

Development of Muslim Law of Succession

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Development of Muslim Law of Succession

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ABSTRACT

In Islamic society, as in most other societies, inheritance represents the most important method of transferring wealth from one generation to the next. Islamic law of Inheritance is one of the most comprehensive systems of succession. It is exhaustive enough to meet most of the situation that have arisen and that may arise. It pays ample attention to the interest of all those who find natural place in the first rank of the affection of the deceased. It is difficult to find in any other system of succession containing such just and equitable rules.

Keywords: Inheritance, Islamic Law, Succession, Deceased, Equitable.

1. INTRODUCTION :

In any legal system of succession, the fundamental consideration is the extent to which an individual has the personal right to determine the devolution of his property after his death. Such power was commonly denied in those early forms of society where the individual was wholly subordinate to the group. Instead, the law imposed compulsory rules of succession of general application, for the security of the group required that property should, on the decease of its owner, be transmitted in a foreseeable way to those held by the law as best entitled to it rather than to those whom the deceased might personally prefer. By contrast, most modern systems of succession rest firmly upon the freedom of the individual to determine the devolution of his property upon his decease. The supreme purpose of the Islamic system is material provision for surviving dependents and relatives, for the family group bound to the deceased by the mutual ties and responsibilities which stem from blood relationship.

2. EXCELLENCE OF MUSLIM LAW OF INHERITANCE :

All the modern writers have admired the Muslim system of inheritance for its utility and formal excellence. The views of only a few of them are given here:

According to Professor Anderson, "There is no aspect of the Muslim Law in which the logical and technical excellencies of the Islamic system are more advantageously displayed than in the Law of inheritance. Indeed, there is a famous dictum attributed to the Prophet that knowledge of the shares allotted to the various heirs under this system constitutes the equivalent of one-half of all human knowledge" [1].

According to Sir William Jones, "I am strongly disposed to believe that no possible question could occur on the Muslim Law of Succession which might not be rapidly and correctly answered" [2].

According to Tyabji, "The Muslim Law of Inheritance has always been admired for its completeness as well as the success with which it has achieved the ambitious aim of providing not merely for the selection of a single individual or homogeneous group of individuals, on whom the estate of the deceased should devolve universal succession, but for adjusting the competitive claims of all the nearest relations" [3].

3. BASIS OF MUSLIM LAW OF INHERITANCE :

The Muslim law of inheritance is based on—

- i. The rules relating thereto laid down in the Quran;

- ii. The rules relating thereto laid down in the Hades or Sunnah;
- iii. The customs of ancient Arabia and usages prevailing amongst the Arabs insofar as they have not been altered or abrogated by the Quranic injunctions or traditions;
- iv. The rules established under Ijmaa, Qiyas and Fatawas;
- v. Acts and Statutes relating to Muslim Law of Succession [4].

4. PRINCIPLES OF PRE- ISLAMIC OR ANCIENT ARABIA AS TO THE INHERITANCE :

In the tribal society of Pre-Islamic Arabia, the rules of inheritance were summarized as follows-

- i. Amongst males only those could inherit who were capable of bearing arms. All minors and infirm person were excluded from succession.
- ii. Only males inherited and inheritance only through males.
- iii. The nearer in degree excluded the more remote.
- iv. Female and cognates were excluded.
- v. Descendants were preferred to ascendants and ascendants to collaterals.
- vi. Where the agnates were equally distant the estates were divided per captia not per stripes.
- vii. Heir ship determined by consanguinity adoption or contract. Thus, the adopted son and natural born son stood on the same footing and succession by contract was possible.
- viii. Only blood relations could succeed on and not those by affinity e.g. husband and wife [5].

Sad's Case:

The Sad's Case embodies the essence of the changes introduced under Islam into the customary Arabian law of inheritance.

“The wife of Sad B. al-Rabi came to the Prophet with her two daughters and said “O Prophet, there are two daughters of Sad B. al-Rabi. Their father died a martyr's death beside you in battle. But their uncle has taken Sad's estate and they can't marry unless they have

property.” After this the verse of inheritance was received and the Prophet sent for the uncle and said to him, “give the two daughters of Sad two-third (2/3) of the estate, give their mother one-eight (1/8) and keep the remainder (5/24) yourself.

