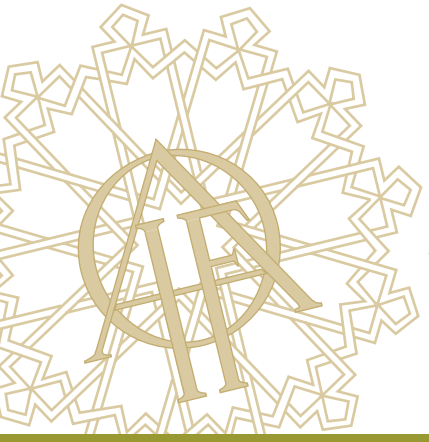

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Marc Gaborieau

Islamic Law, Hindu Law and Caste Customs: A Daughter’s Share of Inheritance in the Indian Subcontinent.

Marc GABORIEAU

ISLAMIC LAW, HINDU LAW AND CASTE CUSTOMS:

A Daughter's Share of Inheritance in the Indian Subcontinent

The implementation of Muslim Personal Law in the Indian Subcontinent raised many problems during the British period of rule and continued to do so after independence. Some issues created intense political mobilisation: Muhammad Ali Jinnah, who was to become the founder of Pakistan in 1947, emerged as a leader of the Muslim community in 1913 when he promoted a law of family religious endowments *awqāf* (Kozlowski, 1986: chap. 6). The maintenance of divorced Muslim women became a national issue in India in 1985-1986 with the Shah Banoo Case: it created divisions between Hindus, who wanted Muslims to abandon their Personal Law in favour of a Common Civil Code applicable to all Indian citizens irrespective of religion, and Muslims, who finally in their majority opted for a separate Personal Law; it also led to a new cleavage between a minority of modernist Muslims who were in favour of providing alimony to Muslim divorced women, and the majority who, for divergent religious and political reasons, kept to the letter of Islamic Law where alimony does not exist (Momin, 1986).

In these cases the issue was whether Muslims could preserve some points of their Personal Law founded in theory on the *šarīʿa*, against the encroachments of government legislation which ultimately were grounded on concepts imported from the West.

But there are other cases where the point is not the implementation of the *šarīʿa* but, on the contrary, the *refusal* to implement it. They fall in the general chapter of Customary Law, as for instance the capacity of making wills, adoption... The most often discussed issue in South Asia is the right of women, particularly daughters, to inherit (Fyzee, 1964: 62-74).

This is the subject of the present paper. Firstly a brief history of the issue will be presented; then an investigation of the social practices undertaken. Finally the question will be posed as to the norms involved: is there only a conflict between the norms of Islamic law and local customs, or do local customs embody another system of norms derived from Hindu law ? Similarly, are those who fight for the abolition of custom motivated only by considerations of Islamic Law, or are they introducing considerations inspired by Western norms ? Ultimately, then, do we have here a conflict between *three* systems of written norms, rather than one between only Islamic Law and local custom ?

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1. THE LEGAL PROBLEM AND ITS HISTORY

1.1. Historical background.

When the British in 1772 took charge of the Judiciary of Bengal (Marshall, 1987), they decided that each religious community would preserve its Personal Law based in theory on religious texts: Hindu Law for Hindus, ' Muhammadan ' Law for Muslims. They thus built, through state intervention and ordinances, the so-called Anglo-Muhammadan Law which " has developped into an independent legal system, substantially different from the strict Islamic Law of the *šarīʿa* " (Schacht, 1964: 96; for Anglo-Muhammadan Law see: Fyzee, 1964; Schacht, 1964: 94-97, 249-250; Derrett, 1968; Hardy, 1972: chap. 1 & 2; Kozlowski, 1986).

The British soon discovered that there was a wide gap between, on the one hand, the few classical texts which they used and translated and which they misconceived as ' Codes ' (mainly *Mānu-smṛti* for Hindus, *Hidāya* for Muslims), and, on the other, social practice. These deviations where classified as customs which, in precisely defined circumstances, would take precedence over written Law.

