

INHERITANCE RIGHT OF ORPHANED GRAND CHILDREN: BANGLADESH PERSPECTIVES

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ABSTRACT

The dilemma of inheritance of grandchildren from the pre-deceased child is one of the most critical areas of Islamic law. According to the classical interpretations of Islamic law, any son of the deceased in general excludes such grandchildren. However, many states brought certain changes into the existing format of Islamic law of succession so as to shield such grandchildren from total exclusion. Egypt, Tunisia, Syria, Morocco, Pakistan and Bangladesh are remarkable for bringing changes in this particular area. Pakistan brought a significant change in 1961 by section 4 of the Muslim Family Laws Ordinance (MFLO), which is a milestone event in the history of reformation of Islamic law. In Bangladesh the same law become accepted through the promulgation of the Laws Continuance Enforcement order, 1971'.Section of the

MFLO affected the whole structure of Islamic Law of Succession. The objective of this work is an attempt to draw the attention of the proper authority for taking steps to ensure the right of orphaned grandchildren and other heirs not violating the Islamic law of succession. For this purpose the author tries to show the injustices to some heirs and the provisions of Islamic law of succession which have been violated caused by the section 4 of MFLO and lastly the author has set up a method that ensures the right of the orphaned grandchildren neither violating the Islamic rule nor excluding any heir. It is a qualitative research.

INTRODUCTION

In the words of Anderson, among many defects and controversial issues in the Muslim Law the most serious defect is the rule against representation of a deceased heir-at least where the children of such heir would be excluded on the principle that the nearer in degree excludes the more remote (Bousquet, 1960). Not only Anderson but many modernists think that this principle causes much hardship to the orphaned grandchildren. On the basis of the strong supports of modernists and considering the situations of orphaned grandchildren, many Muslim states have made provisions to ensure the inheritance rights of the orphaned grandchildren. Egypt in 1946, inserted the principle of obligatory bequest in the bequest law. This provision has encouraged many Muslim countries to enact law inserting the provision of the obligatory bequest to ensure the right of the orphaned grandchildren. As a result in 1953 in Syria, in 1956 Tunisia and in 1959 Iraq the device of obligatory bequest system has been introduced. But Bangladesh and Pakistan have introduced totally a new system of succession that is the rule of representational succession which clearly violates the traditional Islamic law of succession. Therefore, the views of Islamic jurists that law which is necessary for ensuring the rights of orphaned grandchildren, must be made complying with the undoubted excellencies of Islamic law of succession. So, before and after the adoption of The Muslim Family Laws Ordinance 1961 inserting the doctrine of representation, all the Islamic scholars, ulama and even a member of the commission strongly opposed this law. Even many non-Muslim scholars including Herbert J. Liebesny (Islam, 2007) Anderson (Anderson, 1965) and Coulson (Pearl, 1972) think that section 4 of MFLO is absolute violation of the Shariah law of succession. This individual rule not only violates the classical shariah law of succession but also causes severe injustice to some heirs and undermines the Quran, Hadiths and Ijma (Islam, 2015).

THE INHERITANCE RIGHT OF ORPHANED GRAND CHILDREN UNDER SHARIA LAW

Where a person dies leaving his/her children either female or male in the lifetime of his/her father or mother those children are the grand children of that father or mother. So grand children may be following kinds:

- (a) Female through female link .i.e. Daughter's daughter
- (b) Male through female link. i.e. Daughter's son
- (c) Female through male link .i.e. Son's daughter
- (d) Male through male link. i.e. Son's son

These four types of orphaned grand children don't belong to the same class but they belong to different classes of heirs. Under Hanafi law of succession, all the person who are entitled to inherit are called heirs who are classified into three groups (i) Sharers (ii) Agnatic heirs or residuary (iii) Distant kindred (Cheema, 2018). Among these four grandchildren, in Sunni law of succession daughter's daughter and daughter's son belong to the group of distant kindred. Son's daughter belongs to the Quranic heir and son's son belongs to the agnatic heir.

Son's daughter: A granddaughter takes the position of a daughter in the absence of a daughter and a son of the deceased. For the granddaughter, there are following condition (Zouaoui, 2021):

- (i) She takes $\frac{1}{2}$ of the property if she exists alone without a son and daughter. Two or more granddaughters divide $\frac{2}{3}$ of the property among themselves.
- (ii) She takes $\frac{1}{6}$ if she exists with a single daughter making $\frac{2}{3}$ of the quota of two or more daughters in the absence of a son. Two or more granddaughters with a single daughter divide $\frac{1}{6}$ of the asset among themselves.
- (iii) They are excluded in the presence of two or more daughters.
- (iv) An excluded granddaughter becomes a residuary in the presence of a grandson. A grandson, thus converts an excluded granddaughter into a residuary and shares the residue with her in the ratio of 2:1.
- (v) A granddaughter is excluded by a son.