The proportion of the Sad's estate is as follows according to the indication of Prophet (Sm).

Table 1 : Proportion of the Sad's estate

Before Sad's Case	After Sad's Case
Two daughters: x	Two daughters : 2/3
Wife : x	Wife : 1/8
Uncle : 1	Uncle : 5/24

Socially, Islam emphasized the more immediate family tie existing between a husband, his wife and their children and aimed at elevating the status of the female within this group. These changes are in the novel rules of succession introduced by Islam [6].

5. IMPROVEMENTS INTRODUCED BY ISLAM :

- i. The husband and wife were made heirs with each other.
- ii. Females and cognates were made competent to inherit.
- iii. Parents and ascendants were given the right to inherit even when there were male descendants.
- ix. As general rule, a female was given one-half the share of a male [7].

6. GENERAL PRINCIPLES REGARDING MUSLIM LAW OF INHERITANCE :

- 1. For the purpose of Muslim law of inheritance there is no distinction between moveable immoveable property, self-acquired and ancestor property.
- 2. The Fights of an heir comes into existence after the death of the person of whose he is an heir.
- 3. The heirs can claim their share only in what remains. If at all after all the statutory liabilities have been made and debts, valid legacies, death bed gifts out of the property of the praepositus.
- 4. A person who according to Muslim law is an heir of the deceased remain so and get the

legality he or she can't be excluded from inheritance either by other heirs or survivors of the deceased or ever under a specific direction let in that behalf by the deceased himself .one can be excluded from inheritance only under a rule of Muslim law applicable in Bangladesh.

5. Only that relative can be an heir of the deceased who is alive at the moment of the later death. A person who died before the deceased can't be heir of the deceased but there is an exception under Muslim family laws ordinance 1961 (sec-4).
6. A person who has not been conceived till the praepositus dies can't be an heir. A child who is then in its mother womb. However, inherit it is born alive.
7. Where two relatives of the deceased who differ in sex are related to him exactly in an equal degree and both of them are laws of heirs. Between the two the share of the male has to be doubled the share of the female.
8. It at the time of the death of any Mohammadan any of his heir missing his share or if he is the sole heir the entire property shall be reserved until.
 - a. He re-appeared and claimed.
Or
 - b. He is proved to be dead.
9. The spouse descendant, mother and the maternal relation shall have the mutual right of inheritance with an illegitimate child. An illegitimate child can't be an heir of deceased father.
10. Where paternity is established by the effect of acknowledgement the relationship will be deemed to be established for all purposes relating to inheritance.
11. No step relations have got mutual right of inheritance.
12. No heirs get any right by birth whatever the nature of the property [8].

7. CLASSIFICATION OF HEIRS :

Under the Sunni law of succession, the heirs connected to the deceased by the tie of blood are divided in to three types.

- i. Sharers (Ashb-ul-Farais or Zul Furus)
- ii. Residuary (Asabat)

Distant Kindred (Zavil Arham)

7.1 Sharers: That is those persons who are entitled to a prescribed share of inheritance under the rules of Quran. The Quranic sharers are twelve in number-

1. Husband;
2. Wife;
3. Father;
4. Mother;
5. Daughter;
6. Son's daughter or agnatic grand's daughter;
7. Grandfather;
8. Grandmother (Father's mother and Mother's mother)
9. Full Sister;
10. Consanguine Sister;
11. Uterine Brother;
12. Uterine Sister [9].

7.2 Residuary: That is those persons who are not entitled to a prescribed portion but are entitled to take the residue after the sharers take their prescribed share.

List of residuary: They are generally 18 in numbers-

1. Son
2. Daughter-> converted into residuary by son.
3. Son's son-> how law so ever.
4. Son's daughter-> converted into residuary by son's son.
5. Full brother
6. Full sister-> converted into residuary by the brother.
7. Consanguine brother.
8. Consanguine sister-> converted into residuary by consanguine brother.
9. Full brother's son.
10. Consanguine brother son.
11. Full brother son's son-> how low so ever.
12. Consanguine brother son's son-> how low so ever.
13. Full paternal uncle.
14. Consanguine paternal uncle.
15. Full paternal uncle's son.
16. Consanguine paternal uncle's son.
17. Full paternal uncle's son's son-> how low so ever.