They rejoined the classical concept of *ʿādat* (or *ʿurf*) as a source of Law. But they went a step further (Gilmartin, 1988): they recorded the customs of districts and provinces under the Persian denomination of *Riwāǧ-i ʿām*, general custom (ar.: *rawāǧ*). Among the classic works on these collections we must mention Sir W.H. Rattigan's *Digest of Civil Law for the Punjab chiefly based on the Customary Law...*, first published in 1880 (Rattigan, 1896; see also Tupper, 1881) and widely imitated, as in Kashmir (Ahangar, 1986: 57).

One important point for what follows is that in British India the first agency for recording custom was not the Judiciary but the Revenue Department, which compiled registers called *Wājibu'l-ʿarḍ* at the village level and *Riwāǧ-i ʿām* at the district level. For the most important issue at stake was the devolution of agricultural land, the main source of revenue. Following Mughal precedents, land was administered mainly according to state regulations, *ḍawābiṭ*, and not according to *šarīʿa*; disputes were first heard and possibly settled by the revenue courts before coming before the civil courts, which replaced the *qāḍī* in British India as early as 1772 (Marshall, 1987: 127-131).

Among the problems pertaining to the devolution of agricultural land, the main question was whether daughters could inherit or not. There were of course many other issues linked with agricultural land such as the rights of other female relatives, particularly widows; we may also mention the problem of the adoption of a son or ' appointment of an heir ', which was customary for some Muslims, but in contradiction to Islamic Law, where adoption is not recognized (for a recent controversy on adoption, see Ahangar, 1986: 72-77).

In this paper we will concentrate, however, on the problem of the daughter's right to inherit, which was the main point of controversy; it offers sufficient material to analyze the social practices and the main systems of norms involved.

1.2. 'Customary' exclusion of the daughter.

To understand the questions involved it is necessary first to get a clear idea of the customary rules of inheritance which were in use among agriculturalists. The non-agriculturalists, with the exception of some castes of Ismaeli traders (Fyzee, 1964: 66-74), were generally subject to the Islamic Law of inheritance.

> "There are four leading canons governing succession to an estate among agriculturists: *first*, that male descendants exclude the widow and all other relations [...] and *fourth*, that females other than the widow or mother of the deceased are usually excluded by near male collaterals, an exception being occasionally allowed in favour of daughters or their issue, chiefly among the tribes which are strictly andogamous" (Rattigan, 1986, ch. II, Introduction, 12; see also Fyzee, 1964: 5656 & 62 sq.; Ahangar, 1986, ch. V-VIII, 95-152).

This means that :

— "Where a man leaves male and females issues, sons exclude daughters" (Rattigan, 1896: 13, § 6).

— When there are no sons, the property may go to the daughter under certain conditions (unmarried or living in father's house after marriage); or, if there is no daughter or if the daughter does not fulfil the above-mentioned conditions, the estate goes to the nearest collateral agnates (up to seven generations) (*op. cit.*: 22-23, § 23; 31, § 27).

— In the absence of daughters and near collaterals the "estate ordinarily escheats to Government" (*op. cit.*: 32-33, § 28).

The result of these rules is, in most cases, to exclude women from inheritance. Customary Law, then, would appear to be more unfavorable to women than Islamic Law, which accords women about half the share of men in Hanafi Sunni Law (the most widespread school in South Asia) and even more under Shia Law (Fyzee, 1964: 380-459; Caroll, 1983 & 1985).

1.3. The controversies.

From at least the beginning of the XXth century, this exclusion of daughters was commented upon unfavourably — not only by modernists, but also by *'ulamā'* (Metcalf, 1982: 72). What was proposed by the former has not been systematically studied (for Panjab, see Gilmartin, 1988: 50-60); as to the *'ulamā'*, they offered the abrogation of custom as a remedy.

Whether they sided with Indian nationalists — as most of them did — in the Congress Party for a united India, or with Jinnah and the Muslim League for a separate Muslim State to be called Pakistan, the *'ulamā'* campaigned successfully for the promulgation of the Shariat Act by the Central Government in 1937. This act in theory abolished Customary Law (Fyzee, 1964: 55-58 & 459-462; Mahmood, 1972 a: 32); it has been

described as "an act of deliberate purism and archaism" (Schacht, 1964: 96). From now onwards, inheritance was to be governed by Islamic Law and daughters were to get a share.