Son's Son: As an agnatic heir he inherits in 24 capacities. Out of these 24 situations, in 14 cases the grandson inherits the whole property excluding others totally: in 10 capacities he inherits $\frac{1}{3}$ or more and only in one case, where there is surviving son, whether his father or uncle, he is excluded. Daughter's daughter and daughter's son: Both of them are distant kindred and are totally excluded by any Qura'nic heir save the spouse relict or by any male agnate however distant. Among four classes of distant kindred, they are comprised in group I and they take precedence over other heirs (Hoque, 2013).

The Inheritance right of orphaned grandchildren under section 4 of MFLO 1961: In order to remove the sufferings of the orphaned grandchildren, the Commission on Marriage and Family Laws reported for enacting law ensuring the doctrine of representation. On the basis of the report of the commission the section 4 of the Muslim Family Laws Ordinance 1961 was adopted in Pakistan and after independence it has identically been accepted in Bangladesh. The section 4 of the MFLO says- “In the event of death of any son or daughter of the propositus before opening of succession, the children of such son or daughter, if any, living at the time of succession opens, shall per stripes receive a share equivalent to the share which such son or daughter, as the case may be, would have received if alive”

This doctrine can be illustrated by taking a simple example; a dies leaving his son, son's son and daughter's daughter. In this case the grandson and granddaughter will get that share what their respective father and mother would have got if alive at the time of death of their grandfather. So the property of A will be distributed among his son, predeceased son and predeceased daughter and the share of predeceased son will go to his son (son's son) and the share of predeceased daughter will go to her daughter (daughter's daughter). So son inherits from his father 2/5 of his total property, son's son inherits 2/5 from his grandfather's property and daughter's daughter inherits 1/5 from her maternal grandfather's property (Hoque, 2019).

IMPACTS OF SECTION 4 OF THE MUSLIM FAMILY LAWS ORDINANCE 1961

Undoubtedly, section 4 is one of the most major reformations done in the area of Islamic law of Succession. The impact of section 4 of the Muslim Family Laws Ordinance, 1961 upon Sharia law of inheritance is to be analyzed properly. This particular provision encapsulated in section 4, in fact, adversely affected certain fundamental principles of Islamic law of Inheritance (Powers, 1993). Some of such instances are-

Violation of order of priority among different classes of heirs

For the purpose of distribution of property of the propositus among the heirs, Islamic law of inheritance classifies them into three broad categories in order of priority. They are the sharers, agnatic heirs and distant kindred. The legal order of distribution among them is that the property will go to the sharers first, and the residue property will be distributed among the agnatic heirs in order of priority intra class (Powers, 1982). Thus, groups one and two may get the property at the same time one after another, since the first group as a class does not exclude the second group rather just takes precedence over the other. The heir who is grouped as distant kindred can succeed only in the absence of the heirs of the first two groups except the husband or widow. Thus, each heir of the first two groups except husband and widow excludes any distant kindred totally. In other words, distant kindred can not get any property in presence of any sharer

or agnatic heir except the husband and widow. This is the basis of classification of the heirs which forms the first basis of exclusion. This order of priority is totally diminished by section 4 of the MFLO 1961. Thus under MFLO, even distant kindred, e.g. daughter's son and daughter's daughter, gets the property with the heirs of first and second group.

Under Sharia: A distant kindred is excluded by sharer or asaba.

Heir	Share	Reasoning
Son	Res	Son is originally an asaba and the daughter has been converted into residuary by the son.
Daughter		
Daughter's daughter	Excluded	The heirs of the superior classes (both sharer and asba) are present.

Under MFLO: A distant kindred succeeds with sharer or asaba..

Heir	Share	Reasoning
Son	Res	Son is originally an asaba and the daughter has been converted into residuary by the son. Daughter's daughter will also be a residuary being treated as a daughter.
Daughter		
Daughter's daughter		

Under MFLO, distant kindred not only may inherit with sharer and asaba but even sometimes may exclude a Sharer.

Under Sharia: A distant kindred is excluded by sharer:

Heir	Share	Reasoning
Uterine brother and uterine sister	1/3 increases to the whole by Radd	As sharer, they are more than one in number and no excluder to them is present.
Daughter's daughter	Excluded	The sharers are present who exclude all distant kindred.