18. Consanguine paternal uncle's son's son-> how low so ever [10].

7.3 Distant Kindred: The estate of a deceased person devolves or passes in the absence of share of residuary on his other blood relation they are called Distant Kindred.

List of Distant Kindred:

The distant kindred are always entitled to a share when co-existing with the husband and wife. In other word husband and wife though sharer does not exclude the distant kindred.

The uterine relations are divided into four classes-

- a. The off spring of the deceased.
- b. The root of the deceased or his ancestor.
- c. The off spring of deceased's parents.
- d. The off spring of deceased's grandparents.

The off spring of the deceased:

- i. The children of daughter and their descendants (how low so ever)
- ii. The children of son's daughter and their descendants (how low so ever)

The root of the deceased:

- i. Falls Grand Father
- ii. Fall Grand Mother.

Male ancestors however remote in whose line of relation to the deceased then occurs a female and who are therefore called falls grandfather. And all grandmothers excluding father' mother and mother' mother are called falls grandmother.

The off spring of the deceased parents:

- i. The daughter of full brother and full brother's son's daughter and their descendants.
- ii. The daughter of consanguine brother and consanguine brother's son's daughter and their descendants.
- iii. The children of uterine brother and their descendants.
- iv. The children of full sister and their descendants.
- v. The children of consanguine sister and their descendants.
- vi. The children of uterine sister and their descendants.

The off spring of deceased grandparents:

- i. The daughter of full paternal uncle and full paternal uncle's son's daughter.

- ii. The daughter of consanguine paternal uncle and consanguine paternal uncle's son's daughter.
- iii. Full, consanguine, and uterine paternal aunts and their children.
- iv. Maternal uncle or aunt and their children [11].

8. GENERAL CLASSIFICATION OF LEGAL HEIRS :

All relatives of the deceased person on the broad ground of precedence in succession into two groups---

Inner family: The inner family is made up all male agnates whatever their degree of removal from the praepositus along with this those particular relatives nominated by the Quran.

Outer family: All other relatives constitute the outer family which is only called to succession when there are no surviving blood relatives of the inner family.

Members of the inner family may be marshaled into three groups for the purposes of the priority-

- i. Primary heir.
- ii. Substitute heir.
- iii. Secondary heir.

Primary heirs: There are six primary heirs who are never excluded from succession by any other relative of praepositus. They are the (a) husband (b) wife (c) son (d) daughter (e) father (f) mother. Among the children of praepositus there is no priority by virtue of age or any other factor [12].

Substitute heirs: For the four blood relatives who are primary heirs there are four substitute heirs- so called because they generally take the place of the respective primary heir in the latter's absence.

- a. The agnatic grandson how low so ever is a substitute heir for the son.
- b. The agnatic granddaughter, how low so ever for the daughter.
- c. The agnatic grandfather how high so ever for the father.
- d. The grandmother, maternal and paternal how high so ever, for the mother.

As a general rule, a substitute heir is excluded from succession by the respective primary heir on the principle that the nearer in

degree excludes the more remote but is not excluded by any other relative [13].

Secondary heirs-This group is made up of the brothers and sisters of the praepositus and all other male agnatic relatives.

As a whole group the secondary heirs are totally excluded from succession by any male blood relative who is primary or a substitute heir.

The two exceptions to this rule are that: -

- a. Uterine brothers and sisters are excluded by the daughter or the agnatic granddaughter and
- b. Agnatic brothers and sisters are not excluded by the grandfather [14].

9. VARIOUS DOCTRINES UNDER SUNNI LAW :

9.1 The Principle of Tasib:

When a son is present the children inherit as residuary heirs, sharing the estate or the residue thereof in the proportions of two parts to a son and one part to daughter. This is known as the Principle of tasib. A son converts his sister (the daughter of the praepositus) into an asaba or residuary heir and the daughter is said to inherit in these circumstances as "residuary by another". Tasib is not confined to the children of the praepositus. It may be stated as a strict rule of succession that agnate female relatives who are quranic heirs only the wife, grandmother and uterine sister are not affected by tasib. The principle clearly establishes the superiority of the male agnates as legal heirs [15].