But the main problem — the devolution of agricultural land — was not solved by this Act. For in South Asia, the Indian Act of 1935 remained an important constitutional text, which was not superseded by the Indian and Pakistani constitutions of 1950 and 1956. The Indian Act delimits the subjects which fall within the competence of the Central Governments and those which depend on the Provincial States: "succession to agricultural lands [... was] placed under the provincial list [and was] exempted from the Shariat Act of 1937" (Ahangar, 1896: 230; Fyzee, 1964: 56). The relevant part of the last mentioned Act is the following clause :

> " § 2. Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession [...] the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (*Shariat*)" (Fyzee, 1964: 460).

This exclusion of agricultural land was felt to be an anomaly by the strictest Muslims. After the troubles of the Second World War and of the Partition of the subcontinent between India and Pakistan in 1947, the question was taken up again at the earliest opportunity.

The first step was taken in Pakistan, as was becoming of a country whose *raison d'être* was Islam. The first piece of legislation of the new State, after a campaign led by fundamentalist Muslims, was the Punjab Muslim, Personal Law Application Act of 1948 (Schacht, 1964: 96, n. 2; Alavi, 1972: 4; Gilmartin, 1988: 60-61), which entitled women to get a share of inheritance of agricultural land. This was initially applied to the Province of Punjab in West Pakistan; I presume it was later applied to the whole of West Pakistan and East Pakistan (Bangladesh since 1971), for the Pakistan Family Laws Ordinance of 1961, § 4 (Fyzee, 1964: 472) refers to the daughter's share without any restriction.

In independent India — where the reform of Muslim Personal Law is a hot political subject — campaigns for the modification of § 2 of the Shariat Act were slower and limited to a few provincial States in the South: Tamilnadu and Andhra Pradesh in 1949, and Kerala in 1963 (Ahangar, 1986: 230). For the rest of India, especially the North where most Muslims live, daughters are still denied, by the application of the Customary Law, a share of agricultural land.

And the situation may remain unchanged for years: a recent attempt to have the law changed in the States of Jammu and Kashmir (the only Indian State with a Muslim majority) failed; a bill introduced in 1977 in the State Legislative Assembly was finally dropped in 1984 (Ahangar, 1986 : 227-230).

The custom, and the various legislative acts relating to it, are thus outlined as above. It is now time to describe how they are applied, and the various systems of norms involved by the protagonists of the controversies.

2. WHY ARE DAUGHTERS EXCLUDED ? FOUNDATIONS OF CUSTOMARY LAW

2.1. The notion of ' customs of agriculturalists '.

The first explanation is the purely socio-economic one. This very common point of view has been recently reaffirmed in a study of the Customary Law of Kashmir : " From a sociological stand-point the customs of inheritance reflect the structure of family ties and the accepted values and responsibilities within the agrarian community " (Ahangar, 1986: 4).

Insistence is here placed on the fact that this custom is engrained in rural mentalities, even in the minds of the women folk. In a case decided in 1917, a British judge remarked :

> " In many parts of the country, it is unusual for Mahomedan ladies to insist on their unquestioned rights. They will often prefer being maintained by their brothers to taking a separate share for themselves; and when they are married, the marriages expenses and presents are often, by express or implied agreement, taken as equivalent to the share which they could claim. Moreover, Mahomedan females are so much under the influence of their male relations that the mere partition of the property among the males without reference to them cannot count for much " (Fyzee, 1965: 100-101; see also 94 sq. & 104 sq.).

Jurists (Schacht, 1964: 96) and social anthropologists particularly stress the fact that women continued to be denied their share of agricultural land even after new legislation specifically granted such a share to them. Thus in Pakistani Panjab, " by and large the Customary Law is still enforced [...] in most cases in rural areas " (Alavi, 1972: 4). A similar situation exists in Bangladesh:

> " According to Islamic law, a woman inherits from her father's estate, receiving a share one half the size of her brother's share. The estate in Bangladesh consists mainly of land, and women usually do not claim their shares. They leave their shares to be divided among their brothers " (Ellickson, 1972: 58).

