not to be applied to Oude, where the local customs would probably differ from those of the Punjab..... The Indian mutiny which broke out in the following year probably prevented any report being made by the Commissioner, in compliance with the directions of the 46th section, but after the restoration of the British authority, we find in the official report of the administration of the Province of Oude for the year 1859-60, that the Punjab Code is stated to be the basis of the Civil Law of the country and allusion is made to some modifications which have been introduced in it but it does not appear that any such modification related to the subject now in controversy (MIA 1865: 275-6).

Finally, the judges of the Privy Council held that "there is no doubt that the *Punjab Code* was in force at the time of the date of the orders and the commissioners were bound to apply the provisions of this code", further "the commissioners were at liberty to exercise a discretion in the division of the property in dispute between the widows and the heirs (MIA 1865: 277 and 279). In addition, the Privy Council observed that the application of *Punjab Code*[24] might be suspended if there have existed special custom; however no such custom was found and the appeal had been dismissed.

A similar application of the principle of equity has also been manifested in *Prince Mirza Suleman Kadr V. Nawab Mehdi Begam Surreya Bahu.*[25] In short, the parties were husband and wife governed by the *Shia*[26] sect. The respondent filed a

---

[24] In the year 1847-8 few rules for civil judicature were promulgated by the Indian Government for the guidance of the officers employed for ceased and transformed states. These rules were extended to Punjab in 1849. These rules were amended later and were printed as a code titled 'Abstract Principles of Law'. It was circulated for the guidance of officers employed in the administration of civil justice in the Punjab. These amended rules were termed as 'Punjab Code' later by the British judges.

[25] 20 (1892- 93), IA, 144.

[26] Spelt as *shiah* in the judgment.

suit to recover her dower settled by the appellant at the time of their marriage. The respondent claimed that the dower was fixed at Rs. 10 lakhs and Rs. 150/- was fixed as her daily expenses. The appellant admitted the marriage as well as execution of the marriage deed. In addition, he claimed that 'the enormous amount of dower was entered in the deed of marriage simply to enhance the honour of the respondent' (IA 1893:145). He alleged that the amount of dower being Rs. 10 lakhs is invalid by reason of the total amount being indeterminate and the respondent therefore entitled to her legal dower of 500 *dirhams* (about Rs. 105/-). He alleged further that his income did not exceed Rs. 2933/- monthly and that the value of his other properties, immoveable and moveable, was about Rs. 50,000/- (IA 1893:145).Therefore the issue before the court was whether the amount of dower agreed on was excessive considering the means of the husband as well as the status of the wife; if so what was a reasonable amount?

The District Judge decreed the suit and ordered to pay Rs. 25,000/- as dower for present and future by observing that "the agreed amount was plainly fixed for show" (IA 1893:145). In the appeal, the Judicial Commissioner upheld the decree with an order to pay monthly payment of Rs. 150/- in addition to the dower money since the date of the decree. The decision of the Commissioner was appealed to the Privy Council; the validity of the dower being excessive was contested. In addition, the appellant contested the order of the Commissioner to pay additional amount on the ground of absence of sufficient reason given by the Judicial Commissioner. Privy Council, however, ruled out the claim, as the subordinate court did, of the appellant that he is not liable to pay any dower. Therefore there arose no question except as regard to the amount to be paid by the husband to the wife.

The bench of the Privy Council held further that "it is so common a thing among Muslims in this part to put into marriage contracts as dower an excessive amount than the husband can pay or than the wife expects to receive" (IA 1893:147). The Privy Council's judges, therefore, endorsed that the District Judge looked at the case as a whole and considered what payment would be reasonable to substitute for the entire contract. It appeared to the judges of the Privy Council that the District Judge took the course indicated by the statute, in considering whether the dower as a whole was excessive in reference to the means of the husband.

Therefore, the Privy Council's bench preferred to maintain the decree of the District Judge, because he seemed to have addressed his mind most directly, according to the Privy Council, to that which the *Awadh Act* requires.[27]

It is pertinent to mention here that in *Saungra Bibi V. Masuma Bibi* (1878-80) a similar case, where the whole property of the deceased husband was less than the dower amount, the Allahabad High Court held that the wife will be entitled to the whole amount of dower irrespective of the fact that husband's asset is less than the dower amount (see Agnes 1996). Therefore, one might say that the Privy Council's judges failed to take into account the fact that in the Islamic traditions dower has been considered a check on arbitrary oral divorce by the husband (see Agnes 1996). They perhaps failed to distinguish between the concept of dower in English tradition and that of Islamic traditions too. Dower in the former case means the widow's right to be maintained from the property of the deceased husband while in the latter tradition the right arises at the time of marriage not at the time of widowhood (see Agnes 1996). Treating dower as consideration of Muslim marriage being its contractual nature is, one might say, a misconception. Being a gift from husband to the wife fixation of amount of the dower depends on status of the wife rather on ability or amount of property of the husband. Therefore, one cannot allege that the amount of dower is unbearable or excessive to him once it is fixed at the time of marriage. Moreover, in the two cases, mentioned above, both the parties were from noble background. Therefore, their social status does not substantiate the argument put forward that the amount of dower was mentioned excessively which was approved by the Privy Council. A general apprehension that 'mentioning excessive dower is a common feature in Indian society' is, one might say, a reflection of oriental construction of India as well as Indians.

Sharafi sought to defend the Privy Council's judges by observing that "in the few cases the British judges reduced the amount of dower since it fell under the *Oudh Laws Act (XVIII) 1876,* where the judges were allowed to fix a reasonable amount of dower if it appears that the dower was fixed excessively beyond the means of the husband and status of the wife" (2009:69). In addition, Sharafi (2009)

[27] In the said Act it was required that if in the marriage contract the amount of dower is mentioned excessively beyond the means of the husband the entire amount shall not be awarded in any suit in favour of the plaintiff (IA 1893:147).

sought to argue that the British judges tried to protect Indian women from the provisions of the *Awadh Act.* Her study, however, was based on the review of cases of the High Courts which was affirmed by the Privy Council. The judges of the Privy Council upheld the decisions of the sub-ordinate courts, perhaps, not only due to the *Awadh Act* but also from their distrust on Indian women; that is women are capricious to get divorce due to huge amount of dower. In addition, their ignorance of the Islamic legal traditions, it appears, also drove them to reduce the dower amount by applying the principle of equity.

Conclusion

I have argued that the Privy Council, on the one hand, institutionalised the inherent inequality of the Islamic personal law relating to authority to divorce and strengthened the prerogative of the husband by emphasised on the intention of the husband on the other. I have also argued that the idea of intention to divorce made the 'pronouncement' of the *talaq* by the husband central to be determined in the suit related to divorce, which culminated in approving the idea of the triple *talaq* being shows the clear intention of the husband to repudiate the marital tie. In addition, I have argued that the Privy Council failed to understand that by stipulating the period of *iddat* immediately effective divorce, actually, had been prohibited. Therefore the idea of the triple *talaq* is, one might say, a misunderstanding. I have further argued that the Privy Council put forward as well as institutionalised the notion that women has no legal authority to repudiate the marital tie be it the *Khula*; in the *Khula* divorce though wife has an option of bargaining actual *talaq*, according to Privy Council, comes from the husband. On the matter of legal authority I have also argued that the Privy Council, relying on the traditional texts, institutionalised the understanding that the women in no way could be the legal guardian of a minor child. Furthermore, on the matter of economic right of women arising out of marriage I have argued that the Privy Council failed to understand the nature of marriage as well as dower. The Privy Council put forward an idea that dower is simply consideration of a marriage contract. Their understanding of marriage, under Islamic traditions, as a contract led the British judges later to provide a legal remedy to the husband where wife refused to live with husband under the banner of suit for 'restitution of conjugal rights' (see Rahman 2008). The

understanding that women has no authority to divorce as well as that the women cannot be the legal guardian of a minor child led the judges of the post-colonial South Asian countries to take orthodox interpretation of Islamic law especially when the economic right of women became the central point of a litigation (see Rahman 2008).

This understanding of the Privy Council, however, comes under criticism heavily nowadays especially by the post colonial feminist scholars. They have argued that such type of judicial interpretation was an outcome of the colonial judge's adherence to the 'domestic ideology' developed in Britain. It is pertinent to mention here that in the early nineteenth century gendered based difference had got rigour in Britain with the resurrection of the idea of 'domestic ideology' which establilshed the idea that biological difference defined a fundamental difference between men and female. Also that women are fragile, weak, and emotional and the man is biologically strong, intellectual and active thereby essentialising different patterns of behaviour between man and woman. This ideology further advocated that men's nature mandates that they work in the public sphere and women nurture their husbands and children (Metcalf 1995). It is significant that the 'domestic ideology' is, to some extent, deployed to make 'reasonable classification' by the post colonial judges in India. In the *Darwaka Bai V. Prof. Naiman Mathews*[28] it has been observed that inequality among sex based on biological difference in the personal law is based on reasonable classification. In this suit section 10 of the *Indian Divorce Act,* 1869 had been challenged on the ground of its being discriminatory to the Indian constitutional guarantee of equality before law, that is it does not empower the women to divorce the husband on the ground of adultery only as it does so the husband. The court observed:

> ...I consider that section 10 as it stands, is not prima facie repugnant to articles 13 and 15 of the Indian Constitution. It appears to be based on a sensible classification and after taking into consideration the abilities of man and woman, the results of their acts and not merely based on sex, when alone it will be repugnant to the Constitution.

