



Inheritance (Al- Farā'id) and Succession (Al-Mira'th) Under Islamic Law

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Disclaimer: - *the views expressed here are personal and have nothing to do with my official position. The views are expressed (while exercising article 19 of our constitution) with the purpose of learning and endeavoring innovative research in this field*

Key words: - *sharers, testament, intestate, Residuaries, agnates and cognates ,distant kindred,*

Abstract

There is a famous saying of Prophet Mohammad (PBUH), "Learn the laws of Succession and teach them to people, for they are one half of the useful knowledge". This paper attempts to discuss the Islamic law of inheritance (Faraid), its existence and its systematic impact to humankind. Islamic inheritance law is an integral part of Sharia Law. It is a science of distribution of a deceased person's legacy in accordance with the law and teaching of Sharia, which is also known as 'Ilmu Mawarith' or the science of succession. Islam has laid great emphasis on the importance of property and wealth and has never considered wealth and welfare as an evil or filthy phenomenon. As a matter of fact, wealth is given to a person to test his/her strength and response to the fulfillment of obligations towards other human beings. While upholding the property rights Islam emphasize that land is a sacred trust for human being and should be used for continuous production process. Another conditional requirement for property right in Islam is that Land neither be used wastefully nor exploitatively or in a way that will deprive others of their justly acquired property as stated in Al-Baqrah 2:188, "And do not eat up your property among yourselves for vanities, nor use it as bait for the judges, with intent that ye may eat up wrongfully and knowingly a little of (others) people's property".

Methodology: - *Qualitative research is deemed to be more appropriate for this field of discipline, as due to the nature of Faraid which relates to many dimensions of human life , in respect of social life and economic order of society. Likewise, exploratory research suits the purpose of this study that is to increase the awareness for practicing Faraid as an obligation for Muslims and as a tool to create proper economic order in a society. Literature reviews and information collected are employed in order to analyze and make further references. Data collected are mostly from books, journal references, internet sites. Legal prospective is also included through various judgments of legal jurisprudence pertains to this field.*

INTRODUCTION

The words inheritance and succession are often used interchangeably. Inheritance is defined as the process of devolving property upon the death of its owner. According to Morgan, it means the distribution of deceased's property among cognate kindred. It is also believed to be the transfer of an article from one person to another which involves the transfer of wealth, knowledge, honour and dignity. While succession is defined as a substitute of a living person for the deceased person in a relation to all rights and duties which the later had. Both centered on the transfer of properties at the expiration of someone's authority due to death. In an attempt to draw a distinction between the two, T.P.Wallis quoting Judge Ngocobo who argued that succession can take place without the demise of the owner of the property, while inheritance is validated only after the demise of the deceased, known as prepositus.

Now we are looking at the legal meaning of Al-Faraid and Al- Mawrath as enshrined under the Islamic law. Al-Faraid means a science under Islamic law which stipulates what is to be inherited (as property), who to inherit (as heir or beneficiary) and whom to inherit from (deceased). Al- Mawrath on the other hand refers to the science of the systematic jurisprudential reasoning and mathematical calculus involved in the determination of the exact share(s) of each legal heir(s) in the property left behind by one or more deceased or prepositus. It may be noted that even in Islamic Sharia these two terms are used interwoven to denote inheritance and succession respectively.

SOURCES AND VERSES OF INHERITANCE LAW IN CHAPER IV (7-14) AND 176

Muslim law of succession constitute four sources Islamic law

1. *The Holy Quran*
2. *The Sunna- that is the practice of Prophet(PBUH)*
3. *The Ijma – that is the consensus of the learned men of the community on what should be the decision on a particular point.*
4. *The Qiyas – that is an analogical deduction of what is right and just in accordance with the divinely ordained good principles*

According to the Muslim law, after the attainment of majority a girl or a boy have equal rights to fulfill their material needs and manage their own affairs. They have similar rights to hold property and dispose it of, as they desire. They are free to mortgage it, to give it on lease or to bequeath it for thier own benefit. The Quran says, " From what is left by parents and those nearest related, there is a share for men and a share for women, whether the property be small or large – a determinate share" (Surah IV, Verse 7). This verse contains five legal regulations about inheritance. First, not only men, but the women also have a share in the inheritance. second, that it must be divided among all the heirs, however little or insignificant it may. Thirdly, that the verse also implies that this law applies to all sorts of property, transferable, no-transferable, agricultural or industrial or of any other type. Fourthly, that the right of inheritance becomes valid only when the deceased leaves some property behind him. Fifthly, when the nearest relatives are alive, the distant relatives have no right in inheritance.

In another Quranic verse, it is said, " Allah (thus) directs you as regards your children's (inheritance) to the male a portion equal to that of the two females, if only daughters ,two or more , their share is two-thirds of the inheritance ; if only one , her share is a half. And to his (the deceased) parents sixth share of the inheritance to each, if he has a son, and if no children and the parents are only the heirs, the mother has a third: if the deceased left brothers(or sisters) , the mother has a sixth. The distribution in all cases is after, the payments of legacies and debts: you know not whether you parents or your children are nearest to you in benefit. These are settled portions ordained by God and the God is All Wise, All Knowing". (Surah IV Verse 11)

" And you will get half of what your wives leave behind, if they be childless; but if they leave children, then your share will be one-fourth of what they have left after the fulfillment of their will and payment of their debt(if any). As for them , they will be entitled one-fourth of the inheritance left by you, if you are childless, but in case you leave behind children,

their share will be one-eighth of the whole after the fulfillment of your will and payment of your debt(if any)". (Verse 12) and the verse continues....