An example of the operation of tasib among children would be the case of praepositus who is survived by her-

Husband- $1/4$ (Quranic portion)
Father - $1/6$ (Quranic portion)
Mother - $1/6$ (Quranic portion)
Two sons - $4/5$ of $5/12 = 4/12$ (Residuary)
Daughter - $1/5$ of $5/12 = 1/12$ (Residuary)

The residue of $5/12$ of the estate which is left for the sons and daughter in this case after the satisfaction of the Quranic portions is the fact minimum share of inheritance that children of the praepositus as a group will even take.

9.2 The Doctrine of 'Awl':

The doctrine of 'Awl' applies when the estate is

over subscribed. A real anomaly arises however when the fractions allotted to the Quranic heirs amount to more than unity. To obtain the necessary unity all the basic quranic portions are reduced to pro-rata [16].

For example: The deceased is survived by her husband and 2 full sisters—

Husband - $1/2$
2 full sisters - $2/3$

That means the above-mentioned fraction exceed more than unity. This is the anomaly which has to be resolved. The solution is increasing the denominator to make it equal to the numerators to remain, thus proportionally decreasing the share of each heir. The artificial inflation of the denominator is called awl literally called increase. In other words, the process of decreasing the Quranic portions is in fact called increase or awl but its real effect is the proportionate reduction of the share.

Applying this rule, we have-

Husband - $1/2 - 3/6$ by awl $3/7$
2 Full sisters- $2/3 - 4/6$ by awl $4/7$
 $7/6 \rightarrow 7/7 = 1$

9.3 Doctrine of Radd:

Under the Sunni law where the sum total of fraction is less than unity and when there are only sharers, no residuary to take the residue, there the residue returns to the Quranic heirs in proportion to their shares. This is called Return or Radd.

Rules relating to radd: -

- a) The residue returns in proportion to the share.
- b) The husband or wife is not entitled to the return so long as there is a Quranic heir or a uterine heir.
- c) If there is no other surviving heir the residue returns to the husband or wife. This rule has been recognized and enforced by the British Indian and Algerian Court.

Among the twelve numbers of Quranic heirs, the eight numbers are participated in the radd. They are- daughter, son's daughter, mother, father's mother, mother's mother, full sister, consanguine sister, uterine sister, uterine brother. The four numbers are not participated in the radd and they are- father, father's father, husband, wife.

An illustration for first rule-

Mother-->1/6

Daughter-->1/2

There remains 1/3 which returns.

The rule in such a case is to reduce the fraction of share to common denominator and to decrease the denominator and to these shares to make it equal to the numerator and allow individual numerator to remain. The total of the numerator is $1+3=4$

As to Mother--> $1/6=1/6$

Daughter--> $1/2=3/6$

The ultimate shares will therefore be 1/4, 3/4 respectively.

As to Mother--> $1/6=1/6$ by return 1/4

Daughter--> $1/2=3/6$ by return 3/4

An illustration as to the second rule-

Husband -->1/4

Daughter --> 1/2

Mother--> 1/6

1/12 is remained in this case which has to be returned.

In case of radd husband is not entitled to return. After the allotment of husband's share the ultimate share therefore will be-

Husband --> $1/4$ -----
4/16

Daughter--> $1/2=3/6$ by radd $-3/4$ of $3/4=9/16$

Mother --> $1/6=1/6$ by radd $-1/4$ of $1/4 =3/16$
 $=16/16=1$

In a competition for example between a wife, two daughters and a mother the ratio of the collective share of the daughters to that of the mother is 4:1. The residue of the estate after the deduction of wife's share is therefore divided into five parts, form of which goes to the daughters and one to the mother.