Besides social structures, as Nair argues, discrimination of women is also supported by the ambiguities of "legal-juridical framework" (1996:4-5).

[28] AIR (1953), Madras, 792. My acquaintance with this case is from B. Sivaramayya (1972:70-1) and Cossman & Kapur (1996:74 -7).

Particularly the constitutional guarantee of the post-colonial south Asian countries to the freedom of religion leaves the personal law untouched where, according to Nair (1996) discrimination of women is commendable especially in the matter of property, guardianship and custody of children. Mackinnon, however, argues that the 'sameness' and 'difference' approach of the judiciary responsible for discrimination of women. Mackinnon argues:

> ...under the sameness rubric, women are measured according to correspondence with man, their equality judged by proximity to his measure. Under the difference rubric, women are measured according to their lack of correspondence from man, their womanhood judged by their distance from his measure (mentioned in Nair 1996:7).

She advocates, instead, for substantive equality which will take the suppression and oppression against women, historically, into account (see Nair 1996).[29] Nair, in addition to Mackinnon, argues that "in a multicultural land like India where theorising 'difference' is a difficult job the neutrality of the institution will perpetuate these historical disadvantages as the colonial interregnum did it which is manifested in its dealing with personal law; legally ensuring the women's subordination" (1996:7).[30]

Judicial activism in India towards protection of women rights has been classified by Cossman and Kapur (1996) in three ways: formal equality approach, substantive equality approach and gendered based approach. In the formal equality approach women are considered as same as men and therefore the judiciary sought to invalidate any law which creates discrimination between men and women, i.e. equal payment under labour law. Substantive equality requires that the court will take into account social, historical backwardness of the women, i.e., protection of women from the so called judicial remedy of restitution of conjugal rights since the law favours men. Finally, in the gendered based approach, the court sought to protect the women from discrimination based on biological difference, i.e., ensuring maintenance for women in the sense that biologically women are inferior to men which creates division of labour within the family being that men will work outside

---

[29] Kapur and Cossman (1996) call it 'formal equality'.

[30] Cossman and Kapur (1996) call it 'protectionist approach of the judiciary'.

and will earn money while women will rare children as well as will do household works. The duty to maintain women therefore lies with men.

Gendered base discrimination, one might say, has been institutionalised through judicial activism under the guise of institutional neutrality (see Nair 1996). The judges of the Privy Council, it appears, also kept silent and thereby contributed to rationalise the gendered base discrimination in the realm of Muslim personal law, perhaps, to appease the Muslim patriarchs in India. It appears that the highest colonial judicial body did not interfere in one issue only: women's unequal position in the Islamic traditions on the excuse of its being religious which the colonial authority promised not to interfere. Privy Council's dealing with the issues relating to dower, divorce, marriage and guardianship shows that it had institutionalised the apparent unequal position of women in the Islamic family law. Especially, in the matter of divorce and guardianship the Privy Council unequivocally projected women as the object of law.

Chapter Four

British Governance Policy and Interpretation of Islamic Family Law

Introduction

The British policy in India regarding administration of Islamic law was, Fyzee (2009) argues, dictated by three considerations: firstly, they did not want to interfere with the personal matters of the "natives" regulated by the law of religion, secondly, to maintain social security in order to facilitate trade and thirdly, absence of desire to influence the religious susceptibilities of their subjects. These propositions, one might say, have its root in the Hastings's Plan of 1772 by which the policy of non-interference in the administration of religious law had been adopted. It is important to note that this policy had also been re-iterated in the different times by different regulations, i.e., *Cornwallis's Code* of 1793. Despite the reservation on the issues regulated by religious law one cannot simply rule out the interference of colonial power, through judicial interpretation, in this realm of personal law.

It appears that the highest colonial judicial body interpreted the Islamic law in a way that would support the colonial governance policy in India in the long run. The most contested issue in the realm of Islamic family law in India during the period between 1894 and 1930 was the family endowment (*waqf*), the idea of which was, according to Kugle (2001), against the British jurisprudence of private property. It is seen that when the legitimacy of family endowment was contested the Privy Council took the position against family endowment which one might say, supports the colonial policy in India. In addition, it is also seen that the Privy Council interfered in the administration of personal law in a case involving the question of right to custody of a minor girl despite the fact that the case should be dealt according to Islamic law since the defendant being a Muslim. Furthermore, it is seen that the colonial authority was in dilemma over the administration of Islamic law particularly on the question of independent judicial interpretation. One might

say that the colonial authority contributed to stagnation of the progress of norms of Islamic law through the judicial interpretation by two ways: (a) by withdrawal of the native law officers from the courts and thereby took the administration of Islamic law in their own hands, and, (b) by closing the door of independent judicial interpretation of Islamic law.

In this chapter, I have chosen the judgments in which, legitimacy of family endowment, the right to custody of minor child of a converted woman and women's right to post-divorce maintenance were the central question to be determined. The aim is to look at how judicial decisions of the Privy Council corresponded to the colonial governance policy in India. The aim is also to demonstrate that colonial plea of protection of rights of women, as I have discussed in chapter three, was merely rhetoric. Now I turn to the case relating to family endowment which generated a huge political unrest in the British India.

Section 1: On the question of family endowment

One of the ideals, it appears, of the British domination over India was to introduce, encourage and secure the idea of private property (see Metcalf 1995; Powers 1989). The understanding that 'landholders are proprietors' contributed to enforce a permanent settlement policy of land in India by the British colonial authority. The British policy of permanent settlement of land was considered as an alternative to the company's agrarian policy in Bengal up to 1785 as well as a measure to ensure the right of private property in the land (Guha 1981). Guha argues that the fundamental objectives of the idea of permanent settlement in land were that "this would ensure possibility of the *raj* to strike its root deeply: will create a loyal beneficiary class, will encourage the idea of private property and will create a land-market to stimulate agricultural improvement" (1981:18).

There were many champions of the idea of permanent settlement of land in India of whom Alexander Dow, Henry Pattullo and Philip Francis are significant to this history. Dow thought that establishing an idea of property being absent in the pre-British India is foundation of public prosperity (see Guha 1981). According to Dow the sense of private property did not develop in India because under the Islamic dynasty all property belongs to the crown (see Guha 1981). Absence of the sense of private property, Dow thought, caused insecurity which is one of the major

causes behind the ruin of Bengal.[1] Therefore his was a proposal of establishing landed property: that all lands should be sold on permanent basis i.e., permanent settlement (see Guha 1981). Pattullo, another exponent of the idea of permanent settlement, recognised economic value of the land in terms of capitalist development of agriculture and opined that security in the proprietary rights would encourage a large amount of investment in the land (see Guha 1981).

After Dow and Pattullo, the person who had played the pivotal role to translate the policy of permanent settlement of land into practice is no other than Philip Francis. General sate of decay of the state economy, the failure of the farming system, the decline in revenue and the currency problem, perhaps, influenced Francis to produce a plan for a settlement of the revenue of Bengal, Bihar and Orissa in 1776 (see Guha 1981). The plan has been considered by Guha not only as a "practical" solution of fiscal problem only but also as a task of "forming and restoring the Constitution of an Empire" (1981:90-2); it laid down not only a proposal related to economic questions but also on the British policy in India relating to sovereignty, distribution of power, legitimacy of English rule in India and so forth. Guha further opines that Francis had had an occasion to formulate and express his plan on the "permanent settlement in the country" in the guise of "permanent settlement of revenue problem" (1981:90-2).

Francis was influenced, to Guha (1981), by 'Physiocrates' thought of economics to whom land was the source of all wealth. In formulating the concept of 'theory of value' the Physiocrate's thought had placed the 'private property' in land over all other considerations. The economic thesis of Francis, as according to Guha (1981), had resemblance to the model of the Physiocrates. Therefore, the recognition of the right of Zamindars in Bengal over the land was considered as the first thing to build the edifice of his mission. The property rights of the Zamindars over the land in the pre-British India were considered by Francis as 'feudal system' being the fact that the Emperor was only the proprietor. Therefore there were two objectives of the Francis's Plan of 1776: to establish property rights of the

[1] Violence of the company's troops in the country side, monopoly of the company's servants in the internal trade, insecurity being uncertainty of holding lands beyond one year and so forth were considered as other fundamental causes.

Zamindars over the land as well as to encourage the idea of private property and to ensure the revenue (see Guha 1981).

As an anti-feudal measure Francis's plan was, according to Guha (1981), to distribute the landed property in the hands of greater number of people. Therefore, he resorted to adhere to the Hasting's proposal that the large Zamindari should be divided and the small should be preserved in entire. Francis required a new law of inheritance, instead of the rule of primogeniture customarily held for the larger estate, by which the great Zamindari would be divided equally among all the sharers and the small one will be descended to the eldest on conditions. This policy was a solution between two extremist ideas of the Physocratic School: against and in favour of the abolition of aristocracy in the landed property being on the consideration that this policy would not abolish the primogeniture policy altogether rather will prevent its abuses (see Guha 1981). Francis's policy of Permanent Settlement finally came into being in 1793.