“ And if the deceased whether man or woman(whose property is to be divided as inheritance) leaves no children and no **parents** behind but has one brother or sister alive ,each of the two will be entitled to one-sixth of the whole but in case the brothers and the sisters are more than one ,then the total share of all of them will be one-third of the whole after the fulfillment of the will and payment of the debt(if any) provided that it is not injurious (to the heirs).” (12)

“People seek your verdict on (the inheritance left by) a childless person. Say, Allah gives His verdict; if a person dies childless and leaves behind a sister, she shall get half of his inheritance; and if the sister dies childless, her brother shall inherit her property; and if deceased leave behind two sisters, they shall inherit two thirds of the inheritance and if the number of brothers and sisters is more than two , the share of each brother shall be double of that each sister . Allah makes his commandments plain to you lest you should go astray; Allah has perfect knowledge of everything”. (Verse 176)

Verse 176, according to most authentic traditions, it was revealed in A.H.9 when AN--.NISA was already being recited as a complete surah. That is why this verse was not included in the verses about inheritance contained in the first portion of the surah, but was added to it as appendix. There is a difference of opinion about the meaning “Kalalah” mentioned in the verse 176. According to some scholars, Kalalah is a person who dies childless irrespective of whether his father or grandfather is alive or dead. But the majority of jurists however have accepted the view of Hadrat Abu Bakr that Kalalah is a person who dies childless and whose father and grandfather had died before his death. This opinion is also supported by the Quran which awards half of the inheritance of the Kalalah to the sister who cannot be entitled to any share at all if the father is alive. There is a consensus of the opinion reference to the inheritance of brothers and sisters are made who have a common parents or only common father with the deceased. Also the brother will inherit the whole inheritance of sister in case there is no other heir to it. For instance, if the husband of the childless woman is alive, her brother will be entitled to the whole of the remaining inheritance after the payment of the share of the husband.

Tyabji says: 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 single individual or homogenous group of individuals, on whom the estate of the deceased should devolve by universal succession, but for adjusting the competitive claims of all the nearest relations. Sir William Jones Said, “ I am strongly disposed to believe that no possible question could occur on the Muhammadan Law of succession which might not be rapidly and correctly answered”.

Taking a broad view, the Islamic scheme of inheritance discloses three peculiarities:

- The Quran gives specific share to certain individuals
- The residue goes to the agnatic heirs and failing them to uterine heirs
- Bequests are limited to one third of the estate and more only after seeking consent of legal heirs.

The fundamental principles of the Muhammadan Law of are well explained by honorable judge Mahmoud J, in the leading case of pre-emption, Gobind Dayal Vs Inayatullllah which reads as follows

“.....that law as founded by the Prophet (PBUH) upon republican principles at a time when the modern democratic conception of equality and division of property was unknown even in the most advanced countries of Europe. It provides that upon the death of an owner , his property is to be divide into numerous fractions , according to extremely rigid rules, so rigid as to practically exclude all power of testamentary disposition, and to prevent any diversion of the property made even with the consent of heirs, unless that consent is given after the owner’s death ,m when the reason is , not that the testor has the power to defect the law of inheritance , but that the heirs, having become the owners of that property , could deal with it as they like and could therefore ratify the act of their ancestor. No Muhammadan is allowed to make a will in favour of any of his heirs and a bequest to a stranger is allowed only to the extent of 1/3rd of the property”.

Pre Islamic customary principles of succession

The Arabia is believed to be the original home of the Semites, the acclaimed progenies (descendants) of Prophet Nūh (A.S). The Arabian Peninsula housed both sedentary and nomads Arabs who are deeply involved in polytheism. Though, there are huge traces and effects of some of the early monotheistic religions such as Judaism and Christianity (*Al-Yuhūdiyyah* and *Al-Nasārah*) with strong cultural influences on the Arabs as found in Syria, Yamāmah, Lebanon, Yathrib and other places, the prevalence of Arabian polytheism could not be underestimated. Al-Hijāz happened to be one of the most popular places in Arabia because of its economic and cultural position.

In the pre Islamic Arabia, the law of succession was based on the principles of agnatic preferences and exclusion of females. Following were the principles of pre-Islamic customary law of succession (the period is termed “Al-‘Asr Al-Jāhiliyyah- The Period of Ignorance”).

