Inheritance Law in the Major Religious Traditions

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1. Introduction

Wealth can change many things in life. It can affect where and how someone lives, what medical care and education they receive, and what quality of life their family enjoys. The pursuit of money – and its benefits – has impacted humanity’s development as heavily as love or war. But everything, including life, must come to an end. What happens to a man’s wealth when he dies? Who makes that decision? What if those who come after him disagree with his wishes? These questions have been debated throughout history in societies that differ both geographically and culturally. It comes as little surprise, then, that the answers each group has formed differ as much as the people themselves do.

Here in America, the idea of testamentary freedom is strong. Although exceptions can be found,
1 few statutory rules operate to limit a man’s ability to determine what he does with his money. 2 Whether he chooses to bestow all his possessions to one person or many, whether he gives to those he loves or those in need, whether he disinherits his children or not, most jurisdictions impose only minimal statutory limitations. 3

Inheritance laws in other systems, however, can severely limit a person’s ability to distribute property after death. By approaching inheritance as less of a testator’s right and more of an obligation to protect the family, society, or other norms, some systems approach the distribution of wealth in a very different manner than that commonly found in modern-day America.

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1 For instance, one common statutory limit in America is that spouses are typically allowed the option of accepting whatever they received in the will or renouncing the will to take a “fractional share” of the estate. CHARLES J. REID, JR., POWER OVER THE BODY, EQUALITY IN THE FAMILY: RIGHTS AND DOMESTIC RELATIONS IN MEDIEVAL CANON LAW 153 (2004).
2 Of course, if a decedent died before ever expressing his opinion about distributing his wealth, statutes do provide default distribution rules.
3 REID, supra note 1, at 153.
This paper will address the question of inheritance by examining the three largest bodies of religious law – Shari’a law, Talmudic law, and Canon law. It will examine the inheritance rules set forth in the original and subsequent texts of each religion, the prominence of the inheritance issue within each body of law, and the level of influence those laws have over people of the modern world. Furthermore, this paper will address the historical, social, and cultural reasons underlying the laws of each religion in an effort to understand why different rules developed under each body of law. Finally, this paper will compare the three religious systems to evaluate the relative strengths and weaknesses of each body of inheritance law, with a particular emphasis on how females are treated in each system.

II. Background Information on the Religions

Analyzing religious systems provides an interesting twist to the standard legal fare. Most religions focus on providing moral guidance, so their inheritance laws can be viewed in more than pure economic terms. The religious systems developed their inheritance laws by focusing on people and families instead of just wealth distribution. Thus, by looking at how religions address inheritance, comparative scholars have a broader framework of analysis than would be possible in a discussion on common or civil legal systems. To provide the proper background for that analysis, it is important to first consider each religion’s history and development.

A. Talmudic Law

Talmudic law is one of the oldest, living legal traditions still followed today.\(^4\) When Yahweh\(^5\) revealed His word to Moses on Mount Sinai, the Jewish people and their customary

\(^4\) The only older systems are Chthonic and Hindu law. H. Patrick Glenn, Legal Traditions of the World 92 (2nd ed. 2004).
laws already existed. Thus, Moses did not receive the first body of Jewish law, but instead a newer, updated, and divine version. This version is currently found in the first five books of the Hebrew Bible, known as the Torah or Pentateuch. The Torah is considered to be divine law, passed directly from Yahweh to Moses. It is not, however, viewed as a set of laws imposed upon the people, but rather one voluntarily adopted by the Israelites through their covenant at Mt. Sinai. From its very beginning, then, Talmudic law recognized the importance of the people’s consent to and interaction with the law.

The Torah was written immediately after Yahweh revealed it to Moses, and Jewish people and scholars discussed it for centuries. Moses himself gave his people the first oral teachings, known now as the oral Torah. His teachings, and those of his successors, were recorded during the Diaspora and are now referred to as the Mishnah. As time went on, discussions and legal opinions developed in regards to the Mishnah, which themselves were eventually recorded in the Talmud. The Talmud is thus considered to be the repository of all worthy legal discussion that occurred during the two millennia after Moses’ revelation. Although it is compiled in a single text, it is not considered to be the “end” of Talmudic law’s

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5 Yahweh is the Jewish name for “God.”
6 George Horowitz, The Spirit of Jewish Law 8 (1953) (arguing that “[w]hen their ancient authoritative writings, the Holy Scriptures, came to be set down, Israel was already long established as a separate people, with an old and distinctive pattern of folk-ways, customs, and institutions.”)
7 Glenn, supra note 4, at 93.
8 These books include Genesis, Exodus, Leviticus, Numbers, and Deuteronomy.
9 And Moses “took the book... and read in the hearing of the people and they said ‘All that the Lord hath spoken will we do and obey.’ And Moses took the blood and sprinkled it on the people and said ‘Behold the blood of the covenant which the Lord hath made with you in agreement of all these words.’” Exodus 24: 7-8.
10 Horowitz, supra note 5, at 8-9.
11 Glenn, supra note 4, at 94.
12 The oral Torah included more than just explanations of the Pentateuch. It also included many ancient customs and norms that had developed independently from Yahweh’s commandments. Horowitz, supra note 5, at 11.
13 Rabbi Judah the Patriarch, leader of the Jewish community in Palestine, is credited with collecting and editing all the oral teachings, combining them into the Mishnah, and then promulgating the text to his people circa 219 A.D. Horowitz, supra note 5, at 13, 16.
14 Glenn, supra note 4, at 95.
15 Id. at 96.
development. Instead, every subsequent interpretation “that ever will be was known at Sinai, was intended by God.” Thus, Talmudic law is still open for discussion and change.

In its current version, Talmudic law covers most of the substantive areas that western lawyers are familiar with, as well as significant areas of personal life. As such, it addresses a variety of family law issues, including that of inheritance. However, the continual growth and development of the law ensures its followers that these laws can be adjusted to reflect modern needs and concepts. This flexibility, as it impacts on inheritance law, is discussed further in Section III.

B. Shari’a Law

When the Islamic prophet Mohammed was born, the Talmudic, Roman, and Babylonian legal systems were already well-established. The Jewish and Christian religions were flourishing. Allah spoke to Mohammed, commanding him to spread His words to the people of the Arab peninsula. Allah’s commandments to Mohammed came in the form of revelations and occurred over a span of twenty-three years. Each verse was written, word-for-word, as Allah revealed it. Many of the earliest revelations center on morality and holiness. They do

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16 Id.
17 Id. at 103.
18 Id. at 99-100.
19 Id. at 100.
20 At the time Islam developed, there were two main societies living on the Arab peninsula - the sedentary farmers and the roaming Bedouins. Thus, Arabian society possessed two sets of laws at that time. One served the farmers’ agricultural needs and the other served nomadic tribal conditions. Interestingly, violations of the law were settled depending upon the action itself, not which group of people the perpetrator belonged to. For example, both the Bedouins and sedentary populations followed the criminal laws of the Bedouins and the commercial laws of the cities. Mohammed’s familiarity with all these laws and the ways they interacted “comes across clearly in the Qu’ran.” WAEL B. HALLAQ, THE ORIGINS AND EVOLUTION OF ISLAMIC LAW 18-19 (2005).
21 Both religions had many adherents in the major tribes of the Arab peninsula. Id. at 19.
22 Allah is the Islamic name for “God.”
23 GLENN, supra note 4, at 171.
24 Id. at 172.
not reflect any suggestion that Mohammed initially expected to establish a new legal system. The emphasis on the Islamic community possessing a law distinguishable from the other monotheistic laws arose only in the later revelations.\textsuperscript{26} When looking at the Qu’ran as a whole, however, it appears clear that Allah gave Mohammed a new legal system as well as a new religion. The sophisticated legal system that developed grew rapidly in complexity and geographical acceptance, becoming complete in only three and a half centuries after Mohammed’s death.\textsuperscript{27}