It is important to point out that Francis was looking for a new inheritance law which will encourage distribution of property to a greater number of people. Despite the Islamic law of inheritance, notably, the rule of primogeniture had been followed customarily in India. It was not like the family endowment, i.e., *waqf*. Though, unlike Algeria, family endowment was not popular in India the colonial authority considered it as a threat to their policy of distribution of land into many hands (see Powers 1989). Therefore when the question involving legitimacy of family endowment came to the Privy Council it took position against it and thereby contributed to fragmentation of property under the Islamic law of inheritance (see Powers 1989). *Abul Fata V. Russomoy Dhur Chowdhury*[2] is a leading suit in India in this regard which was filed to the civil court to establish a settlement of property by a deed as a valid *waqfnama* (spelt as *waqfnama* in the judgment). The settlers were two brothers named Abdur Rahman and Abdool Kadir. The appellant was the son of Abdur Rahman to whom interest were given by the settlement. The notable feature of the settlement as it was mentioned in the deed that future *Mut'awallis (*manager*)* shall always be chosen from the male issue of the settlers, or if they fail,

[2] 22 (1894) IA, 76. My acquaintance with this suit is from Mahmood (2005:332).

from their relatives. In addition, in the end of the deed the object of the settlement was again stated as:

> ...the object of this *waqf* of properties is that the properties may be protected against all risks, the name and the prestige of the family maintained, and the profits of these properties appropriated towards the maintenance of the name and prestige of the family, the support of the persons for whose benefit the *waqf* is made, and religious, purposes (Mahmood 2005:333).

The subordinate judge held that the settlement was valid as a *waqfnama* and accordingly decreed in appellant's favour. On appeal the High Court took a different view and dismissed the suit on the ground that it was made for the interest of the family:

> ...a small part of the property had been well devoted to charity, but that as to the bulk of it, the settlement was, notwithstanding some expressions importing a *waqf*, in substance nothing but a family settlement in perpetuity, and as such contrary to Mahommedan law (Mahmood 2005:334)

Having adopted the findings of the High Court, the Privy Council held that in this settlement "the poor had been put into merely to give it a colour of piety to legalise arrangements" (Mahmood 2005: 336). Since the charity was not properly reflected in this settlement the Privy Council dismissed the appeal.

This decision, however, became a political issue later and the Muslim thinkers saw it detrimental to the wealth and power of Muslim families in the British India (see Powers 1989). As a result in 1913 by the *Mussalman Wakf Validating Act* the enforcement of the decision of the Privy Council had been suspended. It is worth mentioning that despite the *Wakf validating Act* the position of the Privy Council, it appears, remained unchanged and it continued to declare the family endowment illegal on the plea that it does not reflect the charity properly. For example much later in 1927 in *Balla Mal and others V. Ata Ullah Khan*[3]the bench of the Privy Council again dismissed the claim for a declaration in favour of a particular estate to be *waqf* property.

The fact of the suit, in brief, was that one man named Mian Muhammed Bakhsh executed a *waqfnama (*a deed of *waqf)* by which he dedicated all his remaining properties to charity subject to certain provisions for his own maintenance and that of his descendants. His son Nasir-ud-Din took possession

[3] 44 (1926-27) IA, 372.

accordingly, after his death, of the properties. In the following year the property had been attached in execution of a decree in favour of one of the creditors of the deceased. Consequently, the suit was filed by the respondent to establish his rights in the *waqf* property. Both the subordinate judge and the High Court decided in favour of the respondent. Hence the appeal lied.

The only question before the judges of the Privy Council's bench was whether under the *waqfnama* the properties of the settler were validly dedicated to charity purpose. The *waqfnama*, it appears, frustrated them. It is significant to note that though the disputed *waqf* was executed after 1913 the Privy Council bench after reviewing the provisions of the *waqfnama* held that it does not reflect charity properly; instead it is a settlement to pay maintenance of the descendants of the settler. In the words of the Privy Council:

> ...under the Act a *waqf*[4] is not rendered invalid because it appears that the main object of the settler was to make a settlement of his property on his family rather than to devote it to what are ordinarily understood as charitable purposes, whereas, with regard to *waqfs* created before passing of the Act, the test still is, was there a substantial dedication of the properties.....still the question must remain whether they have been put into *waqf* by settler with the real object of effecting some non-charitable purpose such as, for instance, that of making a family settlement of his property which would otherwise be invalid as opposed to the Mahomedan law of succession (IA 1927:374).

Therefore, it appears that the Privy Council did not shift its ground on the matter of family endowment even after passing of the Act of 1913. In addition, some Muslim wealthy families were also not happy with the *Wakf Validating Act* because it had no retrospective effect; did not validate the family endowments created before 7 March 1913, the date of commencement of the Act. Consequently, much later an amendment bill was moved and finally in 1930 the *Mussalman Wakf Validating Act* was passed. This Act validated the endowments created before the 7 March 1913 (see Mahmood 1983).

It is pertinent to mention here that the highest judicial body in colonial India did not show any good reasons to discourage the family endowment, i.e., *waqf* except observing that it did not reflect charity properly. It did not take into the fact of existence of family- cum- public endowment during the sixteenth to twentieth century in the Near Eastern and Middle East countries either (see Baer 1997). Latifi

[4] Spelt in the judgment as *wakf*.

(1972), however, supports the decision of the Privy Council on the ground that the traditions of family endowment in India did not allow the poor to get benefit of the *waqf* property until the death of all the heirs of the creator of the endowment. Kugle (2001), on the contrary, observed that the Privy Council did it because the idea of *waqf* was against the British jurisprudence and its politico- economic goal. It is noteworthy that in the *waqf* property the beneficiaries are just using the produce from the property and not the property itself. Therefore when many families began to made *waqf* of their family property in order to save it from fragmentation and thereby avoid the British policy of private property the colonial authority considered it as a threat to their interest and sought to restrict it in any way (see Kugle 2001).

The Privy Council even did not take into account the proposition of Syed Ameer Ali, a Muslim judge who was elevated to the Privy Council. Ameer Ali (1921) argued that 'family *waqf* grants is permissible in the Islamic legal traditions as a charitable endowment as evident from a long tradition of decisions of the medieval judges and from the traditions of the Prophet to the effect that the best charity is supporting one's family and dependants in need' (see Baer 1997).[5] Ameer Ali (1921) sought to argue that endowment under Islamic law is fundamentally different from the idea of 'trust' of English legal traditions; in the former case ownership of the property entrusted to the God while in the latter case it entrusted to the trustee:

> ...but the Mahommedan law relating to trusts differs fundamentally from the English law. It owes its origin to a rule laid down by the Prophet and means 'tying up property in the ownership of God and the devotion of the profits for the benefit of human beings'...the donor may name any meritorious object as the object as the recipient of the benefit and the manager of the wakf is the mutawalli, the governor, superintendent or curator. But he has no right in the property belonging to the wakf; the property is not vested in him and he is not 'trustee' in the technical sense (Mahmood 2005:328).

British judges, however, rejected the opinion of Ameer Ali on the ground that it is against the procedure of the British courts to extract a new law from returning to the original source being a traditional method of fiqh (see Kugle 2001). The Privy Council while reversing the decision said that they were applying the Muhammedan

[5] *Vidya Varuthi V. Balusami Ayyar*, 48 (1921) IA, 302. Also cited in Mahmood (2005:323).

law as administered in India. With these words, according to Kugle (2001) they meant what was written down in the traditional texts that were translated and codified. Kugle argues:

> ..in this decision, the British magistrate's 'best ability to ascertain the law' did not go far to outweigh the economic and financial gains of the government by outlawing family *waqf* grants which would have taken much property out of private ownership and taxation revenues. Their 'best ability' certainly did not allow them to see beyond their British legal assumption that private was clearly private and public was clearly public, a dichotomy that the institution of *waqf* manifestly contradicts (2001:286-7).

It must be pointed out that stipulating names of the family members in the deed of an endowment is not new in the Islamic traditions. Even *waqf*s to support the family members, poor, institutions, social units, slaves were very common during the sixteenth to twentieth century in the Near Eastern and Middle East countries (see Baer 1997). According to Baer (1997) two types of private endowments existed in the Near East and Middle Eastern countries: *waqf* for private purpose or non-charitable *waqf* known as *waqf ahlī* in Egypt and *waqf* for the offspring known as *dhurrī* in the Fertile Crescent even though the beneficiaries are outside from the family. Baer further holds that *waqf* in favour of the religious institution is often called family *waqf* since "the great majority of such clauses favour the family and offspring of the founder" (1997:266). To protect interest of the offspring and family being the primary concern of this type of *waqf* it is mentioned in the *waqfnama* clearly that the administration of this *waqf* is reserved for the members of the founder's family. Such type of (combination of religious-charitable-family) *waqf* was found in the Istanbul during 1546 in which the founder stipulates that the administration of the *waqf* property shall retain to the members of the family for as long as the family existed in the earth (see Baer 1997). There also existed numerous examples where public *waqf* was managed by the family especially in Cairo during the seventeenth century. Even stipulating the names of family members only or mentioning a name specifically in the *waqfnama* in order to perpetuate the benefit of the family in public *waqf*s was very common in the Ottoman Empire (see Baer 1997). Therefore, the interpretation of Islamic law regarding the legitimacy of family endowment is, one might say, devoid of practices of Islamic traditions. It is important to note that dilemma of the Privy Council is manifested not only in its

dealing with the suits relating to endowment but also in the issues involving conversion to religion as well as post-divorce maintenance for women. Now I shall turn to the reported cases involving the question of application of personal law which arose due to conversion of the party to Islam.