- (i) *The nearest male agnate or agnates were entitled to succeed deceased Muslim to the exclusion of remoter agnates. For example, if a Muslim died leaving behind a son and son of a pre-deceased son, the son would inherit the entire property totally excluding the son of a predeceased son (Grandson).*
- (ii) *All females and cognates were excluded from inheritance. For example, a daughter or a sister or a daughter's son or sister's son could not inherit from the property of deceased.*
- (iii) *The descendants were preferred over ascendants and ascendants were preferred over the collaterals. For example if a Muslim died leaving behind a son and father, then son (being the descendent) would inherit. Similarly in the presence of father (ascendant), brother (collateral) could not inherit.*
- (iv) *Only relations by blood could inherit excluding the relations by affinity. For example the husband and the wife could not inherit from each other.*
- (v) *Male agnates of equal degree could inherit equally taking equal shares. For example if a Muslim died leaving behind four sons, all of them would get one-fourth of the property.*
- (vi) *Only men who are able to defend or protect the honour of the family or the clan had the right to inherit.*
- (vii) *Women are regarded as part of the property and could be used for the settlement of debts while the weak, old, sick and minors were given no share.*

Besides these were various methods of inheritance in pre Islamic Arabia which were rejected out rightly one was by means of adopted sonship; that is, adopting their former slaves or servant as biological sons which was later prohibited by Islam (See Q33 verses 4) because it is an idea of forcing an alien into the family membership. Another was By swearing an oath of friendship; that is, undertaking a covenant legalizing the process of inheriting one and the other. Example of such alliance in phrase among the Arabs goes thus: “*My blood is your blood, my vengeance is your vengeance, my perish is your perish, my peace is your peace, my war is your war, you inherit me, and I inherit you, you make request on my behalf and I make it on yours, you help me, I help you, you ransom me as I ransom you*”

Islamic principles of succession

The Prophet (pbuh) introduced reforms in pre-Islamic customary principles of succession. Following were the modified principles of succession reformed by Islamic law

- i. *The ascendants (parents and other ascendants) were allowed to inherit along with descendants. For example, if a Muslim died leaving behind a son and a father, both would inherit.*
- ii. *Females and cognates were also recognized as heirs. For example, sisters, daughters and sons (daughter's as well as daughter's son) were recognized as heirs.*
- iii. *Relatives by affinity were also recognized to inherit. (wife and husband could inherit to each other.*
- iv. *The newly created heirs (known as sharers) such as females, agnates and relations by affinity, inherited the specific share along with those heirs who were recognized under the pre-Islamic customary principles of succession.*
- v. *Al-Nikkāh- Marriage or Nuptial Association: Marital relationship legitimizes rights of inheritance under Islamic law. The people in this category are the spouses as enshrined in Q4:12*
- vi. *Al-Nasab -Blood Relationship or Kinship: In accordance with Q8:75, those eligible to inheritance in this category are the Son, Son's son, Father, Grandfather, Full brother, Consanguine brother, Uterine brother, Son of*

- full brother(Nephew), Son of consanguine brother(Nephew), Full brother of the father(Uncle), Paternal half-brother, Son of full brother of the father and the Son of paternal half -brother (Niece), Daughter, Son's daughter, full sister, consanguine sister, Uterine sister, Mother, Paternal grandmother and Maternal grandmother.
- vii. *Al- Walā'* - Right of guardianship or Clientage: This means the slave-master relationship. The master is entitled to inherit his freed-slave through agnatic clause if the former dies without being survived by any heir, but, if survives by heirs; the master takes the balance of the estate once the shares of the surviving heirs are given

Principle and subsidiary classes.

Hanafi jurists' heirs into seven classes, the three principle and four subsidiary classes. The three principles classes are 1) **Quranic heirs Dhawul – Furud (sharers)**; 2) **Agnatic heirs Asabat (Residuaries)**; 3) **Uterine heirs Dhawul-arham (distant Kindred)**. The four subsidiary classes are 1) The Successor by Contract 2) The acknowledged Kinsman 3) the sole legate and 4) the state, by escheat.

The first step in the distribution of estate of a deceased Muslim after payment of his funeral expenses, debts and legacies, is to allot their respective shares to such of the relations as belong to the class of sharers and are entitled to share. The next step is to divide the residue, if any, among such of the residuaries as are entitled to residue. If there are no sharers, the residuaries will succeed to the whole inheritance. If there are neither sharers, nor residuaries, the inheritance will be divided among such class of distant kindred as are entitled to succeed thereto. The distant kindred are not entitled to succeed so long as there is any heir belonging to the class of sharers or residuaries.

In the absence of a member of the three principle classes (i.e., Quranic, Agnatic and Uterine heirs) the right of inheritance devolves upon subsidiary heirs, among whom each class excludes the next.

Quranic heirs

They are persons whose shares have been specified by the Quran. They are entitled to receive a fixed share allotted to them in a certain order of preference and mode of succession. The sharers are twelve in number : (1) Husband ,(2)Wife ,(3) Father ,(4) Mother ,(5) Daughter (6)Paternal Grandfather (7) Paternal and Maternal Grandmothers (8) son's Daughter (9) full sister (10) half/ consanguine sister (11) uterine sister (12) uterine brother.