Several legal sources are important to this religion and each varies in its level of divinity.\textsuperscript{28} The first level is the Qu’ran itself, which is considered the “primary material source of the revealed law” and the sourcebook of Islamic values.\textsuperscript{29} The second level includes the Prophet’s comments about the Qu’ran, which are written in hadiths and known collectively as the Sunna.\textsuperscript{30} The Sunna is also seen as divine, because Allah commanded his people to obey and follow Mohammad.\textsuperscript{31} The third level - the qiyaṣ - provides analogies linking the rulings of one case to another based on similarities in their reasonings and explanations.\textsuperscript{32} The fourth level is even more human-based, and includes the doctrinal consensus known as ijma.\textsuperscript{33} There are different schools of consensus,\textsuperscript{34} however, which have given rise to the two main branches of

\textsuperscript{25} Muhammad’s initial teachings were almost all “religious and ethical, calling for humility, generosity and belief in a God… dissociated from the worldly deities worshiped by the Arabian tribes.” HALLAQ, supra note 20, at 19.
\textsuperscript{26} These later revelations on the law began around the end of the Hijra’s fifth year (626 A.D.) \textit{Id.} at 20.
\textsuperscript{27} \textit{Id.} at 8.
\textsuperscript{28} As explained supra in Section II.A., the Talmudic legal system has a similar pyramidal structure.
\textsuperscript{29} JOHN I. ESPOSITO, WOMEN IN MUSLIM FAMILY LAW 3 (1982).
\textsuperscript{30} GLENN, supra note 4, at 173-174.
\textsuperscript{31} “O ye who believe, obey God and obey the Apostle… if ye differ in anything, refer it to God and His Apostle,” HOLY QU’RAN IV: 59; “Ye have indeed in the Apostle of God a beautiful pattern of conduct for any one whose hope is in God and the Final Day,” HOLY QU’RAN XXXIII:21.
\textsuperscript{32} ESPOSITO, supra note 29, at 7.
\textsuperscript{33} “Ijma” means the “unanimous agreement of the jurists of a particular age on a specific issue.” \textit{Id.}
\textsuperscript{34} GLENN, supra note 4, at 175.
Islam – Sunni and Shi’a. Taken together, these sources provide the totality of the law of Islam, the whole body of which is known as Shari’a law.35

Shari’a law governs significantly more than just civil or criminal law.36 Like Talmudic law, it reaches deeper into the personal life to dictate etiquette, food, hygiene and prayer.37 Unsurprisingly, it also governs inheritance law. What is surprising, however, is the extent to which the Qu’ran itself addresses inheritance. While other legal principles are found mostly in the Sunna and ijma, the Qu’ran gives explicit and detailed rules about inheritance. These rules are discussed below, but what is important to note for now is how its location in the Qu’ran affects inheritance law. Because they are considered the direct word of Allah, there has been virtually no change in inheritance rules over the centuries, nor is there currently much common acceptance of the idea that any change is possible.38

C. Canon Law

Christianity as a religion developed with the birth, death, and resurrection of Jesus Christ, the Son of God. Although this occurred before the Prophet Mohammed’s birth, canon law did not develop until long after Shari’a law. One main reason for the slow growth is the lack of consultation or common action among Christian communities until late in the second century.39

35 “Shari’a” means the way or path to follow. Id. at 173.
36 The legal dictats of the final revelations addressed many new subject matters, showing an increasing tendency toward legislation and an intentional differentiation between it and the other religious and legal communities of the time. HALAQA, supra note 20, at 22.
37 “The Bedouins’ gaming, the Arabian markets’ practices of risk-cum-gambling ventures, the Christians’ and Bedouins’ indulgence in wine-drinking, and a multitude of other practices shunned by the new puritan and deeply moral religion, were subjected to limitations or outright prohibition.” Id.
39 HAMILTON HESS, THE EARLY DEVELOPMENT OF CANON LAW AND THE COUNCIL OF SERDICA 5 (2002). There were, however, intra-congregational deliberative meetings. Id. Such isolated conversations, however, could not give rise to a widely-accepted body of law. This is not to say that the earliest Church leaders did not develop certain regulations for behavior. The Bible itself contains several examples: instructions for appropriate behavior at the
At that time, various groups who identified themselves as “Christian” began gathering to discuss acceptable teachings, the resolution of issues, and their shared struggle for identity.\textsuperscript{40} These meetings became more common and began focusing on “the shared needs of the churches in face of increasing regional doctrinal crises, the need to maintain unity against the pressures of schism, and the need to deal with the grave disciplinary problems which arose as a consequence of persecution of Christians by the state.”\textsuperscript{41} The groups debating and resolving these issues became known as councils.

The term “canon” developed during the fourth century to differentiate the council ordinances from those of the local civil authorities.\textsuperscript{42} In one sense, “canon law” developed between the fourth and fifth centuries.\textsuperscript{43} The canons shifted during these years from an emphasis of collegial mutuality to a flow of authority from above; the canon writers also moved from claiming leadership by virtue of moral force to claiming it via jurisdictional power.\textsuperscript{44} Despite such developments, the existing Roman civil law provided for most legal principles during that time.\textsuperscript{45} Thus, although church leaders and followers consulted council canons, church statutes, and letters from popes for guidance in specific situations,\textsuperscript{46} the writings of that period failed to

\textsuperscript{40} HESS, supra note 39, at 6.
\textsuperscript{41} Id. at 16.
\textsuperscript{43} HESS, supra note 39, at 60.
\textsuperscript{44} Id. at 85.
\textsuperscript{45} Roman law had several other notable impacts on the development of conciliar dialogue. The council members modeled their procedures after Roman governmental models. Id. at 24. The procedures consisted of four states. First, the council president presented the issue under consideration. Second, the council conducted a roll-call where each member stated his opinion. Third, the council members voted on the final resolution. Fourth, the council prepared a letter indicating the council’s decision and sent this to all interested parties. Id. at 27. As discussed infra in Section V, Roman law impacted more than just procedures. Substantive decisions in some arenas – like inheritance – often followed the governing Roman law.
\textsuperscript{46} BOUDINHON, supra note 42.
quickly create generally accepted principles of law. Finally, in the twelfth century, a private scholar named Gratian collected and organized the various canons into one systematic body of law in a book entitled *Decretum*. The *Decretum* “signaled the beginning of the definitive establishment of Canon Law as an autonomous discipline.” By the sixteenth century, significant revisions had been made – texts that seemed doubtful were rejected, new writings were included, and the study of canon law became fully separated from that of the civil law.