Section 2: On the question of application of religious law

The question of application of the Islamic law became the central issue in these two cases, now I am going to review, where the parties were converted to Islam from Christianity and Hinduism respectively. It has been mentioned in the chapter one that despite the promise to not to interfere in the matter regulated by the religious laws of the "native" the judges of the Privy Council, it appears, made their intervention in the administration of matrimonial issues supposed to be dealt by religious law as part of their 'civilizing mission' (see Agnes 2001). These exceptions to the rule of non-interference in the domain of personal laws were justified under the banner of protection of women's rights; but in the end it appears that women's rights were more constrained through judicial decisions. Women's rights over the property, their authority relating to custody as well as guardianship were restricted, to some extent denied, through judicial decisions also (see Agnes 2001). For example in *Skinner V. Orde*[6]a woman, converted to Islam from Christianity, had been denied from the custody of her minor child. The Privy Council did not take into account the matter that the issue deserved to be dealt by the Islamic law despite the fact that the parties had been converted to Islam. The judges of the Privy Council, instead, sought to preserve the superiority of the Christianity at the cost of the right of custody of the mother over her minor child.

In this suit, where legal authority of a woman converted to Islam from Christianity had been questioned, the Privy Council upheld the decision of the subordinate court depriving the mother from right of custody of her minor child. It apprehended that the child's religious belief might be in danger had she been allowed to live with her mother being converted to Islam. The brief facts of the suit were that the child being born of a Christian marriage was bereft of her father, who died during the outbreak and massacre at Delhi in 1857, at a very tender age. She

[6] 14 (1871) MIA, 309. Also cited in Mahmood (2005:208).

remained thenceforth with her mother and had been brought up like a Christian girl. The cause of action arose in the autumn of 1867 when her mother converted to Islam, and got married to one John Thomas John. It is pertinent to mention here that the latter also converted to Islam from Christianity. An application had, therefore, been filed in order to remove the minor girl from custody of her mother. The court of the first instance accordingly decreed the suit and issued an order to remove the ward from custody of her mother. An appeal from this order was presented to the High Court and subsequently to the Privy Council.

The appellant prayed before the Privy Council not to sanction such a violation of the young lady's present religious convictions and natural feelings as was involved in tearing her from her Muslim home and mother. The appellant also held not to place her to the care of a strange Christian schoolmistress. The Privy Council, however, did not pay any head to the appellant and held that the home was no longer suitable for a Christian girl and it held:

> ...when the connection between John Thomas and the widow was formed whether it was adulterous or under the cover of a Mahommedan marriage, the home was no longer a fit home for a Christian young girl; and if the matter had then been brought to the notice of the Judge, it would have been his plain duty, without delay, to find a more suitable home and guardianship than what had become, in fact, the home and guardianship of John Thomas John (Mahmood 2005:211).

The judicial committee of the Privy Council therefore upheld the decision of the High Court. Moreover, the judges of the highest colonial court observed that the young girl was not in a state to make any difference between two religions or she did not possess any conviction to any religion. In addition, the bench of the Privy Council held that "her moral and religious condition would be endangered by placing her where she should receive the secular and religious instructions and training which she ought to have long before" (Mahmood 2005:213). The Privy Council further observed that Mr. John Thomas converted to Islam to get the benefit of polygamy under Islamic traditions (Mahmood 2005:211).

It is significant that the argument that one can marry four wives at a time under the Islamic traditions have been contested by the reformists. They have taken recourse to a Verse of the Qurān which stipulates that one can take more than one wives if he is able to do justice to them. According to Verse IV (3):

> "if ye fear that ye shall not be able to deal justly with the orphans, marry women of your choice, two or three or four; but if ye fear that ye shall not be able to deal justly then only one..." (cited in Serajuddin 2001:124).

The reformists have argued that by the word 'justly' it has been required that one has to do justice to all wives which is related not only to the matter of food, cloths or residence but also to love and affection; which is beyond human quality. Therefore, by this Verse, according to reformists, polygamy is actually prohibited (see Serajuddin 2001). The Privy Council, however, did not care for the reformists's views while acknowledging the fact that Islamic traditions admit polygamy. It is important that the Privy Council judges, perhaps, relied on the Hedaya as well as on the Biillie's digest on Muslim law which supports the classical view that a man can marry four wives at a time (see Sirajuddin 2001).[7]

In addition, the Privy Council did not take into account the present religious belief of the parties at all to decide the suit. Instead an emotional treatment has been manifested in their dealing with the issue due to, perhaps, religious belief. It is also important to note that the Privy Council put forward the idea of a distinctive 'class' based on the religion 'Christianity'; in the words of Privy Council "the home of a Muslim parents is no longer fit for a Christian girl" (Mahmood 2005:211). It is significant that this religious based identity had been institutionalised judicially earlier in the *Abraham V. Abraham*[8] where the Privy Council declared the East Indians as "native Christians" since they possessed all the characteristics like the English:

> ...the East Indians were a class most nearly resembling the English, they conformed to them in religion, manners and customs and the English law as to the succession of movables was applied by the courts in the Mofussil to the succession of the property of this class (Mahmood 2005:39).

The principle question involving in this suit was which law will govern the succession to the property of late Matthew Abraham, a protestant "native" of India. The ancestors of Matthew Abraham for several generations had been Christians. The fundamental question of this suit was whether Matthew Abraham and the

---

[7] In the post-colonial Pakistan polygamy was restricted by inserting a provision which requires one who wishes to take more than one wife to get permission from the arbitration council (section 6) in the *Muslim Family Laws Ordinance,* 1961.

[8] 9 (1863) MIA, 195. Also cited in Mahmood (2005:36).

respondent formed an undivided family in the sense of Hindu law with reference to the acquisition, improvement, enjoyment, disposition and devolution of property. The Privy Council answered the question in the negative that when a person converted to Christianity from Hinduism he would be treated as outcaste and "the tie which bound the family together is not only loosened but also dissolved" (Mahmood 2005:37). Therefore, the obligations connected with the tie also, according to Privy Council, dissolved with it. On the issue of Matthew's conversion to Christianity the Privy Council observed that "from the marriage of late Matthew Abraham he and his wife and their children adhered in all respects to the religion, manners and habits of the East Indians" (Mahmood 2005:39-40). On the application of Hindu law the Privy Council observed:

> ...their Lordships, therefore, are of opinion that upon the conversion of a Hindu (spelt as Hindoo in the judgment) to Christianity the Hindu law ceases to have any continuing obligatory force upon the convert. He may renounce the old religion or if the thinks fit he may abide by the old law, notwithstanding he has renounced the old religion (Mahmood 2005:37).

Therefore the Privy Council, it appears, sought to advance the idea of 'Christianity' as a secular religion than Hinduism or Islam. In addition, the judges of the Privy Council used the term 'Christianity' in a way which is synonymous with the 'English' (as a nation); that one should wear the dress like the English, behave like the English even should have developed an eating habit like the English to be a Christian. Moreover, it is seen in the *Skinner V. Orde,* mentioned above, the Privy Council repeatedly put forward the proposition that the minor child should be protected from conversion as well as arrangements should be made so that she could be brought up as a Christian:

> ...the child up to that time had certainly been brought up and so far as she was educated at all, educated as a Christian girl, eating, drinking and associating with her Christian cousins and going to school (Mahmood 2005:210).

Another striking feature that appears from the *Skinner V. Orde* case is that it put forward the notion of life of Indian Muslim women as "seclusion behind the *purdah"*(Mahmood 2005:211). Living behind *purdah* was considered as the oriental mode of feminine life which, perhaps, led the colonial judges later to project Indian women as *'purdahnishin'*. In the words of the relatives of the minor girl who represented in the court as respondents: "and that she (the minor girl)

began to express a preference for the Mahomedan religion and the 'oriental mode of feminine life' in seclusion behind the purdah" (Mahmood 2005:211). The judges of the Privy Council's bench, it appears, were convinced with this proposition and expressed their anxiety over the fact that the mother might influence her minor daughter to accept the life style, allegedly oriental, of Muslim women had she (daughter) been allowed to live with her mother. In the words of the Privy Council:

> ...it would be very easy, of course, for a mother under such circumstances to procure from a young daughter the expression of a wish to remain with her and to become a Mahommedan like her, rather than continue as Christian (Mahmood 2005:212).

Now I turn to a suit decided differently where a similar question arose before the Privy Council that which law will be applied to administration of property of a person converted to Islam from Hinduism. It is interesting to see that in *Mitar Sen V. Maqbul Hasan*[9], the Privy Council took a different position though this suit shared same cause of action like the case discussed above. In this suit the deceased named Jagardeo Singh, who was a member of an undivided Hindu family, was converted to Islam in 1843 and died in 1844. He left two sons and two daughters and one of whom Agha Hasan Khan was the grandfather of the present defendants. On the death of the widow of Agha Hasan Khan the three children took possession of the property which was originally belonged to Jagardeo Singh. One man named Mitar Sen Singh, who was a descendant in the sixth generation of Babu Sangram Shah who was the ancestor of Jagardeo Singh too, claimed a share in the property of Jagardeo Singh. The appellant based his claim upon the *Caste Disabilities Removal Act*, 1850 which was then applied to Awadh:

> ...So much of any law or usage now in force within the territories subject to the government of the East India Company as inflicts on any person forfeiture of rights of property or may be held in any way to impair or affect any right of inheritance by reason of his or her renouncing, or having been excluded from the communion of any religion, or being deprived of caste, shall cease to be enforced as law in the courts of the East India Company, and in the courts established by Royal Charter within the said territories (Mahmood 2005:425).