Among twelve Quranic heirs, notably as many as nine are women and three are male relatives. Two of the close legal heirs of every deceased person are invariably regarded as his/her Quranic heirs—the mother and the surviving spouse. Seven other female relatives of the deceased may be regarded as Quranic heirs in some prescribed circumstances. These are mothers mother, father's mother, daughter, son's daughter and sister—full, half and uterine. Three male relatives of the deceased may be regarded as Quranic heirs in some prescribed circumstances. These are the father, father's father and Uterine brother

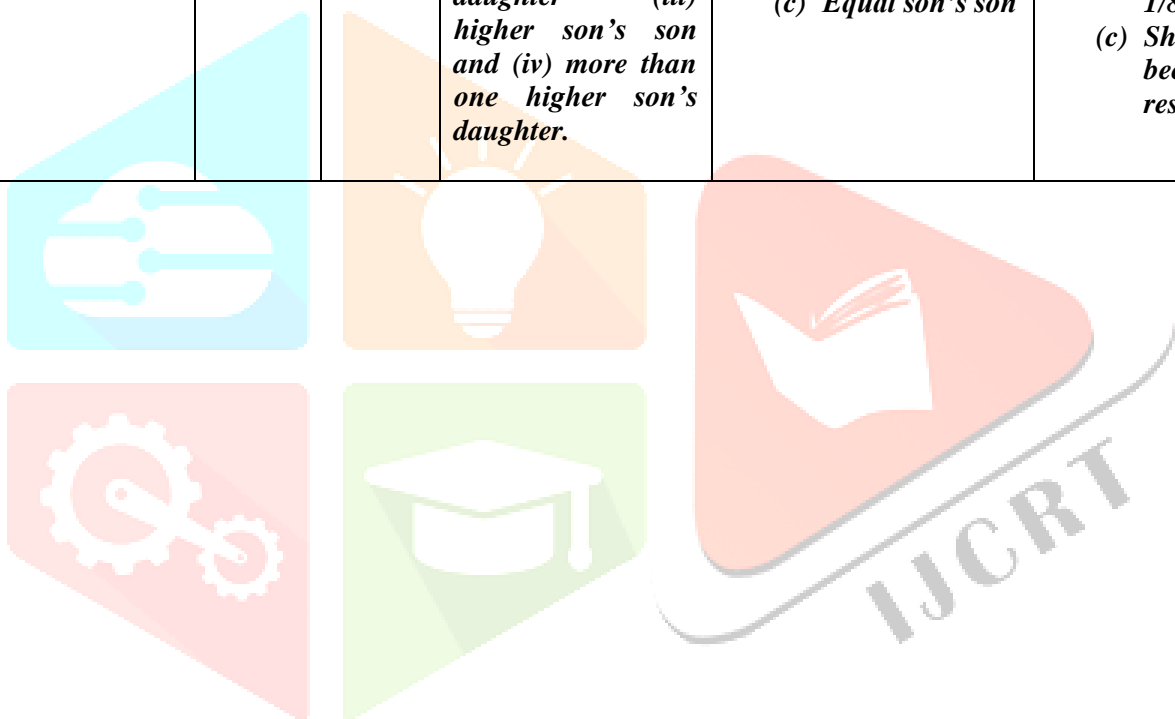
SCHEME OF DISTRIBUTION AS PER THE CIRCUMSTANCES (Taqseem~e tarqa)

The Quranic heirs or sharers and their respective shares may be explained in tabular form in the following table.

Serial no	Heirs	Shares		When excluded entirely	When share may be affected	How the share is affected
		One	Two or more			
1	Wife	1/8 th	1/8 th	Never	When left with no child or son's child or grandson's child	Share is increased to 1/4 th
2	Husband	1/4 th	1/4 th	Never	When left with no child or son's child or grandson's child	Share is increased to 1/2
3	Daughter	1/2	2/3	Never	When there is a son	She became a residuary
4	Mother	1/6 th	-----	Never	<p>(a) When there is no child or son's child ,how low so ever</p> <p>(b) One brother or sister</p> <p>(c) When husband or wife co-existing with father</p>	<p>(a) Share is increased to 1/3</p> <p>(b) Share is increased to 1/3</p> <p>(c) 1/3 of the residue after deducting the share of husband or wife.</p>

5	<i>Father</i>	$1/6^{th}$	----	<i>Never</i>	<i>when there is no child or child of a son how low so ever</i>	<i>He becomes a residuary</i>
6	<i>True grand father</i>	$1/6^{th}$	---	<i>In the presence of (i) father and (ii) nearer true grandfather</i>	<i>When there is no child or child of a son how low so ever</i>	<i>He becomes a residuary</i>
7	<i>Grandmother maternal / paternal</i> <i>Note :- in the absence of mother of deceased, the maternal grandmother or her mother will inherent and get $1/6^{th}$ –even where the father of the deceased is alive.</i> <i>While the paternal grandmother of the deceased will inherit only in the absence of both parents of the deceased.</i>	$1/6^{th}$	$1/6^{th}$	<i>In the presence of (i) mother and (ii) maternal or paternal grandmother</i> <i>In the presence of (i) mother ,(ii) nearer maternal or paternal grandmother (iii) father and (iv) nearer true grand father</i>	-----	-----
8	<i>Full sister</i>	$1/2$	$2/3$	<i>In the presence of (i) son (ii) son’s son how low so ever (iii) father And (iv) true grandfather</i>	<i>When there is a full brother</i>	<i>She becomes a residuary.</i>
9	<i>Half sister</i>	$1/2$	$2/3$	<i>In the presence of (i) son (ii) son’s son how low so ever (iii) father (iv) true grandfather (v) full brother (vi) and more than one full sister</i>	<i>(a) Where there is a full brother (b) When there is a consanguine brother</i>	<i>(a) Share is reduced to $1/6^{th}$ (b) She becomes a residuary</i>
10	<i>Uterine sister</i>	$1/6^{th}$	$1/3$	<i>In the presence of (i) child (ii) child of a son, how low so ever,</i>	-	----