Wife--> $1/8$ -----
5/40

Daughters--> $2/3=4/6$ by radd $4/5$ of $7/8=28/40$

Mother--> $1/6=1/6$ by radd $1/5$ of $7/8=7/40=40/40=1$

As to rule a Muslim leaving a wife as his sole heir. She takes 1/4 as Quranic heir and residue 3/4

by return. The husband would be similarly entitled.

In the case of radd Maliki and Shafi law adopted the view that the residue of the estate in this circumstance should go to the public treasury

and be used for the general benefit of the Muslim community as a whole since it was not permissible to allow any relative a share of the inheritance greater than that specified by Quran. Maliki law remained faithful to this principle [17].

9.4 Doctrine of "Umariyyatan"

Considerable controversy was provoked in the early days by the particular problem of the relative rights of the father and mother when the only other surviving heir is spouse related.

For example: -- husband – 1/2 (Quranic portion)

Father – 1/6 (Residuary)

Mother – 1/3 (Quranic portion)

Wife – 1/4 (Quranic portion)

Father – 5/12 (Residuary)

Mother – 1/3 (Quranic portion)

Ibney Abbas in attained in this case the mother was entitled to a quranic portion of one third of the estate since Quranic clearly stated that the mother's share was to be one third in the absence of any lineal descendant or collaterals. According to him therefore in competition with a husband who takes apportion of one - half in the absence of lineal descendant and the father as residuary one sixth while in competition with a wife who takes 1/4 and five twelfth as residuary while in competition with a wife.

This view was firmly rejected by Sunni Jurisprudence. Sunni law claims for these solutions the authority of the general consensus of the prophet's contemporaries following the view of Omar 'the second caliph of Islam, who allegedly first resolved the case of parents competing with the husband and then by analogy the case of parents competing with the wife. According the cases are generally known as the "Umariyyatan" or "two decisions of Omar"

The majority left that to give the mother one third in these two cases would lead to a contradiction of basic principles. For if in the completion wife the husband she n e one third of the whole estate he takes two the share of father another is no parallel case of a female, in competition with a male of the same class and degree of relationship taking double the share of the male.

According to the remedy was deemed to lie in

extending the principle of tasib to cover these cases. Once it had been decided that principle of the tasib must apply where the parents were in competition with the husband the same principle was systematically applied by analogy, where the parents were in competition with the wife although in this latter case the father's entitlement as a residuary would exceed that of mother's full Quranic portion of one third—

Husband	1/2 (Quranic portion)
Mother	1/2 of 1/3 = 1/6 (Quranic portion)
Father	1/3 (Residuary)
Wife	1/4 (Quranic portion)
Mother	3/4 or 1/3 = 1/4 (Quranic portion)
Father	1/2 (Residuary)

Thus, Omar decided that in competition with the husband mother would take 1/3 after the satisfaction of the husband Quranic portion 1/2. Unlike this in competition with the mother will take 1/3 after the satisfaction of the wife's Quranic portion 1/4 she would not be entitled to one third from the whole of the estate [18].

9.5 Rules of Himariya:

For the peoples of the Arabian Peninsula Islam marked a transition in social values and standards which is represented in the laws of inheritance, by the attempt to harmonies the claims of the asaba, the traditional heirs of the customary law, with those of the new heirs nominated by the Quran. Inevitably, during the early period, there existed a basic tension between these two classes of heirs. As far as collaterals relatives are concerned, that tension lay between the agnatic (full) brothers and uterine brothers of the prepositus; and for two full brothers at least the tension reached breaking point in the case known as Donkey case or Al Himariyya.

A deceased woman survived by her husband, mother, two full brothers, and two uterine brothers.

At first hearing of the case Umar followed the golden rule of distribution allotted the prescribed Quranic portion of 1/2 to the husband, 1/6 to the mother, 1/3 to the uterine brothers. With the result, the full brothers as residuary heirs were defector excluded from succession.

Such as- Husband-1/2
Mother-1/6

Two full brothers-×

Two Uterine brothers-1/3

Since the rights of the husband and mother as an heir by marriage and an ascendant respectively were undisputed the case resolved itself into a straight forward competition for the remaining 1/3 of the estate between the full and uterine collaterals therefore this competition. In a sense, therefore this competition between the asaba and Quranic heirs epitomized the conflict between old and new order of the society: and the full brothers despite their traditional pre-eminence as agnatic heirs had in effect totally been totally ousted from succession by the new uterine heirs. On appeal by full brothers, Umar revised his decision and ordered that the 1/3 of the estate remaining after the deduction of husband and mother's portion should be distributed in equal shares among the full brothers and uterine brothers.