The appellant relied upon this Act and said that though Jagardeo Singh had renounced his religion nevertheless the plaintiff's rights of inheritance is not impaired by reason of Jagardeo Singh's having renounced the Hindu religion. He

[9] 57(1930) IA, 313. Also cited in Mahmood (2005:423).

claimed, therefore, a share in the property of Jagardeo Singh according to the Hindu Law.

The judges of the Privy Council were of opinion that there have been, no doubt that two conflicting lines of decisions have existed on the construction of this Act. One had been the wide view clearly manifested in the decision of Sir John Edge in *Bhagwant Singh V. Kallu*: "the latter portion of the section, in my opinion, protects any person from having any right of inheritance affected by reason of any person having renounced his religion or having been excluded from caste" (cited in Mahmood 2005:426). The Privy Council's bench, however, declined to endorse these propositions considering its consequences:

> ...if that were the rule then it has a far reaching consequences if one tried to apply that principle to ordinary cases, because it would apparently mean that, if a Hindu becomes a Muslim, then the descendants of that Muslim throughout the ensuing generations, without any limit, would always derive their succession under the Hindu Law of succession and not under the Mahommedan law of succession (Mahmood 2005:426).

Therefore, judges of the Privy Council applied this law somehow in a narrow sense: "this section in terms only applies to protect the actual person who either renounces his religion or has been excluded from the communion of any religion or has been deprived of caste" (Mahmood 2005:426). They, further, opined that "the words 'or may be held in any way to impair or affect any right of inheritance by reason of his or her renouncing' should be read 'any right of inheritance of any person reason of his or her renouncing" (Mahmood 2005:426). Finally, the Privy Council's Bench had held that the present religious law will govern the rights of succession of the children of a person who changed his religion as well as personal law.

From the above discussion one might form an opinion that the highest colonial judicial body was in dilemma on the question of application of personal law in the matter involving change of religious belief. The dilemma of the Privy Council is also manifested in dealing with the question of independent interpretation of Islamic law, i.e., *ijtihād*. The following two cases will show the duality of the Privy Council judges over the interpretation of Islamic law: on the one hand they recognised the plural legal character of the Islamic law; on the other hand they

explained Islamic law in such a way that contributed to close the door of independent judicial interpretation.

Section 3: Privy Council on interpretation of the Islamic law

Let me turn to the first case which involved a question relating to legitimacy of the personal law of Shia sect. In the *Rajah Deedar Hossain V. Ranee Zuhoor-oon-Nissa*[10] the Privy Council encountered the question of acknowledgment of the sectarian Islamic law. This suit arose from a petition to recover the moiety of the Zamindary of Pergunnah Soorjapore to which the appellant claimed to entitle a share on the death of his brother Akbar. This Zamindari (spelt as *Zemindary* in the judgment) formerly belonged to appellant's father, Fookur-ood-deen Hossein. After his death the appellant and his brother, then minor, were in joint possession of the Zamindary and so continued until the demise of Akbar.

This suit was filed in the civil court in 1815 and the decree of the civil court was upheld by the Sadar Diwany Adalat in 1822. Finally it travelled to the Privy Council and was decided positively. The fundamental question of this suit was involving administration of the Zamindary property being devolved, customarily, entirely on every successor. The appellant claimed that the Zamindary property should not be disposed of according to Islamic law of inheritance since there is a family custom which supports the Zamindary to be devolved entirely on every successor. The Privy Council's bench, however, did not agree with the proposition of the appellant and therefore opined that on the death of Akbar his interest in the Zamindary will disposed of, according to the Muslim law of succession.

The next question, therefore, arose which, *shia* or *sunni*[11] respectively), law will be applied. It is significant that both the litigants were belonging to the former sect. If the law of the *Shia* sect is to prevail the plaintiff will be deprived from the share as a brother cannot succeed in the *Shia* law. The Privy Council, therefore, took recourse to the *Regulation IV of 1793* and held that there is no bar to apply the *Shia* law though majority of the Indian Muslims are *sunni*. In the words of the Privy Council:

---

[10] 2 (1841) MIA, 441. Also cited in Mahmood (2005:420).

[11] Spelt in the judgment as *soonees* and *sheeahs*

> ...according to the true construction of this Regulation in the absence of any judicial decisions or established practice limiting or controlling it's meaning, the Mahommedan law of succession applicable to each sect ought to prevail as to litigants of that sect. It is not said that one uniform law should be adopted in all cases affecting Mahommedans but that the Mahommedan law, whatever it is, shall be adopted. If each sect has its own rule according to the Mahommedan law that rule should be followed with respect to litigants of that sect. Such is the natural construction of the Regulation and it accords with the just and equitable principle upon which it was founded and gives effect to the usages of each religion (Mahmood 2005:422).

As I have stated above that though the Privy Council recognised internal plurality of law in the Islamic traditions, but it contributed to close the gate of independent judicial interpretation as well as foster the idea of *taqlid* (application of law decided thousand years ago blindly). The suit in which the highest judicial body of colonial India encountered this question is the *Aga Mahomed V. Koolsom Bee Bee.*[12] It was a consolidated appeal and cross-appeal from a final decree of the Recorder Court (of Rangoon) involving the correctness of various intermediary orders passed in the suit. In this suit, Koolsom Bee Bee, a widow, claimed maintenance for one year from the death of her husband and a right to live rent-free in her husband's house along with her share in the deceased's property. The claim of the widow was decreed by the Recorder court of Rangoon.

The judicial committee of the Privy Council, however, expressed its disagreement on the point of post-divorce maintenance for one year. It appears that the said Recorder Court was relying on the authority of a passage of the Qurān quoted by Ameer Ali J. in his work on the *Personal Law of Mahomedans*, in which he observed that "several jurists have held that a wife has a right to be maintained out of her husband's estate for a year independently of any share she may obtain in the property left by him" (cited in Mahmood 2005:3-4). The Privy Council judges took recourse to the two traditional texts *Hedeya* and *Imameea*, codified under the auspicious of the colonial authority, which express a different view that the woman will not get maintenance after the death of her husband irrespective of her pregnancy (Mahmood 2005:4).

Therefore, the Privy Council's bench held that "a Muslim widow is not entitled to maintenance out of her husband's estate in addition to what she is entitled to by

[12] 24 (1897) IA, 196. Also cited in Mahmood (2005:1).

inheritance or under his will" (Mahmood 2005:4). In addition, the Privy Council condemned the subordinate court to interpret the provisions of Islamic law independently which is the most important consequence of this decision:

> ...it would be wrong for the court on a point of this kind to attempt to put their own construction of the Quran in opposition to the express ruling of commentators of such great antiquity and high authority (Mahmood 2005:4)

It is significant that this ruling of the Privy Council has far reaching effect on the interpretation of Islamic law in post-colonial South Asian countries especially in Bangladesh, Pakistan and India. Judiciary of the said countries has taken recourse to this decision, as a precedent, to justify their adherence to the legal doctrines established thousand years ago, i.e., *taqlid.*[13] It is claimed that the Privy Council did so in order to appease the conservative section of the Muslim community as well as to force a community to practice orthodoxy (see Ahmed 2001; Rahman 2011). It is pertinent to mention here that the recommendations of the Commission on Marriage and Personal Laws to reform the Muslim personal law in the undivided Pakistan was opposed by the *Ulama* on the ground that the members of the Commission exercised *ijtihād* which is prohibited from tenth century of Islam (see Serajuddin 2001). The words of Maulna Ihtisham-ul-Haq, one of the leader of Ulama as well as a member of the Commission, sounded just like the Privy Council when he said that:

> where there was a clear injunction of the Qurān and the Sunnah the question of ijtihād did not arise at all; where the early jurists were in general agreement on a question, the later jurists had no right to upset it (cited in Serajuddin 2001:48).

Conclusion

In this chapter I have argued that the Privy Council contributed to foster the British idea of 'private property' in land by discouraging family endowment in India. I have also argued that the Privy Council judges did not take into account the existence of family endowments in the different Islamic countries while dealing with the legitimacy of the same in India. Moreover, I have shown that the judges of

---

[13] The most illuminating example could be the *Hefzur Rahman* case in Bangladesh (51, DLR, AD, 172) where the highest court of the country took the same position like the Privy Council. This position was also contested in Pakistan in *Mst. Rashida Begum V. Shan Din and others* (1960), Lah, 1142. The Supreme Court of India, however, sought to come out from this authoritative decision of the Privy Council in the famous Shah Bano (1985) case.

the highest colonial court decided the legitimacy of family endowment from their notion of 'trust' of the English jurisdiction which is fundamentally different from endowment in Islamic traditions. In addition, I have argued that the Privy Council put forward an idea of 'class' based on religion. It also institutionalised the idea of *'purdahnishin'* to mean the life style of the "oriental" woman. I have further argued that the British judges sought to argue that Christianity is superior to Islam being non-secular. Finally, I have shown that the Privy Council contributed to the orthodox interpretation of Islamic law as well as contributed to restraint the space for the judges to go beyond the settled, allegedly, decision in a particular context. I have also argued that this decision has influenced the post-colonial sough Asian judges to take recourse to orthodox interpretation of Islamic law especially in the matters involving rights of the women.