				(iii) father and (iv) true grand father	----	----
11	Uterine brother	1/6 th	1/3	In the presence of (i) child (ii) child of a son, how low so ever, (iii) father and (iv) true grand father	--- ----	---- ----
12	Son's daughter	1/2	2/3	In the presence of a (i) a son (ii) more than one daughter (iii) higher son's son and (iv) more than one higher son's daughter.	(a) When only one daughter (b) One higher son's daughter (c) Equal son's son	(a) Reduced to 1/8 th (b) Share is reduced to 1/8 th (c) She becomes a residuary.



Agnatic heirs or Residuaries

When there are *Quranic heirs or sharers* and a residue of estate is left after allotting them their shares, or when there are no *Quranic heirs or sharers*, then whatever is left in the former case, and the entire estate in the latter case, goes to the *Agnatic heirs or residuaries*. The *agnatic heirs* may be classified into (i) *Agnatic Descendants* (ii) *Agnatic Ascendants* and (iii) *Agnatic Collaterals* (*Father's agnatic descendants and Grandfather's agnatic descendants*). They may be depicted in tabular form as below.

(i) Agnatic Descendants

<i>Heirs</i>	<i>When portion of estate they take</i>
1. <i>Son</i>	(a) <i>When there is a daughter, he takes double portion</i> (b) <i>When there is no daughter, he takes the entire residue.</i>
2. <i>Son's son how low so ever</i>	(a) <i>When there is son's daughter, he takes double portion.</i> (b) <i>Nearer son's son excludes the remoter.</i> (c) <i>Two or more son's son take the estate in equal shares.</i>

(ii) Agnatic Ascendants

<i>Heirs</i>	<i>When portion of estate they take</i>
3. <i>Father</i>	<i>As a residuary, he takes the entire estate.</i>
4. <i>True Grandfather</i>	(a) <i>As a residuary, he takes the entire estate</i> (b) <i>The nearer true grandfather excludes the remoter.</i>

(iii) Agnatic Collaterals (Collaterals descendants of the father)

<i>Heirs</i>	<i>When portion of estate they take</i>
5. <i>Full brother</i>	(a) <i>When there exists a full sister, he takes double portion</i> (b) <i>In the absence of sister, he takes the entire residue.</i>
6. <i>Full sister</i>	<i>In the absence of the full brother and aforesaid residuaries, she takes the residue.</i>
7. <i>Consanguine brother</i>	<i>When there is consanguine sister, he takes double portion.</i>
8. <i>Full brother's son</i>	<i>In the absence of above residuaries, he takes the entire residue.</i>

Collaterals descendants of the true grandfather

<p><i>Full paternal uncles, Consanguine paternal uncle Full paternal uncle's son Consanguine paternal uncle's son Full paternal uncle's son's son Consanguine paternal uncle's son's son</i></p>	<p><i>Takes the entire residue in the default of above residues.</i></p>
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Sharer become residuary

There are certain Quranic heirs or sharers who do not take their specified shares if a residuary equal rank co exists. In such a case they become agnates or residuaries. They are called Quranic residuaries with another. They may be stated in tabular form as below.

<i>s. no.</i>	<i>Sharers</i>	<i>Circumstances in which the sharer becomes residuary.</i>
1.	<i>Daughter</i>	<i>When there co – exist a son of deceased.</i>
2.	<i>Son's daughter</i>	<i>When there co-exist :</i> <i>(a) Son's son or</i> <i>(b) A male agnatic heir in a lower degree.</i>
3.	<i>Son's son's daughter</i>	<i>When there co-exist :</i> <i>(a) Son's son or</i> <i>(b) A male agnatic heir in a lower degree.</i>
4.	<i>Full sister</i>	<i>When there exists a full brother.</i>
5.	<i>Consanguine sister</i>	<i>When there exists a consanguine brother.</i>

Father and Grandfather in some situations inherits both as sharer and residuary

So this is the case of shifting the status of heirs as residuaries. But there is a marked change also where the Father and Grandfather succeed in certain circumstances both as Quranic sharer and a residuary. Both of them are the only relation, who could inherit both as Quranic heir and the residuaries. All the other above mentioned would either inherit as sharer or residuary. The father will be treated as a residuary " **when there is no child or child of a son how low so ever**" and the Grandfather will be treated as residuary (in the absence of father) when " **When there is no child or child of a son how low so ever**"

Al-Hajb (Doctrine of Exclusion or Veiling up)

What is Al-Hajb? Al-Hajb which in English means "exclusion" or "veiling –up" means a process Where an heir is partially or totally deprived of his normal share due to the presence of a closer heir Who takes precedence over him. The heir who prevents others is called the "Hājib" (the excluder or

Preventer) while the heir who is prevented or excluded is called the “*Mahjūb*” (The veiled). Under Islamic laws, the basic rules of exclusion to inheritance are premised on the following principles:

- A. Nearer in proximity excludes one who is a remoter. For example, son of the deceased excludes son’s son and father would also excludes the grandfather.
- B. A sharer related to the deceased through another is excluded by the presence of latter. For example, father of the deceased would exclude the brother.
- C. Full blood excludes half-blood. For example, full sister would excludes consanguine sister
- D. All collateral sharers are excluded by a lineal male descendant or ascendant who can also take a residuary. For example, the son excludes full sister or consanguine sister of the deceased.