However, on appeal the full brothers abandoned their original contention that their agnetic tie gave them absolute priority over the uterine and produced a more term perature and logical argument. As full relatives, they asserted they had the same mother as the deceased and thus possessed the very same quality of relationship which was the exclusive basis of the uterine brother's right of inheritance. At least therefore, they should stand on parity with the uterine. The fact that they also had the same father as the deceased was beside the point. If they gained no advantage from this agnetic tie, then by the same token they should not be penalized because of it. Accepting the necessity for a quilted modification of the golden rule of distribution in these particular circumstances and allowed the full brothers to inherit qua uterine. The case takes its name from the way in which the full brothers explained that they wished to waive their character of agnates in the sense that their connection with the praepositus through their father should not be taken into account. "O commander of the faithful" the common version of the case has them say" suppose our father were a donkey (hima) do, we stillhane the mother deceased?" The case is also given the somewhat more prosaic title of the Mushtanka, or "The case of divided inheritance." Since the

portion of 1/3 was equally divided among the full and uterine brothers-

Such as follows-

Husband-1/2

Mother-1/6

Two full brothers-2/4 of 1/3

Two uterine brothers-2/4 of 1/3

The Himariyya rule applies only where germans as residuary heirs would be totally excluded from succession owing to the presence of uterine. The only combination of surviving relatives which can produce this result is that of a husband, a mother or a grandmother and two or more uterine brothers and sisters.

Note: The Himariya rule is accepted by Maliki and Shafi Law, rejected by Hanafi and Hanbali Law.

9.6 Lucky and unlucky kinsman:

The variable effect of the tasib rule that the granddaughter loses her Quranic entitlement in the presence of grandson and must always be converted into residuary heir by him is aptly illustrated in the case known as the lucky kinsman and unlucky kinsman [19].

The case lucky kinsman arises when the principle of tasib operates to the advantages of the granddaughter. Here as in any other cases where there are two or more daughter of prepositus surviving the granddaughter could inherit nothing in the absence of grandson; for the residue would be returned to the Quranic heirs under the doctrine of radd. As far as the grand daughter is concerned therefore the grand son is a lucky kinsman in the sense that his presence is fortune for her, admitting her to a share of the inheritance which she would otherwise not have taken. Conversely in the case of unlucky kinsman the rule of tasib operates to disadvantages to the granddaughter.

Example-

Mother--> 1/6

Two daughters--> 2/3

Son's daughter--> 1/3 of 1/6

Son's son--> 2/3 of 1/6

*Here son's son is a lucky kinsman.

Husband--> 1/4

Mother--> 1/6

Father--> 1/6

Daughter--> 1/2

Son's daughter--> ×

Son's son--> ×

*Here Son's son is an unlucky kinsman.

9.7 Doctrine of Representation:

According to section -4 of the Muslim Family Laws Ordinance, 1961 in the event of the death of any son or daughter of the prepositus before the opening of succession, the children of such son or daughter, if any living at the time of the succession opens shall per-strips receive a share equivalent to the share which such son or daughter as the case may be would have received if alive. This theory will be applicable only in the case of son's son, son's daughter, daughter's son, daughter's daughter [20].

10. CONCLUSION :

Islam is the complete and comprehensive code of life. The Holy Quran was sent to us and all the dictations and verses did not come at a point of time. But it was sent by the Almighty as per the circumstantial requirements of the Prophet (Sm) and his disciples. The reason behind such circumstance dependent revelation is that if the whole Quran was sent at once, the effectiveness would not be conceived by the commoners. No sphere of human life is kept untouched in this holy Code. Perhaps the best illustration of the various aspects of the Quranic laws to which we have referred is provided by the regulations concerning inheritance. After the advent of Islam all sorts of illegal acts and traditions were evicted from the society.

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