Canon law thus encompasses the laws and regulations that the Catholic ecclesiastical authority has made or adopted to govern itself and its members. The religion’s primary inspiration is the divine Word of God, which is found in the Bible. The Bible consists of the Old Testament (the first five chapters of which are the Torah of Talmudic law) and the New Testament. The New Testament contains the Gospels and the Apostolic writings that occurred during and after the life of Christ. However, although the divine Word is the foundation of Christianity, the actual writings that make up canon law were all authored by humans. Gratian’s *Decretum*, for example, did not cite any Biblical text in its compilation of laws.

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47 *Id.*

48 *See generally* Peter Landau, *Gratian and the Decretum Gratiani*, in *The History of Medieval Canon Law in the Classical Period* 22, 22-54 (Wilfried Hartmann & Kenneth Pennington eds., 2008) (offering an in-depth discussion of Gratian, the ordering of the *Decretum*, its incorporation of canons, papal decrees, and Roman civil law).


50 *Boudinon*, *supra* note 42. The *Decretum* ceased to have legal force in 1917 after Pope Benedict XV published the *Codex Iuris Canonici* (Code of Canon Law). However, both that Code and the revised one that Pope John Paul II promulgated in 1983 allow for the use of Gratian’s text in modern jurisprudence. *Landau*, *supra* note 48, at 53.

51 *Boudinon*, *supra* note 42.

52 *Id.*

53 *Id.*

54 *See generally Gerosa*, *supra* note 49, at 49-82 (tracking the sources, methods, and development of Canon Law).

55 Gratian divided his *Decretum* into two general sections – the compilation of the laws and fictional case examples that he answered by referring to the laws. While he did reference New Testament scripts in his dicta discussing the case examples, he entirely avoided Old Testament Commandments by instead including allegorical interpretations of those Commandments. Before Gratian, the collections of Church writings that did exist typically included
Because of the way canon law developed, it functionally includes elements and concepts that were taken from custom, Roman civil laws, private writings, and the teachings of church leaders over time. As seen below in Section V, the incorporation of many Roman law concepts had a significant impact on most non-spiritual matters, including inheritance law.

D. Summary

The three major religious systems share many elements in common. They are all inspired by divine teachings, address both moral and practical matters, and were impacted by the cultural, legal, and religious beliefs of their neighbors. However, they also differ in significant respects. Talmudic law, while used to keep its people together during the Diaspora, now has little jurisdictional power in nations other than Israel. Shari’a law has heavily impacted the laws of countries throughout the Middle East and in some countries constitutes the official legal system. Canon law never developed into the legal system of any particular country, although its prevalence in Western Europe certainly impacted the development of both civil and common law there. All three religions address inheritance, but from very different angles and in very different ways. As seen in the discussion below, each religious system’s approach to the topic impacts its followers in positive and negative ways.

III. Talmudic Law on Inheritance

Talmudic law is a reflection of divine guidance and subsequent interpretations. This multi-nature approach to the law is clearly demonstrated in the inheritance context. The Torah provides for certain inheritance rights. The Mishnah and Talmud give significantly greater

Biblical passages alongside council canons and papal decreets. Gratian, however, did not cite to a single biblical text in his compilation of the laws. LANDAU, supra note 48, at 28-29.

BOUDINHON, supra note 42.
details and guidance, though they base their rules off the principles found in the Torah. The Talmudic system draws several important lines that must be understood – those between males and females, between heirs and lienholders, and between testamentary freedom and familial obligations.

A. The General Principles

The Talmudic legal system does not provide any significant amount of testamentary freedom; there is no precise equivalent to a “will.”\textsuperscript{57} Property, under Talmudic law, can only be owned by a living being, so a person generally cannot control what happens to his property after death.\textsuperscript{58} Instead, a man’s sons are automatically designated his heirs and his widow and daughters are automatically granted a lien on his property.\textsuperscript{59} The women’s lien provides for housing, food, clothes, and support at the quality of life that the women were accustomed to before his death.\textsuperscript{60} This lien has precedence over the sons’ inheritance rights.\textsuperscript{61} Thus, although on the surface Talmudic inheritance law appears discriminatory against women, in practice, the lien provides greater support than equal inheritance would.

\textsuperscript{57} MOSHE MEISELMAN, JEWISH WOMAN IN JEWISH LAW 87 (1978). One exception involves requests made at the last moment by a dying man. Rabbinical legislation mandates that dispositions made in such circumstances must be enforced by the courts even if those dispositions do not accord with the Torah’s instructions on heir precedence. The purpose behind this legislation is to prevent the dying man’s agitation from increasing from fear that his legal heirs would not otherwise carry out his last wishes. ARNOLD COHEN, AN INTRODUCTION TO JEWISH CIVIL LAW 68 (1991).

\textsuperscript{58} MEISELMAN, supra note 57, at 87; COHEN, supra note 57, at 202. Because of this principle, the inheritance passes to the heir at the exact moment of the decedent’s death. Contrast this to the Western notion of waiting for a will to be read before any property passes to the heirs. HOROWITZ, supra note 5, at 379.

\textsuperscript{59} “At death the property of a deceased person, not otherwise disposed of, passed to his heirs by operation of law…” The whole estate descended to the heirs at law without the intervention of an executor or administrator of the personal property.” HOROWITZ, supra note 5, at 378.

\textsuperscript{60} MEISELMAN, supra note 57, at 90.

\textsuperscript{61} Id.
B. The Specific Rules

The Rabbis developed a complete system of inheritance that addressed both descent and property distribution. Their teachings are based off of the Torah’s short, but direct, instructions on inheritance:

If a man die and have no son, then ye shall cause his inheritance to pass unto his daughter. And if he have no daughter, then ye shall give his inheritance unto his brethren. And if he have no brethren then ye shall give his inheritance unto his father’s brethren. And if his father have no brethren, then ye shall give his inheritance unto his kinsman who is next to him of his family and he shall possess it. And it shall be unto the children of Israel a statute of judgment.\(^{62}\)

Based off the Torah’s teachings, only certain people can be heirs to an estate. The husband succeeds to the entirety of his wife’s estate.\(^{63}\) The widow is not an heir, but she is nonetheless supported by her lien rights.\(^{64}\) If a man had any sons, then they take all shares of the estate, with the firstborn receiving a double share.\(^ {65}\) Furthermore, if there were sons, the daughter cannot serve as an heir and instead receives a lien.\(^ {66}\) A daughter can only serve as an heir when the decedent had no sons.\(^ {67}\)

Two significant limits are placed on heirs. Both gifts and liens have precedence over an heir’s right to possession of the estate. These limits are very real and can dramatically curtail an heir’s access to the estate. However, there are still concrete benefits to being an heir, the primary one being *kam tahtav*, the replacement of the father’s activities by his heirs.\(^ {68}\) This doctrine allows for heirs to inherit all the non-financial affairs of the testator, such as position in the

\(^{62}\) Numbers 27:8-11.

\(^{63}\) Rev. Moses Mielziner, Jewish Law of Marriage and Divorce in Ancient and Modern Times and Its Relation to the Law of the State 102 (1884). Twelfth-century rabbis modified this law in situations where the wife died childless within the first year of her marriage. In that circumstance, her dowry property would be returned to her father or his legal heirs. *Id* at 106.

\(^{64}\) Horowitz, *supra* note 5, at 379.

\(^{65}\) “He must agree to give the older son two shares of everything he owns...” Deuteronomy 21:17.