Therefore, from the above discussion, one might, say that the Privy Council acted as an agency of the British colonial authority to legitimise colonial rule in India. Privy Council's interpretation of Islamic family law is shaped by their idea of class, race, gender and religious belief developed in Britain during this period of time. They advanced the rhetoric of improving the status of women under the realm of family law in India to justify their interference in the personal domain regulated by religious law. Therefore, one should not confine the interpretation of Islamic family law only in the 'cage' of matrimonial issue, rather should look beyond it, i.e., governance policy, colonial construction of oriental society as well as people, race and above all their intention to prolong colonial rule in India.

Conclusion

This study examines how the Privy Council interpreted the Islamic law in colonial India. I have argued in the first chapter that a systematic court system which developed law when the Company took over the administration of civil judiciary of Bengal, Bihar and Orissa. The Mughal court system, as it is mentioned earlier, was very close to the courts introduced in India by the colonial authority later in terms of formation, jurisdiction and so on. It is pertinent to remind us here that during the whole period from last quarter of the eighteenth century to middle of the nineteenth century the colonial authority experimented different judicial set up as well as division of power between executive and judicial officers (see Pandey 1967). Finally, by the middle of the nineteenth century British colonial power was able to set up a systematic judicial administration as well as extended the jurisdiction of the Privy Council over Indians; with extension of the British sovereignty as an outcome of the great mutiny of 1857. From this time Indian laws especially administration of the Islamic law, one might say, had been influenced, modified and finally re-named: Anglo-Muhammedan law.

The governance strategies of the British colonial authority in India, it appears, were shaped by two contradictory policies: similarity and difference. Similarity in the sense that since Indians were as British subjects reforming their social and legal perceptions, which they termed as 'oriental despotism', lies with the British while in the matter of application of law the British were considered as superior to Indian notions of law and custom (see Metcalf 1995). This dilemma of the colonial government has clearly manifested in the administration of criminal law in India. Limitation of jurisdiction of the Indian courts over the non-official British citizens in India, introduction of harsh criminal punishments for Indians and keeping some inhuman activities out of the purview of criminal law are few examples of colonial dilemma (see Kolsky 2005; Singha 2000). The administration of the Islamic law, one might say, is also a manifestation of the colonial dilemma. The British colonial authority, it appears, considered the "native's" law inferior as well as barbarous and thereby had assumed responsibility to reform it in order to make "native's" legal

system civilized. To quote Judge Straight, a judge of the Allahabad High Court who wrote the decision of *Allahdad Khan V. Muhammad Ismail Khan* (1888) case:

> There are many apparent anomalies in both the Hindu and 'Muhammadan' law that strike the mind of an English lawyer with astonishment, if not dismay, as irreconcilable with the principles of the English statute and common law that he has been taught; and in India it is natural enough that among our High Court advocates and pleaders, who *represent the progress of English thought* and influence upon more or less undigested mass of doctrines and principles to be found in the Mitakshara or the various sources whence the Muhammadan law is drawn, the discussion of questions such as *we have here should be maintained on modern lines and according to what may fairly be called popular views* (see Mahmood 2005: 168).[1]

By the words 'popular view' Straight (1888), perhaps, indicated the views of the western press and thinkers in absence of any Indian agency. It is significant that the British colonial authority did not care for any popular view at the time of the codification of laws as well as at the time of many legal reforms in India (see Singha 2000; Chatterjee 1994). In addition, by the words 'we have here', Justice Straight sent a message clearly that they came up with an agenda to reform the "native" laws, allegedly, in the image and the English law.

It is also mentioned in the first chapter that the British colonial authority inherited a legal system that had been developed by the Muslim rulers. As a result of the Muslim rule the *lex loci* was the Islamic law but the Hindu laws were also applied except in the realm of crime, constitutional and fiscal matters (see Nair 1996; Dutta 1981; Hussain 1977; Jain 1970). The Company therefore had to deal with the Islamic law with commencement of their authority of *Diwan* in Bengal, Bihar and Orissa. Lack of acquaintance with the Islamic traditions as well as intention to reform the "native's" laws had, perhaps, drove the judges of the Privy Council to deal with Islamic law in a way which, one might say, despotic.[2] Their interpretation in most of the cases, it appears, is devoid of historical as well as theoretical development of the Islamic law and cultural sensitivity (see Hardiman 1985) of the Indians.[3]

---

[1] Emphasised by me

[2] I borrow this term from Radhika Singha (2000).

[3] A theoretical development of Islamic jurisprudence/rule of interpretation has been discussed in detail in the Chapter one.

Despotic interpretation of the Islamic law by the Privy Council's judges appears from its dealing with the issues like legitimacy of child and dower. I have mentioned earlier in the first chapter that the classical Islamic jurisprudence does not recognise any legal authority of the antiquity therefore the system of judicial hierarchism, i.e., precedent did not develop in the Islamic legal traditions. Similar scenario has also been found in the pre-British legal system in India, i.e., Mughal judicial system, due to, perhaps, its adherence to the Islamic legal traditions. The British colonial authority, on the contrary, established a hierarchical court system in India where decision of the superior court was considered authoritative as well as binding upon the subordinate courts (see Rankin 1939).

Though the judicial precedent under the Common law system helps to reduce workload of the court on the one hand it obliged the subordinate courts to apply, blindly, a decision of the higher court on the other. In this system it is not a matter for the subordinate courts whether the higher court decided the suit erroneously or whether the decision of the higher court sparked much debate. Such type of application of the judicial precedent has manifested in dealing with the cases involving questions relating to legitimacy of child born out of wedlock. The discussion in the second chapter states that the principle, 'clear and unambiguous acknowledgment of the father will create a status of legitimacy of a child born out of wedlock' (MIA 1866:94) became the judicial precedent and had been applied by the sub-ordinate courts mechanically in the later cases. Despite the observation that this principle is against the norms of the Islamic traditions, the Privy Council's judges went on it without taking into account the opposite view and the basic texts of Islamic law.

Beside the suits relating to legitimacy of child anarchist interpretation of the Islamic law of the Privy Council has also appeared from its dealing with the suits relating to dower. Two basic questions were encountered by the Privy Council while dealing with the dower claims: (a) whether the British Sovereign, as a conqueror, can alter the "native's" law and (b) whether principle of equity will supersede the Islamic law. Regarding the first question the Privy Council agreed with the views of the sub-ordinate court that as the sovereign authority the British can change the "native" laws. In addition, it allowed the application of the *Punjab*

Code of 1854 which provided for discretion of the judges to reduce the amount of dower should they think it beyond means of the husband. Privy Council's dealing with the dower cases, one might say, shows their ignorance of the Islamic legal traditions which drove them to cover it with the veil of principle of equity. For example the Privy Council's judges held the father of a bridegroom liable to pay the dower money in the case of incapacity of his son, perhaps, due to their understanding of marriage under the Islamic law as a contract in the English sense and therefore father of the bridegroom is vicariously liable to perform it. Their interpretation of the concept of dower instigated many a scholar later to put forward the idea that the institution of marriage under the Islamic law is similar to a sale of the bride; against which Islam fought for during its early days.

In chapter three, I have argued that the Privy Council had institutionalised the inherent inequality within religious laws towards women as well as projected women as the object of law by two ways: by adhering to the reservation on the issues regulated by religious laws in order to show their neutrality and by advocating that the Islamic law is purely divine as well as beyond human interpretation. It is pertinent to mention here that it is the Islamic law which recognised first the right of women in the property as well as person and elevated the status of the women, as it is mentioned in chapter one, from the object to the party to a contract (see Agnes 2000). Though there are some inequalities in the religious law but it is because Islamic law had been developed in a particular context (see Zayad 2004; Menski 2006; Hallaq 2005). Therefore by way of contextual interpretation of the Islamic law judges of many Muslim countries like Tunisia, Turkey, and Bangladesh today are trying to minimise these inherent inequalities. The judges of the Privy Council, on the contrary, adhered to the principle of *taqlid* and discouraged deduction of new rules through exploiting the original texts. In the event of explaining the rule of post-divorce maintenance the Privy Council adopted a conservative approach of interpretation and thereby shut up the door of independent judicial activism, perhaps, to appease Muslim patriarchs. The Privy Council's judges categorically observed, after having denied the post- divorce maintenance of wife, that providing new interpretation of the Islamic law is beyond Islamic jurisprudence. By adopting this principle the highest

colonial judicial body had placed the judicial activism on the Islamic law subservient to express ruling of the commentators pronounced thousand years ago and thereby contributed to the progress of Islamic society getting stuck. It is significant that this authoritative decision has been followed by the post-colonial judges even today in Bangladesh and Pakistan. By adhering to this gloating decision of the Privy Council the highest judiciary of Bangladesh and Pakistan has, without any hesitation, shut the door of judicial activism up on the Islamic law (see Rahman 2011).

The discussion of the fourth chapter also shows that the Privy Council contributed to translate the colonial policy in India into practice through interpretation of the Islamic law. Especially by abolishing family endowment the highest colonial judicial body had categorically stimulated the British policy of encouraging the idea of private property in India. Despite numerous examples of family endowment in the Near Eastern and Middle East countries during the period of sixteenth and twentieth century the Privy Council did not allow family endowment in India due to perhaps their adherence to the colonial policy of encouraging the idea of private property here.