Furthermore, it must be noted that of all the twelve Quranic Sharers, five are never prone to be totally excluded from inheritance (these are the Son, the Daughter, the Husband/Wife, the Father and the Mother) while the remaining seven might fall a victim of exclusion due to the presence of preferable heirs of higher degree (proximity).

Types

As we said *Al-Hajb* (Exclusion from inheritance) denotes a process where an heir is deprived of his normal share due to the presence of a closer heir who takes precedence over him. It is then apposite to inform us under Islamic law of inheritance, there are two forms of exclusion that can be experienced by a potential heir; these are:

1. *Hajb Hirmān* (Total Exclusion)- This means excluding a prospective heir from shares completely. All the heirs could be totally veiled up except the five closest heirs who are the son, the daughter, the mother, the father and the spouses (wife and husband). The heirs that can be totally veiled up by the presence of others are true grandfather, true grandmother, son’s daughter, full sister, consanguine sister, uterine brother and uterine sister. Examples of total exclusion are the brother of the deceased who shall be absolutely excluded by the father, the son’s daughter would be totally veiled up in the presence of two or more real daughters of the deceased and also the grandchildren would be excluded in the presence of the deceased’s son.
2. *Hajb Nuqṣān* (Partial Exclusion) -This also means prevention of a potential heir from inheriting specific legal share due to the availability of certain heirs who is closer to the deceased. It involves the partial reduction of the shares of some heirs which will graduate them to other share of inheritance of reduced proportion. Those that are normally affected in this process are the husband, the wife, the mother, the son’s daughter and the consanguine sister. Examples of *Hajb Nuqṣān* cases are the husband’s share which moves from 1 to 1 in the presence of child or children, Mother’s share from $\frac{1}{3}$ to $\frac{1}{6}$ with the existence of child or children who is eligible to inherit and the wife/wives’ shares which would become $\frac{1}{8}$ instead of 1 in the presence of child or grandchild from any legitimate wife.

Doctrine of ‘AUL’ or increase

It is pretty clear that in the Muslim Law of inheritance which allots a number or fractional parts of unity to various heirs; it may happen that the fractions when added together may sometimes be (i) equal to unity, (ii) more than unity or (iii) less than unity. When the sum of fractions is equal to unity, there is no problem. But if it is more or less than unity, the shares of respective heirs are reduced or increased respectively. The process whereby the shares are reduced is called the doctrine of increase (AUL) and the process whereby the shares are increased is called doctrine of return (RADD).

Increase or ‘aul’ is affected in following manner:

If the total of fractional shares allotted to sharers exceeds unity, the share of each sharer is proportionately diminished by ‘reducing the fractional share’ to a common denominator and increasing the denominator so as to make it equal to the sum of numerators.

Illustrations

(a) Husband _____ $\frac{1}{2}$

Two full sisters _____ $\frac{2}{3}$

Since the total sum of $\frac{1}{2}$ and $\frac{2}{3} = \frac{7}{6}$, which is more than the unity, doctrine of increase will apply in this case.

First step _____ “reduce fractional shares top common denominator”

Thus, $\frac{1}{2} + \frac{2}{3} = \frac{3}{6} + \frac{4}{6}$ (here 6 is the common denominator)

Second step _____ “increase the denominator to make it equal to the sum of numerators, and allow the individual numerator to remain”

Thus $\frac{3}{6} + \frac{4}{6}$ becomes $\frac{3}{7} + \frac{4}{7}$ (here 7 is the sum of numerator 3 and 4). The shares are thus proportionately reduced and the sum of the fractions comes equal to unity ($\frac{3}{7} + \frac{4}{7} + \frac{7}{7} = 1$).

(b) Wife _____ $\frac{1}{8} = \frac{3}{24}$ reduced to $\frac{3}{27}$

Two daughters _____ $\frac{2}{3} = \frac{16}{27}$ reduced to $\frac{16}{27}$

Mother _____ $1/6 = 4/24$ reduced to $4/27$

Father _____ $1/6 = 4/24$ reduced to $4/27$

$27/24$

$27/27$

Doctrine of return or radd

If the sum total of fractions allotted to sharers is less than unity (that is something is left behind after satisfying the claims of each sharer) and there is no residuary to take the residue, the residue reverts back to the sharers in proportion of their shares.

Exception ____ in the presence of any heir, neither the wife nor the husband is entitled to the return.

Illustrations

(a) Mother $1/6$

Daughter $1/2$

As the total of $1/6$ and $1/2$ is $2/3$, thus $1/3$ remains to be distributed . thus the doctrine of return would apply.