\(^{66}\) Horowitz, *supra* note 5, at 379.

\(^{67}\) Id.

\(^{68}\) Meiselman, *supra* note 57, at 93-94.
community or the business world. While it may be hard to value these amorphous rights, they can nonetheless provide strong advantages if the decedent held high status or a successful business.

The heirdom, along with the gift and the lien, compose the three ways that property transfers hands under Talmudic law. A man can make a gift to anyone he wants to during his lifetime. The anticipated heirs have no ability to limit a man from gifting away any portion of his estate. Although he can gift to any of his children, men are explicitly encouraged to provide gifts to their daughters. Thus, even during her father’s life, a daughter receives some preference over a son.

The final method of property transfer is the lien. All lien-holders, or creditors, must be repaid at the time of a debtor’s death before the sons can receive any inheritance. The wife and daughters all receive liens, which also have precedence over all other creditors who came subsequent to the mother’s marriage. Additionally, the liens have rights over all gifts that were given during the decedent’s lifetime. Thus, a man cannot circumvent his duties to the females by gifting his entire estate to a son before death.

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69 Mishnah, Baba Batra, 116a, 141a.
70 Meiselman, supra note 57, at 92. Because of this ability to provide for gifts, some scholars argue that Talmudic law provides the equivalent of a will. See Horowitz, supra note 5, at 402-410. Despite this similarity, gifts must be given during the testator’s lifetime. He thus loses his ability to utilize the property or money while he is still alive, which creates a considerable difference between such gifts and a true will.
71 Meiselman, supra note 57, at 89. However, Talmudic law assumes that no dying man would intentionally ignore the law and deprive his sons of their rightful inheritance. Thus, if a man facing death declares that his property should be transferred to one person, that declaration of gift is treated as a trust. The recipient is expected to serve as trustee for the heirs. This is true even if the testator made no mention of a trust or his heirs and instead stated only that he wanted his estate to go to the recipient. Cohen, supra note 57, at 108.
72 Mishnah, Baba Batra, 141a.
73 Meiselman, supra note 57, at 89.
74 Id.
75 Id. at 92.
The wife’s lien is for a portion of the estate that is great enough to support her until her death.\(^{76}\) The daughter’s lien is for support until her marriage.\(^{77}\) For both, the lien encompasses the use of the home and household effects.\(^{78}\) The actual functioning of the widow’s lien provides the option of a lump-sum settlement or continuing support from the deceased’s estate.\(^{79}\) The widow’s support terminates whenever she elects to take her lump-sum settlement or remarries.\(^{80}\)

The lien’s effect on the son’s inheritance varies depending on the size of the estate, as shown in the following Mishnah:

One who dies and leaves sons and daughters, at the time that the estate is large, the sons inherit and the daughters are supported. If the estate is small, the daughters are supported and the sons go begging from door to door.\(^{81}\)

As this shows, the lien effectively freezes a son’s access to small and medium-sized estates.\(^{82}\)

He cannot sell the home or land, cannot take possession of any money that must be used to support the women, and cannot place his claim of inheritance before the liens.\(^{83}\) In larger estates, the sons have full access to any part of the estate remaining after the women’s needs are met.\(^{84}\)

C. The History and Purpose of the Laws

The Torah repeatedly addresses wealth and its place within the Jewish community.

Yahweh Himself destined Israel to a land of riches.\(^{85}\) Wealth is viewed as “Israel’s appointed

\(^{76}\) Id. at 84.

\(^{77}\) HOROWITZ, supra note 5, at 392.

\(^{78}\) The women receive food, clothing, shelter and other necessaries according to their stations and the lifestyle they are accustomed to during the testator’s lifetime. Id. at 389.

\(^{79}\) The lump-sum settlement is specified in the marriage contract. MIELZINER, supra note 63, at 104.

\(^{80}\) MEISELMAN, supra note 57, at 90.

\(^{81}\) MISHNAH, Baba Batra, 139b.

\(^{82}\) MEISELMAN, supra note 57, at 84.

\(^{83}\) Id. at 89.

\(^{84}\) Id. at 84.

\(^{85}\) “For the Lord your God is bringing you into a good land, a land of brooks and water, of fountains and springs, flowing forth in valleys and hills, a land of wheat and barley, of vines and fig trees and pomegranates, a land of olive trees and honey, a land in which you will eat bread without scarcity, in which you will lack nothing, a land whose stones are iron, and out of whose hills you can dig copper. And you shall eat and be full.” Deuteronomy 8:7-10a.
destiny”86 and the collection of personal riches is accepted as a reflection of Yahweh’s generosity.87 However, “the land ultimately remains God’s to dispose of as he deems fit.”88 Thus, there are limits upon what a man can do with his money.

These limits began to arise during the post-exilic period in direct response to the growth of the monarchy. The Hebrews’ ideal community was one in which each family possessed their own home and land, provided for their own livelihood, and thus maintained their own autonomy.89 This idyllic picture became threatened by the growth of the monarchy and the resulting capitalist society.90 As widespread class differences became common, legislators sought to develop protections for those most in need; the lien is one such protection they created.91

Talmudic family law considers it preferable for a man to earn a living rather than a woman.92 Thus, the inheritance laws were written to prevent a woman from being forced to work outside the home. Her support is seen as more important than a man’s inconvenience at having to work because he did not inherit anything. Furthermore, Talmudic law became active during a time when women had relatively few rights. Because a religious-based legal system has moral goals, it strives to protect the family and the unfortunate. Thus, the law prevented men from ignoring their moral responsibilities to the women of their family.

87 “And Isaac sowed in that land, and reaped in the same year a hundredfold. The Lord blessed him, and the man became rich, and gained more and more until he became very wealthy. He had possession of flocks and herds, and a great household.” Genesis 26.12-14a. Contrast this attitude with Shari’a law’s prohibition on collecting individual wealth, discussed infra in Section IV.C.
88 Phillips, supra note 86, at 149.
89 Id. at 149-150.
90 Id. at 150-151.
91 A partial motivation for protecting those in need can be found from Yahweh’s commands in the Talmud, particularly regarding widows and orphans: “You shall not afflict any widow or fatherless child. If you afflict them in any way, and they cry at all to Me, I will surely hear their cry; and My wrath will become hot, and I will kill you with the sword; your wives shall be widows, and your children fatherless.” Exodus 22:22-24.
92 Mishnah, Baba Batra, 141a. See also Psalm 45:14 (“The entire glory of the daughter of the king is on the inside.”).
IV. Shari’a Law on Inheritance

Inheritance is one of the most common ways that people acquire land or access to land in the Muslim world.93 Determining and protecting the right to inherit is therefore extremely important in this system. Compared to other areas of Shari’a law, the Qu’ran provides extremely detailed guidance on this topic.94 Because the Qu’ran explicitly states the rules, inheritance law has remained largely unchanged despite the modern reforms that have influenced several other fields of Islamic law.95 As seen below, the laws provide for direct inheritance by women (as compared to the lien-holder status in Talmudic law), but their inheritance is only one-half the amount that a man receives. Nonetheless, on the surface these rules – especially given the time frame in which they were enacted – provide strong inheritance rights for women.96 Unfortunately, other methods of estate planning have developed that allow these rules to be largely ignored. Those methods, and their impact on women’s inheritance rights, are discussed in Section VI, below. For now, this section addresses the inheritance rules as found in the Qu’ran.