Pearl and Menski (1998) states three factors which contributed to the colonial influence on the South-Asian Islamic law: (a) impact of English law itself, (b) use of local customs over the Islamic law, and (c) reforms introduced by the colonial authority on general law through direct legislation. Under the first category they sought to argue that colonial judges influenced the administration of the Islamic law by applying English notion of law. Ignorance of the Islamic legal traditions and overwhelming dependency on the traditional texts, according to Pearl and Menski (1998)), drove colonial judges to apply English legal principles over the Islamic law in India. Kugle argues that the ignorance of Islamic legal traditions of the colonial authority led them to adopt two strategies: (a) to codify some texts from the understanding that "Islamic law is a code of law to be located in the authoritative texts" (2001: 271-4), and (b) to record and publish the decisions of the Anglo-Muhammedan courts. It is pertinent to mention here that the first case book titled '*principles and precedents of Muhammedan law* appeared in 1825 and thereby

qazies had nothing but to abide by the decisions of the superior courts which was unknown to the Islamic legal traditions before (see Kugle 2001:274).

In addition, by publishing the judgments of the Privy Council the colonial authority, actually, required the subordinate courts to follow it. Publishing the decisions of the Privy Council as a digest was one of the colonial strategies to require the subordinate courts to apply the appellate decisions. At one stage judgments of the Privy Council was considered as secondary sources of law along with the translated texts, i.e., Hedaya, Fatwa-e- Alamgiri. In the end the practice of following the judgments of the Privy Council culminated in total declination of consulting the basic sources of the Islamic law (Qurān, Sunnah) by the British judges in India (see Anderson 1993; Kugle 2001).

Finally, a proposition can be formed that the Privy Council did not take into account the rules of interpretation of the Islamic law developed by the fifth century onwards (see Hallaq 2005). In addition, the judges of the Privy Council, due to their ignorance of Islamic legal traditions, considered traditional texts as the basic source of law instead of following the methodology to interpret the Islamic law (as discussed in chapter one). In the end Indian Muslim witnessed a hybrid law which is termed, later, as 'Anglo- Muhammedan' law. The English authority paved the way for the utilitarian ideal into the Islamic law by way of translating few codes of the Islamic legal doctrines. The codification of laws contributed to shape the Islamic jurisprudence in a way which, in the words of Kugle "was necessary for the colonial modern states and gradually the Anglo-Mohammedan law went far away from the *fiqh*" (2001: 257-9).

It appears that the interpretation of the Islamic family law by the Privy Council influenced the post-colonial judges, especially judges of the Supreme Court of Bangladesh, by two ways. Firstly, it encourages them to put their own construction of law which, one might say, is shaped by the patriarchy. Patriarchal interpretation of the Islamic law is manifested in their dealing with the issues involving questions of authority to divorce, right of custody of children as well as guardianship and maintenance. For example, in a case it was held that though the wife has right to custody of her minor child her right will be extinguished if she married to a person

who is not a relative to the child[4] or does not live within the convenient distance from the residence of the father of the child; right of the mother does not extinguish the right of the father to oversee the grooming of that child.[5] In addition, at present the judges are applying the 'principle of welfare of the child' irrespective of age limit[6] to determine the suit related to the custody of a minor child. It is significant that this 'welfare' doctrine becomes another easy weapon to deprive the mother from her right on the ground that mother does not have sufficient economic ability to take care of the child properly.[7] Similarly, on the issue of divorce the judges are providing importance on the pronouncement of *talaq* by the husband. However, in few cases progressive decisions have been pronounced.[8] Secondly, as it is mentioned earlier, the Supreme Court has adhered to the old notion that the gate of independent judicial interpretation is closed. The Supreme Court of Bangladesh took recourse the principle established by the Privy Council hundred years ago in the *Aga Mahomed* (1897) case while determine a claim of post-divorce maintenance.[9] Therefore, influence of the Privy Council on the post-colonial judges cannot simply be overruled. This invites us to undertake a further research in future to look into the impact of the interpretation of the Islamic family law by the Privy Council on the judicial activism of the post-colonial South-Asian countries.

---

[4] *Akter Zahan alias Bab V. State*, BLD (1986), HCD, 281.

[5] *Rahimullah Chowdhury V. Mrs. Sayeda Helali Begum and others*, 20 (1968) DLR, AD, 1.

[6] According to Islamic law a mother has right to custody of a minor child up to seven years of age in case of boy and until puberty in case of girl.

[7] *Md. Abu Bakar Siddique V. S.M.A. Bakar*, 38 (1986) DLR, AD, 106.

[8] *Nelly Zaman V. Giasuddin Khan*, 34 (1982) DLR, HCD, 221; *Hasina Ahmed V. Syed Abul Fazal*, 32 (1980) DLR, HCD,294.

[9] *Hefzur Rahman V. Shamsun Nahar Begum and another*, 51 (1999) DLR, AD, 172.

Bibliography

Abbott, Freeland. 1968. *Islam and Pakistan.* New York: Cornell University Press.

Acharyya, Bijoy Kisor. 1994. *Tagore Law Lectures, 1912: Codification in British India.* Calcutta: S.K. Banerji and Sons.

Agnes, Flavia. 2011. *Family Laws and Constitutional Claims.* New Delhi: Oxford University Press.

_____. 2011. The concubine and notions of constitutional justice. *Economic and Political Weekly*, XLVI (24): 31-33.

_____. 2007. Women, marriage and the sub-ordination of rights. In *Subaltern studies XI: Community, Gender and Violence*, ed. Partha Chatterjee and Pradeep Jeganathan, 106-137. Delhi: Permanent Black and Ravidayal publisher.

_____. 1999. *Law and gender inequality: The politics of women's rights in India.* New Delhi: Oxford University Press.

_____. 1996. Economic rights of women in Islamic law. *Economic and Political Weekly*, 31 (41/42): 2832-2838.

_____. 1994. Triple talaq judgment: do women really benefit. *Economic and Political Weekly*, 29(20): 1169-1170.

Ahmed, Anfees. 2001. Reforming Muslim personal law. *Economic and Political Weekly*, 36(8): 618-619.

Ahmed, Furqan. 2004. Understanding the Islamic law of divorce. *Journal of Indian Law Institute*, XXV (3 and 4).

Ali-Karamali, Shaista P. and Dunne, Fiona. 1994. The ijtihād controversy. *Arab Law Quarterly*, 9 (3): 238-257.

Anderson, J.N.D. 1971. Modern trends in Islamic legal reform and modernisation of Islamic law in the Middle East. *International and Comparative Law Quarterly*, 20 (1): 1-21.

_____. 1968. The eclipse of the patriarchal family in contemporary Islamic law. In *Family Law in Asia and Africa*. London. George Allen and Unwin Limited.

Anderson, M.R. 1993. Islamic Law and the colonial encounter in British India. In *Institutions and ideologies: A SOAS South Asia reader, ed.* David Arnold and Peter Robb, 165-185. London: Karzon Press Limited.

An-Naim, Abdullahi A. 2002. *Islamic family law in a changing world.* London/New York: Zed Books Limited.

Baer, Gabriel. 1997. The waqf as a prop for the social system (sixteenth-twentieth century). *Islamic Law and Society*, 4(3): 264-297.

Baljon.1986. *Religion and thought of Shah Wali Allah Dihlawi, 1703-1762.* Leiden: Briil.

Bannerjee, Phanindra Nath.1981. Impact of British policy on the judicial administration in Bengal in the eighteenth century. In *Western colonial policy: A study on its impact on Indian Society-V-I,* ed. N.R. Ray, 312-325. Calcutta: Institute of Historical Studies.

Brown, Daniel W.1996. *Rethinking tradition in modern Islamic thought.* Cambridge: Cambridge University Press.

Chandra, Sudhir.1998. *Enslaved daughters: colonialism, law and women's rights.* Delhi: Oxford University Press.

Chatterjee, Indrani. 1999. *Gender, slavery and law in colonial India.* New Delhi: Oxford University Press.

Chatterjee, Partha.1994. The colonial state. In *The nation and its fragments: colonial and post-colonial histories,* ed. Partha Chatterjee, 14-34. Delhi: Oxford University Press.

Cossman, Brenda and Kapur, Ratna.1996. Women, familial ideology and the Constitution: Challenging equality rights. In *Feminist terrains in legal domains: interdisciplinary essays on women and law in India,* ed. Brenda Cossman and Ratna Kapur, 61-97. New Delhi: Kali for Women.

Coulson, N.J.1997. *A history of Islamic law.* New Delhi: Universal Law Publishers.

_____. 1969. *Tensions and Conflicts in Islamic Law.* Chicago: University of Chicago Press.

Dien, Mawil Izzi. 2005. *Islamic law: From historical foundations to contemporary practice.* New Delhi: Atlantic.

Dutt, Asim Kumar. 1981. Why did the East India Company recognise Hindu and Muslim law? In *Western colonial policy: A study on its impact on Indian society*-V- I, ed. N. R. Ray, 173-182. Calcutta: Institute of Historical Studies.

Elias, T. Olawale. 1954. Form and contents of colonial law. *The International and Comparative Law Quarterly*, 3(4): 645-651.

Engineer, Asghar Ali. 2004. Abolishing triple talaq: What next. *Economic and Political Weekly*, 39 (28): 3093-3094.

_____. 1992. *The rights of women in Islam.* New Delhi: Sterling Publishers.

Everett, Jana. 2001. All the women were Hindu and all the Muslims were men: State identity politics and gender. *Economic and political weekly*, 36 (23): 2071-2080.

Fyzee, Asaf A.A. 2009. *Outlilnes of Muhammadan Law.* New Delhi: Oxford India Paperbacks.