First step ____ ‘Reduce the fractional shares to common denominator’

Thus, $1/6 + 1/2 = 1/6 + 3/6$ (here 6 is the common denominator)

Second step ____ ‘decrease the denominator to make it equal to the sum of the numerators, and the entire individual numerator to remain’

Thus $1/6 + 3/6$ becomes $1/4 + 3/4$ (here 4 is the sum of numerator 1 and 3). The shares are thus proportionately increased, so that their sum becomes equal to unity ($1/4 + 3/4 = 4/4 = 1$)

(b) Husband $1/2$

Mother $1/2$ ($1/3$ as sharer and $1/6$ by return)

(c) Wife $1/4$

Sister (full or half) $3/4$ ($1/2$ as a sharer and $1/4$ by return)

Legislation in India in the field of Muslim Personal law

In the area of family law, India maintains a system of legal pluralism, usually referred to as a personal law system. According to this, the different religious communities --- Hindus, Muslims, Christians, Jews and Parsis –are governed by their respective laws. The personal law is defined as a law that applies to a certain class or group of people or particular persons, based on religion, faith and culture.

It would be relevant to record, that personal law dealing with the affairs of those professing the Muslim religion was also regulated by custom or usage. It was also regulated by Shariat the Muslim personal law. The status of Muslim women under customs and usages adopted by Muslims, were considered to be oppressive towards women. Prior to the independence of India, Muslim women organizations condemned customary law, as it adversely affected their rights, under the Shariat. Muslim women claimed, that the Muslim personal law be made applicable to them. It is therefore, that the Muslim Personal Law (Shariat) Application Act, 1937 (hereinafter referred to, as the Shariat Act), was passed. It is essential to understand, the background which resulted in the enactment of the Shariat Act.

The same is recorded in the statement of **objects and reasons**, which is reproduced below

For several years past it has been the cherished desire of the Muslims of British India that Customary Law should in no case take the place of Muslim Personal Law. The matter has been repeatedly agitated in the press as well as on the platform. The Jamiat-ul-Ulema-i-Hind, the greatest Moslem religious body has supported the demand and invited the attention of all concerned to the urgent. Customary Law is a misnomer inasmuch as it has not any sound basis to stand upon and is very much liable to frequent changes and cannot be expected to attain at any time in the future that certainty and definiteness which must be the characteristic of all laws. The status of Muslim women under the so-called Customary Law is simply disgraceful. All the Muslim Women Organizations have therefore condemned the Customary Law as it adversely affects their rights. They demand that the Muslim Personal Law (Shariat)

should be made applicable to them. The introduction of Muslim Personal Law will automatically raise them to the position to which they are naturally entitled. In addition to this present measure, if enacted, would have very salutary effect on society because it would ensure certainty and definiteness in the mutual rights and obligations of the public. Muslim Personal Law (Shariat) exists in the form of a veritable code and is too well known to admit of any doubt or to entail any great labour in the shape of research, which is the chief feature of Customary Law.

A section 2, of the Shariat Act is relevant and extracted hereunder:

Section 2 Application of personal law to Muslims. - Notwithstanding any customs or usage to the contrary, in all questions (**save questions relating to agricultural land**) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, Marriage, dissolution of marriage, including talaq, ila, zihar, lian, khula and mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and Charitable and religious endowments) the **rule of decision** in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat)

A close examination of Section 2, extracted above, leaves no room for any doubt, that custom and usage, as it existed amongst Muslims, were sought to be expressly done away with, to the extent the same were contrary to Muslim personal law. Section 2 also mandated, that Muslim personal law (Shariat) would be exclusively adopted **as the rule of decision** in matters of intestate succession, special property of females, including all questions pertaining to personal property inherited or obtained under contract or gift or any other provision of personal law, marriage, dissolution of marriage, including talaq, ila, zihar, lian, khula and mubaraat, maintenance, dower, gifts, trusts and trust properties, and wakfs. (But save questions to agricultural land mentioned in the sharia act of 1937 is in direct contrast with the verse 7 chapter 4th of Al Quran and also do not find any place in Jammu and Kashmir Muslim Personal law(Shariat) act 2007 in its section 2)

Are personal laws, laws under article 13(3) of Indian Constitution?

Article 13 reads as under:

13. Laws inconsistent with or in derogation of the fundamental rights.-

- (1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.
- (2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.
- (3) In this article, unless the context otherwise requires,- (a) law includes any Ordinance, order, bye law, rule, regulation, notification, custom or usage having in the territory of India the force of law;
- (b) Laws in force includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed,
- (4) Nothing in this article shall apply to any amendment of this Constitution made under article 368.

In state of Bombay Vs Narasu Appa Malli landmark judgement of 1951, honorable Supreme Court of India upheld that personal laws are immune from the application of Article 13 and could not be included in the definition of “laws in force”. The same stand has been repeatedly taken in Krishna Singh V. Matura Ahir 1984, Maharshi Avadhesh v. Union of India, 1994, Panalal Bansilal and others v. State of A.P, 1996, Shayara Bano v. Union Of India 2017.