A. The General Principles

When a person dies, his property is first used to pay debts and legacies. After that, specific fixed, fractional shares of the decedent’s estate are distributed to pre-defined parties according to the rules explicitly outlined in the Qu’ran. The share that each person receives depends on the familial situation – how many sons or daughters there are, whether there is a

91 Sait & Lim, supra note 38, at 107.
92 Id.
93 Id.
94 Scholars recognize that some of the most fundamental reforms the Qu’ran made to the customary law of the time were in the fields of marriage, divorce, and inheritance. The reforms aimed to strengthen the family and improve women’s status in Muslim society. Esposito, supra note 29, at 4.
widow, what other extended family are still alive, etc. The fractional share cannot be altered by wills or any other method.\footnote{The fractional share system today is almost unanimously viewed as compulsory rather than suggestive. Cf., David S. Powers, Studies in Qur'an and Hadith: The Formation of the Islamic Law of Inheritance (1986) (arguing that the mandatory nature of the shares is an inaccurate interpretation because it does not accurately reflect the common understanding during Mohammed's lifetime).}

The fixed share system is very inclusive and seeks "to support a conscious socio-economic religious ideology."\footnote{Id. at 107.} It distributes property to a range of relatives, including immediate, near and distant kin. As explained below, the size of the share depends on the gender and on the level of kinship. Women do have specific inheritance rights within this system, although a woman will always receive only half of what a similarly situated man would receive.\footnote{Sait & Lim, supra note 38, at 109.}

\section*{B. The Specific Rules}

The Qu’ran gives several common family situations that might occur after someone’s death. For each situation, it provides specific shares for every affected family member.\footnote{See Holy Qur'an, IV: 11-12: "Allah chargeth you concerning (the provision for) your children: to the male the equivalent of the portion of two females, and if there be women more than two, then theirs is two-thirds of the inheritance, and if there be one (only) then the half. And to his parents a sixth share of the inheritance to each if he left children; and if he left no children and his parents are his heirs, then to his mother appertaineth the third; and if he have brethren, then to his mother appertaineth the sixth, after (the payment of) any legacy he may have bequeathed, or debt. Your parents or your children: Ye know not which of them is nearer unto you in usefulness. It is an injunction from Allah. Lo! Allah is All-Knowing, All-Wise. And unto you belongeth a half of that which your wives leave, if they have no child; but if they have a child then unto you the fourth of that which they leave, after (any payment of) any legacy they may have bequeathed, or debt. And unto them belongeth the fourth of that which ye leave if ye have no child, but if ye have a child then the eighth of that which ye leave (the payment of) after any legacy ye may have bequeathed, or debt. And if a man or a woman leave neither parent nor child, and he (or she) have a brother or a sister then to each of them twain the sixth, and if they be more than two, then they shall be sharers in the third, after (the payment of) any legacy that may have been bequeathed or debt not injuring. A commandment from Allah. Allah is All-Knowing, Most Forbearing."} A general summary of these rules,\footnote{For a complete and detailed description of the inheritance rules geared towards practicing lawyers, see Jamal J. Nasir, The Islamic Law of Personal Status 218-263 (2nd ed. 1990).} as interpreted by the Sunni, is as follows:
A surviving parent will receive one-sixth of the estate, the surviving spouse either one-eighth (a wife) or one quarter (a husband), with the balance shared between the surviving children and the sons receiving twice the share of the daughters. Where the deceased has no sons and only one daughter, she will receive one-half of the estate. If there are no sons but two or more daughters, they will share two-thirds of the estate. The residue of the estate in this case will pass to the closest surviving male agnate (asaba), the deceased’s father, brothers, uncles, cousins or more distant male relative.102

Shi’a and Sunni factions have developed different answers to situations not explicitly discussed in the Qu’ran. For instance, if a man dies and leaves a wife and two parents, the Sunni scheme provides one-quarter of the estate to the wife, one-third to the mother, and the remaining 5/12 to the father.103 The Shi’a scheme, in contrast, provides one-quarter to the wife, one-quarter to the mother, and the remaining one-half to the father.104 The Sunni and Shi’a also differ on the solution when the compulsory rules lead to the estate being insufficient to provide the prescribed shares to all parties.105 This would occur, for instance, if a man dies leaving both parents, a wife and two daughters.106 The Qu’ran mandates that each parent is entitled to one-sixth of the estate, the two daughters are entitled to split two-thirds of it, and the wife is entitled to one-eighth. Thus, nine-eights of the estate are allocated. To resolve this dilemma, the Sunni scheme reduces all shares proportionately while the Shi’a scheme pays the wife first and divides the remaining estate into the appropriate shares for the other relatives.107

C. The History and Purpose of the Laws

Chronology of the divine revelation of Qu’ranic verses shows a movement from full freedom of distributing property as personally desired through a will (wasaya) to the current

102 SAIT & LIM, supra note 38, at 110.
103 Id. at 111.
104 Id.
105 Id.
106 Id.
107 Id.
restricted scheme.108 The first relevant revelation given to Mohammed states: “It is prescribed when death approaches any of you, if he leaves any goods, that he make a bequest to his parents and near relatives, as per reasonable usage.”109 This verse reflected the pre-Islamic cultural practices of using wills and excluding women and children from inheritance.110 A later revelation annulled the earlier verse and stated: “From what is left by parents and those near related, whether the estate is small or large, a determinate share shall be for both men and women.”111 Thus, this later revelation included women in inheritance for the first time.112

This shift can be explained in part by the transition from nomadic to sedentary life. The previous tribal system had been governed by small groups of men who passed power and property from one to the next.113 A man could choose to give his property to anyone he desired; the men in charge of the tribe generally received preference.114 Those leaders then used their discretion to provide for the remaining members of the tribe. Success of the community group was paramount. As the tribes settled, the individual family became more important than the larger group. The new inheritance rules that placed emphasis on the family rather than the tribe were a logical extension of such changes.115 Family-centered inheritance rules yielded significant gains to women because they too were seen as family members meriting property and inheritance rights.116

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108 For a detailed description of the initial acceptance of testamentary freedom and how it shifted into the fixed-share system, see POWERS, supra note 97.
109 HOLY QU’RAN II:10.
110 Tribal law at the time of Mohammed demanded that only the deceased’s male relatives could inherit from him. HALLAQ, supra note 20, at 22.
111 HOLY QU’RAN 4:7.
112 This allotment of one-half the brother’s share “appears to have been unprecedented in Arabia.” HALLAQ, supra note 20, at 23.
113 POWERS, supra note 97, at 210.
114 Id. Male minors, widows, and daughters were barred from inheritance because they were unable to fight and defend the tribe’s possessions.
115 Id.
116 Id.
Another explanation for the shift from wills to fixed shares can be found in the social needs of the people at that time, as well as the religious leaders’ desires to emphasize the divinity of Shari’a law:

Compulsory rules that divide up property in an egalitarian manner would have promoted social cohesion at a time when Muslims were dying in large numbers either on the battlefield or as victims of the plague, and when large amounts of wealth and property were being channeled into a relatively small number of hands. And the identification of the Divinity as the source of these rules would have served to reinforce the emerging conception of Islamic law (Shari’a) as the working out, down to the smallest details, of God’s plan for mankind.\textsuperscript{117}

These laws also reflect the balance between individual property rights and the “fundamental principle that ultimate ownership of property lies with God.”\textsuperscript{118} The forced distributive aspect of the inheritance rules supports one of the basic tenants of Islamic property law – the prohibition of one person hoarding and accumulating excessive wealth.\textsuperscript{119} The fixed share system operates as a reminder that Allah ultimately owns all property and it must therefore be divided according to His divine formula.\textsuperscript{120}

\textbf{V. Canon Law on Inheritance}

Canonical authors had many sources to pull from when they developed their inheritance laws. Both the Talmudic and Shari’a systems had fully developed and the Roman civil law dominated much of the land. Many “Western” notions of property rights had already become commonly accepted. Drawing from both moral concepts and the new focus on property rights, Canon law’s inheritance rules sought to balance testamentary freedom with familial obligations.