This acceptance by the women of the denial of their rights is thus found everywhere in South Asia.

The main economic motive for this custom is not difficult to find. It is the strong interest of the patrilineages to keep for themselves their agricultural land, which is their main asset (see Gaborieau, 1993: 343-344 & 414-415).

A more sophisticated socio-political explanation was framed by the British who codified the Customary Law of Panjab, particularly C.L. Tupper. For them this exclusion of the daughter was a necessary consequence of " a universal structural logic underlying Punjab's system of ' tribal ' kinship. In this sense the idiom of kin-based solidarity for the British had become itself an idiom of integration. The structure of

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kinship had not only a foundation for the structure of the administation but also, through the elaboration of the law, an indigenous idiom manipulated by the British for the support of the state " (Gilmartin, 1988: 50 sq., commenting on Tupper, 1881). According to this theory, as interpreted by David Gilmartin, the main reason for preserving Customary Law was that it was an indispensable ingredient of tribal solidarity, on which rested the powers of the local leaders, who in turn were indispensable auxiliaries of the colonial powers. This interpretation would appear to make sense and explain why landed political leaders in British dominated Panjab fought against the introduction of the Islamic Law of Inheritance during the first half of the xxth century (Gilmartin, 1988: 50-60). The drawback is that it is too particularistic: firstly, it presents as peculiar to Panjab a situation which is universal in South Asia; secondly, it gives too much credit to the influence of the British administrators, for the end of the colonial period did not significantly change the situation.

2.2. Norms of inheritance and Hindu ritual.

But are these explanations shortsighted ? Are only economic and political interests involved, or are there some deeper religious implications behind this issue ?

2.2.1. *Opinion of judges and* ʿulamāʾ.

It is well known that this customary rule among the Muslims is in fact borrowed from Hindu Law. The point has again been stressed recently by Kashmiri judges in 1972 :

> " It is to be remembered that the legacy of these customs has been borrowed from the members of the Hindu community " (quoted in Ahangar, 1986: 232).

Already at the beginning of this century a famous *ʿālim*, Ashraf ʿAlī Thānawī (1863-1943), stressed that the exclusion of daughters was derived from Hindu Law. In the latter, the daughter is deprived of her share of inheritance, only getting as compensation gifts at the time of marriage and other ceremonies, as well as at the time of festivals (Metcalf, 1982: 72) :

> " When a Hindu father dies in Hindustan, the daughters receive no share at all from his wealth. Ignorant (*jāhil*) Muslims have imitated the Hindus, or, if you wish, they did not imitate them but invented the practice themselves. Either way it is wrong. How is it legitimate to deny — indeed, to suppress — the right of any claimant as established by God and his Apostle ? Because the family has deprived the girl of her inheritance, they give her some gifts as a compensation to satisfy her on different occasions and festivals. Thus everyone convinces themselves that she has no claim on anyone. In elaborating this custom, there is either imitation (*pīrwī*) of the unbelievers or oppression (*ẓulm*). Both these sins are forbidden " (Thānawī, n.d.: book VI, chap. 2; translation quoted from Metcalf, 1990: 106).

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And this is not surprising: I have noted elsewhere that even pious *'ulamā'* unwittingly followed a rule of Hindu Law which prohibits levying interest on a loan beyond the point of doubling the capital (Gaborieau, 1988: 70-71). Thānawī himself pointed out that many customs are borrowed from the Hindus (Metcalf, 1990: 80-87, 100, 106), which is one more reason to condemn them, because " acting as the infidels is forbidden " (*op. cit.* : 132). He further emphasized that not only were custom and law involved, but also that religious concepts were implied. In order to prove his case, he compared the attitude towards daughters with the beliefs concerning debt: many Muslims, he said, believe like Hindus that repaying long-standing debts is an obligation, for if they do not repay them, the road to heaven will be closed for the ancestors (Metcalf, 1982 b: 72). Thānawī is here referring to the Hindu theology of debt, which is linked with the cult of ancestors (Malamoud, 1980). He suggests then that, in matters of inheritance, similar theological concepts borrowed from the Hindus may also be involved. But can this be proved ?