Although the term personal laws had not been defined in the constitution, but there is a reference to the same in entry 5 of the concurrent list of the seventh schedule. Article 372 of the constitution also mandates that all the laws in force, in the territory of India immediately before the commencement of the constitution, shall continue in force until altered or repealed or amended by a competent legislature (or other competent authority). So we can infer that it was in the wisdom of constitution makers also who treat personal laws under separate category and hence even expected under legislature article 44 for the formulation of uniform civil code. So just like article 368 constitutional amendments act is immune, the personal laws also seeks immunity from the operation of article 13 so far.

Marriage under the special marriage act 1954

Where a Muslim contracts his marriage under the special marriage act of 1954, he ceases to be Muslim for the purpose of inheritance. Accordingly, after the death of such Muslim, his / her properties do not devolve under Muslim law of inheritance. The inheritance of such Muslims is governed by the provisions of the Indian Succession Act of 1925.

Also in cases where the subject matter of property is an immovable property, situated in the state of West Bengal, Chennai and Mumbai, the Muslim shall be bound by the Indian Succession Act 1925. But this second exception is only for the purpose of testamentary succession. In non-testamentary succession even there, the Muslim Personal Law (Shariat) application act gets applied.

Summary

Now we should summarize the cardinal tenets of inheritance under Islamic sharia as follows

- *The Muslim law makes no distinction between moveable or immovable property and ancestral or self-acquired property for the purpose of inheritance. Whatever is left after the death of Muslim is his heritable property.*
- *Under Muslim Law there is no ‘joint property’ or joint family system. Hindu legal concept of joint undivided family, coparcenary, Karta, survivorship has no place in the law of Islam. A member of the family may not be an heir or vice-versa.*
- *No birthright of inheritance is given under Muslim Law. If an heir lives even after the death of an owner, only then his share in the property is ensured. So Muslim law follows the principle “**nemo est haeres viventis**” i.e. nobody can become an heir to a living person.*
- *The doctrine of representation finds its place in the Roman, Hindu and English Law of inheritance. However, this doctrine representation does not find place in the Muslim Law.*
- *Under the Muslim law, distribution of property can be made in two ways—per capita and per strip distribution.*
- *A child in the womb of its mother is competent to inherit provided it is born alive. A child in the embryo is regarded as a living person, and, as such, the property vests immediately in the child. But if such a child is not born alive, then the share is divested and it is presumed that there was no such heir at all.*

- *Nearer in degree excludes the remoter within the limits of each class of heirs.*
- *Rights of females enshrined under the sharia law of inheritance.*
- *Spes succession is not recognized under Muslim Law.*
- *Succession to deceased (Murdered). A person causing death of another, under the Sunni law cannot inherit to the latter, no matter whether the person is killed intentionally or by accident. But under the shai law, homicide is not a bar to succession unless the death was caused intentionally.*
- **Difference of Religions (*Ikhtilāf al-Dīn*).** Difference in religion is one of the fundamental impediment to succession in Islam, There is an important *hadith* on this subject which goes thus: “*Narrated Usāmah bn Zayd (May Allah be pleased with him): The Prophet (Peace be upon him) said: A Muslim cannot be the heir of a disbeliever, nor can a disbeliever be the heir of a Muslim.*”
- **Divorce** simply means an act of separation from a legally binding marriage or solemnization as propounded under Islamic law. In Islam, divorce, known as *Al-Talāq* is not encouraged nor allowed except in a tense and irreconcilable situation because the Prophet (PBUH) was reported to have said that the most detestable permissible act in the sight of Allah is divorce. In the area of inheritance, we have learnt before that one of the three conditions which legitimizes inheritance and succession under Islamic law is marriage (*Al-Nikkāh*); and likewise, once such marriage becomes void, the inheritance procedures, legitimacy and leverages becomes void too. In other world, a divorcee, once legally divorced as pronounced under Islamic law has no shares in his or her partner’s estates or properties during and after his death.
- Islam forbids fornication and adultery and specified the punishment accrued to such act if anyone, either male or female found guilty of it (See Q24:3). An illegitimate child is any child, either male or female born out of wedlock. It mean that child was a product of *Zinā* (Adultery) since the expected *Sharī’ah* inclined solemnization (*al-Nikkāh*) did not take place. Such child is termed illegitimate child (*Walad al-Zinā*) under Islamic law. However, under *Al-Farā’id*, as inferred from *Sunnah* of the Prophet and *Sunni* Schools’ *Fatāwah*, an illegitimate child would not inherit his biological father. He or she only has an unfettered rights to inherits the mother because to a woman, there is no an illegitimate child. According to scholars, such child is also entitled to *hibah* (gift) and *wasiyyah* (bequest) from the father if he decided so but he or she would not be counted or identified as a potential heir during the devolution of the deceased’s property. **So the steps children are not entitled to any right to inherit the property of their step parents or vice-versa.**
- Under Islamic law, apostasy constitutes a deprivation or impediment to Inheritance. In India, the position is different as section 3 of the caste Disabilities Removal Act 1850 removed this disability.
- Missing persons (Mafkud) and slavery are also impediments in the way of inheritance.
- Rights of widows protected under inheritance law.
- There is a provision of **escheat** which refers to the transfer of all estate assets or unclaimed property to the state.