\textsuperscript{117} Id. at 213.
\textsuperscript{118} Salih & Lim, supra note 38, at 110.
\textsuperscript{119} Id. at 109. This inability to consolidate property within one person’s hands is cited as one of the major reasons that Muslim countries never developed a “strong bourgeoisie which could generate the equivalent of European capitalism.” Id.
\textsuperscript{120} Id. at 110.
A. General Principles

Canon law’s inheritance rules developed to add a social dimension to the pre-existing Roman law, which it largely incorporated. This system differs dramatically from Talmudic and Shari’a law in its acceptance of the principle of testamentary freedom. Such freedom was deemed to be an inherent right in a way the other systems never considered, but there were still some limits placed upon it. These included requiring funds to be given to the church as well as to any children and occasionally to the widow. Thus, the canonists devised a system that supported what they saw as two competing concepts—the freedom to dispose of property through a will and the obligation to support remaining family members. Both of these concepts were eventually seen as “natural rights” premised upon the Christian vision of mutual and reciprocal family love.

B. Specific Rules

The Bible, although it repeatedly mentions inheritance, does not govern the subject in Canon Law. Gratian’s Decretum pointedly left out any direct citations to the Old Testament, instead relying on manmade sources. Although inheritance rights are addressed by the New Testament, the vast majority of those discussions revolve around how Christ’s followers would inherit the “Kingdom of God.”

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121 Reid, supra note 1, at 164-165.
122 Id. at 154.
123 Id.
124 See Section III.B., supra, for information on the Old Testament’s treatment of inheritance law.
125 See footnote 55, supra, for information on Gratian’s treatment of the Old Testament.
126 This is a common refrain in the New Testament. Examples of such assertions include: “Now I commit you to God and to the word of his grace, which can build you up and give you an inheritance among all those who are sanctified,” Acts 20:32; “For of this you can be sure: No immoral, impure or greedy person—such a man is an idolater—has any inheritance in the kingdom of Christ and of God,” Ephesians 5:5; “[G]iv[e] thanks to the Father, who has qualified you to share in the inheritance of the saints in the kingdom of light,” Colossians 1:12; “For this reason Christ is the mediator of a new covenant, that those who are called may receive the promised eternal
The divine Word of God was therefore not the inspiration for the idea of testamentary freedom. Instead, the concept originated from the developing Western belief that humans have the ability to understand, determine, and dictate how their affairs should be ordered in death as well as life. Canonists referenced the Old and New Testament’s acknowledgement of inheritance rights as providing divine support for testamentary freedom—particularly for the last will and testament.127 This right to determine the fate of an estate after death came to be known as the ius testandi.128 Although the concept is uncontroversial to current Western scholars, it was a novel idea unmatched by the other two religious systems then operating.

Despite the general flexibility of the ius testandi, testators were admonished to make some type of contribution to the Church.129 This requirement, however, “allowed considerable latitude in the kind and amount of the contribution given.”130 As with the ius testandi itself, this requirement to give to the religious organization was a novel concept not found in the other religions of the time.

The testator’s obligation to protect his children’s natural rights prevented the ius testandi from giving the testator unlimited control. Canonists taught that children have a “claim owing by nature” to a portion of the parental estate.131 This natural claim and its resulting inheritance rights differed among children depending upon the relationship that each child had to the decedent; legitimate, illegitimate, and adopted children all had different rights that they could claim. While most canonical writings simply referenced this right without giving numerical

127 Reid, supra note 1, at 162-163.
128 Id. at 154.
129 Id. at 164-165.
130 Id.
131 Id. at 23.
limits, others specified that the amount should be a minimum of one-fourth of the parents’ estate.\textsuperscript{132}

Canon law generally retained the Roman law’s meager approach to the inheritance rights of spouses. The Roman law of the time limited spousal rights to those of their wedding gifts alone. Thus, other than claiming the amount they had contracted for at the time of the marriage itself, spouses had no right to support after their partner died.\textsuperscript{133} Canon law incorporated this minimal spousal right with only one major modification - if the “law of the land” provided for any spousal inheritance, then the spouse would receive it.\textsuperscript{134} Otherwise, the widow was to rely upon the \textit{donatio propter nuptias} (wedding gift) that she had received at the time of the wedding.\textsuperscript{135} Because Canon law developed alongside civil laws, rather than acting as the civil law itself, this reference to the “law of the land” is understandable and to a certain extent unavoidable.

Later papal legislation provided additional specific rules on the actual process of inheritance. For instance, subsequent laws specified that only two or three witnesses needed to be present for the execution of a valid testament,\textsuperscript{136} that legacies supported only by “bare words” would be treated as valid,\textsuperscript{137} and that executors should be compelled to uphold all of the will’s provisions.\textsuperscript{138}

\textsuperscript{132} \textit{Id.} at 170.

\textsuperscript{133} This does not mean, however, that Roman women were unable to inherit more if the testator chose to give them more. The \textit{Lex Voconia} of 169 B.C. prohibited women from being named heirs to estates that fell into the top property class of the census. However, this rule could be avoided several ways if the testator wanted to leave his widow with greater protections. The man could leave her a legacy, leave his property in trust to a male friend who would then gift the property to the widow, or request the governing body to exempt his widow from the law. During the Empire period, the \textit{Lex Voconia}’s prohibition on female inheritance relaxed even further in practice, to the point that a man could provide a true inheritance to his wife or daughter if he so desired. J.P.V.D. BALSDON, \textsc{life and leisure in ancient rome} 127-128 (3\textsuperscript{rd} ed., 2004).

\textsuperscript{134} \textsc{Pope Innocent III, Nuper a nobis} X.4.20.6 (1199).

\textsuperscript{135} \textit{Id.}

\textsuperscript{136} Reid, \textit{supra} note 1, at 163.