_____. 2005. *Muhammedan Law.* New Delhi: Oxford University Press.

_____. 1965. *Cases in the Muhammadan law of India and Pakistan.* Oxford: Clarendon Press.

_____. 1963. Muhammedan law in India. *Comparative Studies in Society and History*, 5 (4): 401-415.

_____. 1954. Islamic law and theology in India: Proposal for a fresh approach. *Middle East Journal*, 8(2): 163-183.

Fawcett, Sir Charles. 1934. *The first century of British justice in India*. Oxford: Clarendon press.

Gangadevi, M. 2003. Restitution of Conjugal Rights: Constitutional perspective. *Journal of Indian Law Institute*, XXXXV (3 & 4).

Goldzihar, Ignaz. 1981. *Introduction to Islamic theology*. Ttranslated by Andras and Ruth Hamori. Princeton: Princeton University Press.

Guha, Ranjit. 1981. *A rule of property for Bengal: An essay on the idea of permanent settlement*. New Delhi: Orient Longman.

Hallaq, W.B. 2005. *The origins and evolution of Islamic law*. Cambridge: Cambridge University Press.

_____. 1997. *A history of Islamic legal theories: An introduction to Sunni Usūl al-fiqh* . Cambridge: Cambridge University Press.

_____. 1984. Was the gate of ijtihād closed? *International Journal of Middle Eastern Studies*, 16 (1): 3-41.

Hardiman, David. 1985. From custom to crime: The politics of drinking in colonial South Gujrat. In *Subaltern Studies –IV,* ed. Ranajit Guha, 165-228. Delhi/New York: Oxford University Press.

Hasan, S.M. 1972. Muslim law of legitimacy and section 112 of the Indian Evidence Act. In *Islamic law in modern India,* ed. Tahir Mahmood, 192-201. Bombay: N.M. Thripathi.

Hassan, Ahmed. 1976. *The doctrine of Ijmā in Islam*. Islamabad: Islamic Research Institute.

_____. 1988. *The early development of Islamic jurisprudence*. Islamabad: Islamic Research Institute.

Hoque, Ridwanul, and Khan, Md. Morshed Mahmud. 2007. Judicial activism and Islamic family law: A socio-legal evaluation of recent trends in Bangladesh. *Islamic Law and Society*, 14(2): 204-239.

Huda, Shahnaz. 1994. Untying the Knot-Muslim women's right to divorce and other incidental rights in Bangladesh. *The Dhaka University Studies*- Part-F, V (1): 133-157.

Huq, Naima. 1995. Talaq: A modern debate. *The Dhaka University Studies*- Part-F, 6 (1): 33-54.

Hussain, Wahed. 1977. *Administration of justice during the Muslim rule in India*. Delhi: Idara-i-Adabiyat-i-Delli.

Inden, Ronald.1986. Oriental construction of India. *Modern Asian Studies*, 20 (3): 401-446.

Jain, B.S. 1970. *Administration of justice in seventeenth century India: A study of salient concepts of Mughal justice*. Delhi: Metropolitan Book Company.

Jain, M.P. 1966. *Outlines of Indian legal history*. 2nd ed. Bombay: N.M. Tripathi.

Kamali, Mohammad Hashim. 1996. Methodological issues in Islamic jurisprudence. *Arab Law Quarterly,* 11 (1): 3-33.

_____. 1991. *Principles of Islamic jurisprudence.* Cambridge: Islamic Texts Society.

Kolsky, Elizabeth. 2005. Codification and the rule of colonial difference. *Law and History Review,* 23 (3): 631-683.

Kugle, Scott Allan. 2001. Framed, blamed and renamed: The recasting of Islamic jurisprudence in Colonial South Asia. *Modern Asian Studies,* 35 (2): 257-313.

Latifi, Daniel. 1972. Law of family waqfs in India: Need for a reconsideration. In *Islamic law in modern India,* ed. Tahir Mahmood, 228-231. Bombay: N.M.Tripathi.

Mahmood, Tahir, ed. 2005. Asaf A.A.*Fyzee: Cases in the Muhamedan law of India, Pakistan and Bangladesh.* New Delhi: Oxford University Press.

_____. 1983. *Muslim personal law: Role of the state in the Indian subcontinent.* Nagpur: All India Reporter.

_____. 1976. *An Indian Civil Code and Islamic Law.* Bombay: N.M. Tripathi Private Limited.

Menski, Werner. 2006. *Comparative law in a global context: The legal system of Asia and Africa.* Cambridge: Cambridge University Press.

_____. 2011. Jurisprudence as flying kites. *Stamford Journal of Law,* 2 (March 2011):109-134.

Metcalf, Tomas R. 1995. *The Ideologies of Raj.* Cambridge: Cambridge University Press.

Monsoor, Taslima. 2008. *Judiciary and gender on trial: Reported and unreported decisions of family courts.* Dhaka: The British Council.

_____. 2008. *Gender equity and economic empowerment: Family law and women in Bangladesh.* Dhaka: The British Council.

_____. 2004. Dissolution of marriage on test. *The Dhaka University Studies-* (Part-F), XV (1): 1-34.

_____. 1999. From patriarchy to gender equity: Family law and its impact on women in Bangladesh. Dhaka: University Press Limited.

Morely, William H. 1858. *Administration of justice in British India: Its past history and present state.* New Delhi: Metropolitan Book Company.

Nair, Janaki. 1996. *Women and law in colonial India: A social history.* Delhi: Kali for Women.

Navlakha, Gautam. 1994. Triple talaq: Posturing at women's expense. *Economic and Political Weekly,* 29 (21): 1264.

Pandey, B.N. 1967. *The introduction of English law into India: The carrier of Elijah Impey in Bengal, 1774-1783.* London: Asia Publishing House.

Parker, Kunal. 1994. Interpreting oriental cases: The law of alterity in the colonial courtroom. *Harvard Law Review*, 107 (7): 1711-1728.

Pearl, David and Menski, Werner. 1998. *Muslim family law.* 3rd ed. London: Sweet and Maxwell.

Pearl, David. 1987. *A textbook on Muslim personal law.* 2nd ed. London: Croom Helm.

_____. 1971. I divorce you I divorce you I divorce you. *The Cambridge Law Journal,* 29 (1): 40-44.

Pollock, F. 1906. The jurisdiction of the Privy Council. *Journal of the Society of the Comparative Legislation, New Series*, 7(2): 330-332.

Powers, David S. 1989. Orientalism, colonialism, and legal history: The attack on Muslim family endowments in Algeria and India. *Comparative Studies in Society and History*, 31 (3): 535-571.

Rahman, Anisur. 2011. Unlocking the gate of ijtihād: Hefzur Rahman revisited. *Stamford Journal of Law,* 2 (March 2011): 153-177.

_____. 2008. Development of Muslim family law in Bangladesh: Empowerment or streamlining the women? *Journal of the Asiatic Society of Bangladesh* (Humanities), 53 (2): 263-286.

Rahman, Fazlur. 1966. *Islam.* London: Weidenfeld and Nicolson.

_____. 1965. *Islamic methodology in history.* Islamabad: Islamic Research Institute.

Rankin, George. 1939. The judicial committee of the Privy Council. *The Cambridge Law Journal*, 7 (1): 2-22.

Sarkar, Lotika, and Sivaramayya, B, eds. 1994. *Women and Law: Contemporary Problems.* Dhaka: Academic Publishers.

Schacht, Joseph. 1997. *An introduction to Islamic law.* New Delhi: Universal Law Publishers.

Scott, David. 1995. Colonial governmentality. *Social Text*, 43 (Autumn): 191-220.

Serajuddin, Alamgir Muhammad. 2001. *Shari'a law and society: Tradition and change in South Asia.* Karachi: Oxford University Press.

Sharafi, Mittra. 2009. The semi-autonomous judge in colonial India: Chivalric imperialism meets Anglo-Islamic dower and divorce law. *Economics and Social History Review*, 46 (1): 57-81.

Singha, Radhika. 1998. *A despotism of law: Crime and justice in early colonial India.* Reprint, New Delhi: Oxford University Press, 2000.

Sinha, Chittaranjan. 1969. *The Indian Civil Judiciary in Making, 1800-1833.* New Delhi: Munshiram Manoharlal

Sivaramayya, B. 1972. Equality of sexes as a human and constitutional right and the Muslim law'. In *Islamic Law in Modern India.* Tahir Mahmood, ed. 69-79. Bombay: N.M.Tripathi.

Lokugé, Chandani, ed. 2001. *India calling: The memories of Cornelia Sorabji, India's first woman Barrister.* New Delhi: Oxford University Press.

Subramanian, Narendra. 2008. Legal change and gender inequality: Changes in Muslim family law in India. *Law and Social Inquiry*, 33 (3): 631-672.

Vatuk, Sylvia. 2008. Islamic feminism in India: Indian Muslim women activists and the reform of Muslim personal law. *Modern Asian Studies*, 42 (2/3): 489-518.

West, Raymond. 1900. Mohammedan law in India: Its origin and growth. *Journal of the Society of Comparative Legislation-* New Series, 2 (1): 27-44.

Wiederhold, Lutz. 1996. Legal doctrines in conflict the relevance of Madhhab boundaries to legal reasoning in the light of an unpublished treatise on taqlīd and ijtihād. *Islamic Law and Society*, 3 (2): 234-304.

Zaman, Muhammad Qasim. 2002. *The Ulama in contemporary Islam: The custodian of change.* Princeton: Princeton University.

Zayd, Nasr Abu. 2004. *Rethinking the Qur'ān: Towards a humanistic hermeneutics.* Amsterdam: Humanistic University Press.