2.2.2. *Evidence from Hindu legal texts.*

The influence of Hindu theology on customs is often denied. Let us examine, for instance, a question which is linked with inheritance: the " appointment of an heir " as a substitute for adoption (which does not exist in Islamic Law). It has been recently contended (Ahangar, 1986: 193-196) that, while Hindus through adoption try to secure a spiritual benefit (performance of funerary rites), for Muslims " the object of the appointment of an heir is not to secure any religious benefit for the soul of the appointer... " (Ahangar, 1986 : 197).

Similarly, it can be claimed that then, in customary rules of inheritance, no religious concepts are involved ? It has long been known that Hindu rules of inheritance are linked with funerary rites: further support for this view has recently been given with the help of Nepalese legal texts (Gaborieau, 1993 : 138-145). This latest work shows that the Hindu Law of inheritance is closely linked with two religious obligations, namely, repaying the debts of the deceased and performing funeral rites :

> " One can take possession of an estate only after performing or causing to perform funerary rites, and after paying off or causing to pay off the creditors; if one has not satisfied these two [obligations], one cannot obtain the estate " (Code of 1935, vol. 3, 164, § 18).

Specifically, the heirs are those who perform the funerary rites: sons to the exclusion of daughters but, if there are no sons, daughters and their husbands; if there are no offspring, agnatic collaterals fulfil the role. These rules are exactly the same as those of Muslim Customary Law.

Mawlānā Thānawī was thus right when he affirmed that Hindu beliefs underlie customs about inheritance. He was also correct in saying that inheritance and debts are closely related: funerary rights provide the link between the two. Economic interest (keeping the land) and religious preoccupations (ensuring the continuation of funerary

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rites) are closely connected in order to promote the solidarity of the male lineage to the exclusion of daughters.

3. JUSTICE FOR DAUGHTERS: CONFLICTING REMEDIES

3.1. Two problems.

Some recent cases, particularly in Kashmir, have drawn attention to the injustice suffered by daughters (Ahangar, 1986: 61-78). Two problems contribute to this situation.

One is the problem of enforcing the law in favour of daughters in places where it does indeed exist, like in Pakistan. Field observations has shown that many obstacles can arise:

> " Resistance to the application of the Islamic Law to inheritance of land is most pronounced amongst *birādarī*-s (lineages) of small landholders who regard demand by any person for his wife's share of her patrimony to be dishonourable. But, nevertheless, such demands are occasionally made. When this is done it is a source of serious conflict. Which in some cases has resulted in murder of claimants, with the connivance of *birādarī* so that officers of the law have often found it impossible to marshall witnesses and evidence on the basis of which they might take punitive action. Frequently (and specially when a girl is given in marriage to a person of another *birādarī*) brothers get their sisters to sign a deed of gift transferring her share of the land to them " (Alavi, 1972: 4-5).

The second problem is that in most parts of India customary rules of succession in agricultural land have not been abolished; it is therefore necessary to frame a law which would give daughters a share of inheritance. At this juncture a further problem arises as to which norms will be chosen to frame the new laws: Western norms or *šarī'a* norms.

3.2. Pressure of the State and Western equalitarian models.

When we, Westerners, are studying such legal systems, we may fall into the trap of imagining that the aim of the reformists is to secure absolute equality between sons and daughters.

Some texts do indeed seem to hint at this. We have already quoted (above § 2.2.1), the pronouncement of a judge according to which the customary law excluding a daughter is borrowed from the Hindus. It continues:

> " [The Hindus] themselves have discarded [these customs]; and with a view to eradicate the evil consequences that flow from them have passed an enactment which does substantial justice between males and females and even between males *inter se*. It will therefore be appropriate with the spirit of times that legislature comes to the aid of Muslim Zamindars [cultivating castes] of the Valley [of Kashmir] and passes an enactment according to which these customs are abrogated and Personal Law restored " (Ahangar, 1986: 232).