\textsuperscript{137} \textit{Id.}

\textsuperscript{138} \textit{Id.}
C. The History and Purpose of the Laws

The Roman law allowed for the making of a will, but that ability was only granted to those of “free” status—slaves and minor children were ineligible. Further, testators had to possess clear judgment and the ability to accurately express themselves.\(^{139}\) These requirements reflected the Roman’s opinion that wise property management was a critical economic and social goal.\(^{140}\) The canonists retained this attitude by limiting testamentary freedom to those of sound mind who were not in another’s power. Canon law required a “sound and solemn and benevolent mental intention undisturbed by the passions of the moment.”\(^{141}\)

Roman law had two other major provisions which impacted the Canon law’s inheritance rules. First, Rome’s “Falcidian fourth” rule guaranteed heirs a minimum of one-fourth of the estate.\(^{142}\) While a testator could include personal legacies in his will to persons other than his heirs, the heirs’ rights to their Falcidian fourth came before these legacies.\(^{143}\) Second, if the testator left any fideicommissum (loosely translated as a “trust”), it was binding upon the heirs after they received their portion.\(^{144}\) Canonists used these rules as foundations for both their acceptance of testamentary freedom and the need to protect children’s natural claims.

As Canon inheritance law developed, it added a focus on serving social goods, such as supporting the Church and aiding the poor.\(^{145}\) Thus, while embracing testamentary freedom, canonists taught that people should be concerned with matters of the spirit as well as with

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\(^{139}\) This disqualified the mentally infirm and deaf/mutes. The praetor or centumviral court could invalidate a will based on the testator’s unfitness. BALSDON, supra note 133, at 128.

\(^{140}\) Reid, supra note 1, at 157.

\(^{141}\) Reid, supra note 1, at 163.

\(^{142}\) The Falcidian Fourth rule amended the law in order to prevent legacies from exhausting the estate and leaving the heir with no possessions or with a collection of unpaid bills. It limited the total of any legacies to no more than three-quarters of the estate, leaving the heirs with a minimum of one quarter. The name “Falcidian Fourth” derived from lex Falcidia, the name of the law enacted in 41 B.C. that first articulated this limit on legacies. BALSDON, supra note 133, at 127.

\(^{143}\) Id.

\(^{144}\) The trustee would be motivated to comply with the fideicommissum not only because the law itself demanded such, but because his reputation and standing within the community depended upon it. Id. at 128.

\(^{145}\) REID, supra note 1, at 157.
dynastic affairs. This spiritual focus led to the idea of donating to the church. Early texts and sermons encouraged priests to hasten to dying men in order to sing the Psalms, recite prayers, hear confession, and notably to encourage the person to make a charitable bequest to ensure forgiveness of their sins. St. Augustine taught that men should consider “Christ’s Church” as a son when making out a will; they should give at least the same amount to the church as to a son.

Gratian’s Decretum did little to further the developing inheritance doctrine. In one of the few places that he discussed inheritance, he stated that anyone who interfered with testamentary gifts to the church should be punished by excommunication or a similar sanction. Such punishment effectively endorsed the concept of testamentary freedom while still providing a method that would ensure any gifts made to the Church were enforced. What Gratian did not say on inheritance is significantly more noteworthy than what he did say. As discussed in section III.B., the Old Testament laid out several inheritance rules that became an important part of the Talmudic legal system. Because Gratian intentionally removed all direct citations to the Old Testament, none of those inheritance laws passed into the canonical system. Although the canon law itself continued to develop after Gratian, few changes were made to the inheritance laws from that point forward. Instead, the rules retained recognition of testamentary freedom limited by the expectation that parents honor their children’s natural rights of inheritance.

VI. Comparison of the Laws

The above analysis provided detailed information about inheritance laws governed by the Talmudic, Shari’a, and Canon legal systems. With that foundation in mind, it is now appropriate

146 Id. at 164-165.
147 Id. at 157-160.
148 Id. at 161-162. One later writer did argue that a man should be free to give more than one son’s portion of inheritance to the Church, so long as it was done with “pious deliberation of mind” rather than in a fit of anger against a son. Id. at 162-163.
to turn to a comparison of the three systems. Each has strengths and weaknesses in the
inheritance realm, particularly in regard to female family members. Those pros and cons are
explored below.

\textit{A. Talmudic Law Analysis}

The inheritance system that the Talmudic laws set up offers strategic advantages for
women, but it does so at the expense of the decedent's sons. Because that legal system deems it
preferable for men to be forced to work rather than women, it has arranged a system whereby the
women are protected first and foremost. No other creditors supercede their claim to support, nor
do the actual heirs. Even gifts that the male decedent has given to others can be reclaimed in the
name of supporting his female relatives. Additionally, the laws provide for a woman to choose
between support until her next marriage or a lump-sum amount. One commendable aspect of
this arrangement is that the lump-sum amount is still available for women who choose to remarry
and release their lien. This prevents a widow from having to choose between remarriage and
losing her financial independence.

The possibility of a lump-sum payment also offers other solutions to problems that the
inheritance laws might otherwise impose on women. The lien for support, as explained above in
Section III, does not entitle the women to actual possession of the estate – only the use of it. The
women cannot sell the house or land or possessions; they are not the actual heirs but only lien
holders. If left at this, the system could be seen as providing only limited freedom for women.
For instance, although it protects them from being thrown out on the street, it also prevents them
from the financial ability to move to another house. What if the widow desired to move back to
the area where her family lived? With only the lifetime support option, she would be unable to
sell her husband’s house and purchase another one closer to her family. The house itself belongs to the male heirs, despite the woman’s right to live in it. However, the lump-sum option prevents such problems from developing. While the lifetime support option allows for the widow to remain in her marital home if she so chooses, the lump-sum one enables her to be fully financially independent if that is her wish.

Where Talmudic law remains inequitable is its willingness to allow only the male heirs to step into the father’s business shoes. This rule is premised on the belief that males are more capable of running a business than females. While this might have been true at the time the laws were written, it is arguably no longer the case today. Nonetheless, female relatives continue to be prevented from inheriting any right to participate in a male decedent’s business or community affairs. However, there is certainly an argument to be made that allowing a son to inherit his father’s business activities is only fair given the liens of his female relatives. Unless an estate is large enough to support the women and still have an amount left over for the men, the sons will be effectively removed from any financial support from the estate. Allowing them the opportunity, instead, to participate in the business world at least gives them a chance to partially benefit from any success that their father may have had.

B. Shari’a Law Analysis

There are several benefits, especially to women, that appear with a cursory look at the Shari’a inheritance laws. For instance, this system facilitates Islamic women’s rights to gain, retain and manage their own wealth and land. This ability differed markedly from the lack of rights that women possessed in the Arabic world before the development of Islam and in the
Western World until several decades ago. The laws operated to protect women’s rights by declaring the shares they would receive mandatory. Furthermore, the laws facilitate familial harmony. Because parties cannot be disinheritied and everyone already knows what each party will receive, there is minimal cause for familial strife. Again, this differs from both Canon and Western legal traditions where testamentary freedom often leads to lawsuits and arguments about the choices made by a testator.

The placement of the inheritance laws within the Qu’ran itself also creates a benefit to women, although it arguably leads to far more negatives. Because the fractional shares allocated to women are mandated by Allah’s divine words, men and religious leaders have virtually no ability to change these laws and remove the women’s inheritance rights. However, this also operates against women because the current laws limit them to only one-half the share that an equally situated man would receive. While this was a drastically positive development for women at the time the Qu’ran was written, today’s feminist scholars have little room to maneuver in their arguments that this discriminatory practice should be abolished. They, too, are confined in their calls for change by the fact that Allah himself decreed the majority of the inheritance rules that operate in Shari’a law.

While this inability to change the one-half rule creates the potential for claims of discrimination in today’s society, there is a considerably larger problem facing women subject to Shari’a law today. While it is true that men have been unable to change the fixed share rules that dictate women’s receipt of their share of inheritance, men have been markedly successful in

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149 SAI1 & LIM, supra note 38, at 112.
150 Id.
151 The only major change that has occurred in Shari’a inheritance rules concerns the “mandatory will.” Traditional Shari’a law prohibited an orphaned grandchild from succeeding to his deceased parent’s share of the grandparent’s estate. The development of the mandatory will ensured these grandchildren received an amount equivalent to their deceased parent’s share, up to a maximum of 1/3 of the estate. The concept of the mandatory will thus developed to protect orphans and has been adopted in Egypt, Tunisia, Morocco, Syria, Kuwait, Jordan, Iraq, Algeria, and Indonesia. Id. at 124.
developing doctrines that work around the Qu’ran’s protection of women. The development of these cultural doctrines has seen Islamic women’s actual ability to receive their fixed share severely curtailed.

One of these doctrines is that of the gift, or hiba, that can be granted while the giver is still alive. This doctrine allows a giver to leave the entirety of his property in the hands of one person – typically, a son – and therefore eliminates his estate altogether, along with the claims of any female relatives to that estate.¹⁵² The hiba is justified, particularly in agricultural areas, by claims that the fragmentation of land into multiple partners with unequal shares would lead to the failure of any party to successfully utilize that land.¹⁵³

Other cultural doctrines involve post-inheritance adjustment practices like consolidation and renunciation of inheritance rights.¹⁵⁴ Consolidation occurs after distribution of the shares, when parties sell or swap their new-found inheritances. This commonly occurs when the daughter exchanges her share in land for cash from her brother – thus, consolidating the land into one person’s hands.¹⁵⁵ Renunciation, or tanazul, occurs when a person renounces their inheritance rights after they have been legally confirmed as a share-recipient.¹⁵⁶ Family and community pressure can lead a woman to feel forced into renouncing her share. In these situations, a woman’s refusal to renounce can lead to strained or severed ties with her brothers and other male relatives, who are often necessary for a woman to operate successfully in Islamic society.¹⁵⁷

¹⁵² Id. at 115.
¹⁵³ Id. at 112.
¹⁵⁴ Id. at 108.
¹⁵⁵ Id. at 119.
¹⁵⁶ Id. at 121.
¹⁵⁷ Id. at 121-122.
Additionally, some parties follow unofficial channels in order to avoid the mandated share distributions for females. Instead of registering the death of an original title holder or the redistribution of his estate with the relevant authorities, the parties involved simply move the distribution out of the official sphere and pass the land in its entirety to a chosen son.\textsuperscript{158} This creates a significant negative impact on women’s rights in isolated geographic areas that accept such behavior.\textsuperscript{159}

The impact of these cultural practices varies by society. Some Islamic countries frown upon using the above techniques to avoid the rules set forth in the Qu’ran, others are ambivalent about it, and still others actively promote them as both legitimate and appropriate.\textsuperscript{160} Thus, “[o]ne must always keep in mind the difference between law and custom when dealing with women in Islam, for often Islam grants them rights which social custom strips away.”\textsuperscript{161} Because the Qu’ran’s dictates are virtually impossible for women to change in their favor, and because men have developed cultural practices in order to avoid the benefits that the Qu’ran does grant women, there is a strong feminist argument to secularize the Qu’ran’s mandated inheritance laws.\textsuperscript{162} However, unless this call for change bears success, it is likely that the benefits Shari’a law gives to women will remain curtailed in many countries by the cultural practices that have developed to deny those benefits.

\textit{C. Canon Law Analysis}

There are significant benefits that can be found for testators under Canon law, although those benefits are achieved at the expense of female relatives. Under Canon law, women were

\textsuperscript{158} \textit{Id.} at 118-119.
\textsuperscript{159} \textit{Id.} at 118-119.
\textsuperscript{160} \textit{Id.} at 117.
\textsuperscript{161} \textit{Id.} at 119.
\textsuperscript{162} \textit{Id.} at 123.
simply not considered as part of the inheritance process. Unless the local civil law provided otherwise, the canonists taught men to split their estate between their sons, their Church, and any others that they chose. While nothing in the Canon system prevented men from choosing to give to their daughters or wife, there was also nothing to insist that these women be provided for. Certain canon doctrines directly limited the support a woman could receive to that of her marriage gift; while that was certainly meager protection, it was nonetheless more than was given to daughters. Perhaps this was a reflection of the mindset of medieval Europe, or perhaps a reflection of the Church itself, but the practical result either way was that women received significantly less protection under Canon law than they did under Talmudic or Shari’a law.

The testator’s right to dispose of his property as he desired dramatically differentiates Canon law from either of the other two religious systems. There are certainly benefits to this freedom, at least from the Western perspective, because it enforced the concept of property rights and estate planning. It also enabled men to pass large amounts of property from one person to another, which resulted in the development of large and powerful estates unmatched in the Islamic world. Furthermore, testamentary freedom gives a person more negotiating power with his relatives while he is alive, because everyone is aware that he has full control of distributing his property after death. There are negatives to this attitude, however. It does virtually nothing to encourage familial harmony, other than causing sons to check their inclinations to disagree with their fathers. It does not protect sons from disinheritance if they take a stand they believe is right but with which their father disagrees. Additionally, testamentary freedom prevents a son from relying upon a future inheritance when planning his career or future.

Another element to consider in evaluating Canon law is its emphasis on leaving money or property to the Church. Neither Talmudic nor Shari’a law have similar requirements for their
followers. Viewed from a positive angle, leaving portions of estates to the Church enabled it to provide more services and support to the community. The Church also received land this way, which gave it new locations for facilities, as well as the means to support itself. From a less idealistic viewpoint, the Church advocated giving money to itself while denying money to spouses and daughters. With the quantity of wealth that the Church eventually built up, it is difficult to defend such priorities, especially when the legal system that does so is a moral-based one.

VII. Conclusion

The three major religious legal systems developed different rules concerning inheritance. These rules stemmed from divine authority, manmade declarations, and the incorporation of other civil law systems. Talmudic law provides women with money or support but denies them access to the decedent’s place in the business world. On the surface, it therefore appears discriminatory because it denies women the right to be heirs, but the lien-holder practices almost fully remedy that disparity. By protecting daughters and widows, Talmudic law instead sacrifices protection for the male heirs or the testator’s freedom. Shari’a law, in some respects, is similar. It provides for direct inheritance by female relatives in accordance with a fixed share system. The fixed system also curtails testamentary freedom in order to protect female relatives. Unfortunately for women, cultural practices have developed that largely negate those rights; the inflexibility of the Shari’a inheritance law makes it difficult to overcome those practices. Canon law created a system that modeled the Roman law but differed drastically from the other two religious legal systems. It focused on testamentary freedom, explicitly discouraged the inheritance rights of women, and required a portion of the estate to be left to the Church. From a
Western perspective, Canon law is the most familiar in its regard for estate planning but also the most offensive in its blatant discrimination against women. Thus, all three systems have struggled to balance the same needs – security in the disposition of the estate, protection of the family, and the testator’s right to direct the disposal of his property. In their answers to this balancing question, however, each religion reached a very different answer.