The first sentence of the above quotation refers to the Hindu Succession Act of 1956, promulgated by the Central Government in India, which places daughters and sons on the same footing in matters of inheritance (Desal, 1966: section 8, 781 sq.). To quote a learned commentator:

> " The outstanding feature of the change made in the law is that all disparities in the rights of the Men and Women and disabilities between castes and sexes are eliminated in matters of marriage, succession and adoption " (Desal, 1966: VII).

It is clear that, under the pressure from the State, the Western ideal of equality between individuals is introduced into the law.

It remains however to be seen in what measure the new Act is applied:

> " There were a great many more adjustments which, substantial in appearance, would affect the public less drastically in practice; [...] such, as the experience of India since 1956 reveals, was the grant of an equal share in her father's property to a daughter, whether married or unmarried (!), in competition with her own brother " (Derrett, 1973: 32).

Manifestly, the Hindu Succession Act of 1956 was as unsuccessful as the 1948 Act in Pakistani Punjab (see Carroll, 1991) !

In fact the Muslim jurists in India are in no way moving towards the implementation of the equalitarian ideal of the 1956 Act: the end of the above quotation of the Kashmiri judge proposes that " customs are abrogated and Personal Law restored " (Ahangar, 1986: 232). The remedy must be sought in Islamic Law, to which we now turn.

3.3. The Islamic Law solution.

We should ask, however, why the solution has been sought only in the framework of Islamic Law.

One answer may be that this is the only practicable remedy. Experience has shown that radical solutions inspired from Western models are either not applied, as with the case of inheritance in the Hindu Succession Act, or are vehemently resisted, as shown by the example of the introduction of the notion of alimony in the Shah Banoo case.

Some texts seem to suggest that the equalitarian ideal does exist in the background, with the application of Islamic Law being a preliminary step towards equality:

> " To conclude [...] the denial to Muslim females of benefits flowing *at least* [emphasis mine] from Muslim Law of inheritance has no reasonable object. In these circumstances, the replacement of Customary Law of Kashmir by Muslim Personal Law is strongly recommended. The State [of Kashmir] has failed to promulgate a law which secures to women the right of full equality in all social, educational, political and legal matters. [...] *Comparatively, the Muslim Law of inheritance does substantial justice to females* " [emphasis mine] (Ahangar, 1986: 77-78).

Other authors — or even the same (as they are often very ambiguous on the subject) — drop this perspective of a completely equalitarian solution most of the time. They limit themselves to the application of Islamic Law, taking their inspiration from reformist precedents in the Near East (Mahmood, 1972b); they refuse to recognize some bold modernist steps embodied in the Pakistan Family Law Ordinance of 1961, as for instance the right of representation (Ahangar, 1986: 230-232; see also Carroll, 1985: 123-124). They hope in this way to gain a Muslim consensus and the help of the *'ulamā'* to implement changes in the Law.

I should add that there is in South Asian Islam, as in other parts of the world, an apologetic trend to justify the solutions of Islamic Law, not only as God ordained but also simply *per se*. For a fundamentalist thinker such as Mawdūdī, the rules of inheritance are well designed to avoid an excessive concentration of wealth, in the same way as *zakāt* provokes a salutary redistribution of riches (Gaborieau, 1986: 48).

CONCLUSION

This discussion of the daughter's share of inheritance has shown that there are, in fact, three systems of norms involved in the elaboration of the laws to which South Asian Muslims are subject:

1. Hindu Law — founded on the cult of ancestors with a strong emphasis on the male line — which is the basis for the customary exclusion of the daughter from inheritances;

2. Islamic Law which is gradually gaining ground against custom;

3. Legal ideas of Western origin with a strong emphasis on equality, which remain an ideal — as does the case of the demand for a common civil code for India.

Neither in India, nor in Pakistan or Bangladesh, are present circumstances favorable for a bold modernist legislation founded on the third system of norms. The present trend is for a reinforcement of the second system in the form of eclectic legislation modelled on Middle Eastern precedents.

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