Under Sharia: A distant kindred even may exclude a sharer.

Heir	Share	Reasoning
UB and US	Excluded	Daughter's daughter is treated as daughter and so she excludes them like the daughter.
Daughter's daughter	½ that increases to the whole by Radd.	Since she is getting the property of the daughter.

Violation of the fundamental principle of distribution between male and female in the ratio of 2:1:

The Holy Qur'an clearly declared that a male receives a share equal to that of two females'. Thus, the son will get double of daughter's share and

Son's son will get double of son's daughter's share. It will not be applicable between son and son's daughter, because they do not belong to the same class and the term 'walad' used by the Qur'anic verse either mean 'Child' or 'son's child', but in the same case it cannot be used for both the meaning. However, this Qur'anic principle which forms an important rule of Islamic law of inheritance has been clearly affected by the provisions of section 4. For example, under MFLO, male and female get equal share violating Qur'anic principle of distribution.

This rule of 'double share for male' is applicable in cases of the pairs of son and daughter. Son's and Son's daughter, full brother and full sister, consanguine brother and consanguine sister, uncles son and uncle's daughter, brother's son and brother's daughter, and in cases of their descendants as such.

Heir	Share	Reasoning
Son's son (offspring of the pre-deceased son1)	½ as residuary	Representing his father (PDS1)
Son's daughter (Offspring of the pre-deceased son2)	½ as residuary	Representing her father (PDS2)

In the above case, son's daughter is getting ½ in the representative capacity of her father though she is a female, whereas Qur'ran clearly says about the personal capacity. Interestingly, if both of them would be the offspring of the same pre-deceased son, then their position under sharia and MFLO would have been same. For example, according to sharia and MFLO, male is getting double share of the female.

Heir	Share	Reasoning
Son's son (of pre-deceased son1)	2/3 as residuary	Representing his father (PDS1)
Son's daughter (of the pre-deceased son2)	1/3 as residuary	Representing her father (PDS2)

Thus, if we consider above two son's daughters, each of them in fact enjoys the same identity, that is son's daughter, and sharia also treats each of them in the same way; whereas MFLO distinguished between these two because of the application of the doctrine of representation. This is the double standard taken by the MFLO towards the same kind of heir.

Violation of the fundamental principle of hierarchy of degree

Islamic law of succession recognizes the principle of hierarchy of degree by which nearer in degree excludes more remote. Thus the nearness of the relationship forms the prior claim to get the property. However, this rule is not strictly applicable in Sunni school, as the daughter does not exclude the son's son, and thus it appears that this rule of exclusion is applied only

in the same class of heirs. But, it is true that under Shia school even the daughter excludes son's son.

Under MFLO: Violation of the principle of hierarchy of degree.

Heir	Share	Reasoning
son	½ as residuary	As asaba.
Son's son	½ as residuary	Representing her father (PDS), whereas he would be totally excluded by Sharia because of the hierarchy of degree by the presence of son.

Creates new methodology of distribution

Under Sharia law, everyone gets the property in his or her own capacity. But if section 4 is applied, then every child of the pre-deceased child will get the property in a representative capacity always. Thus, it will create a completely new mode of distribution. The innovative line will be clear from the following example, MFLO introduces new scheme of distribution

Heir	Share under MFLO	Share under Sharia
Son's son (of PDS1)	½ representing their father PDS1, each gets 1/4	All will be converted into residuary together to be divided the whole property among them equally, each gets 1/3 at his independent capacity.
Son's son (of PDS1)		
Son's son (of PDS2)	½ representing his father PDS2	

In the above examples, someone dies leaving 2 son's son from his first pre-deceased son and 1 son's son from his second pre-deceased son. Sharia treats them equally as each of them gets property in his dependent capacity. But, the MFLO distributes the property to them as the representatives of their deceased father. Thus, interestingly, MFLO has become discriminatory towards the sons of the same grade under the similar circumstance. Probably, the persons who advocated for making such a rule they even could not contemplate of such an anomalous situation, though they always tried to portray their report to had been made based on equity and just principles (Khan, 2016).

Unnecessary interference under certain circumstances

There are many cases where the orphaned grandchildren are not deprived even under sharia law. But, section 4 becomes applicable everywhere irrespective of their exclusion. For example, if someone dies leaving one daughter will get ½ as a sharer and the rest ½ will go to the Son's Son. But MFLO modifies it and accordingly, daughter will get 1/3 and the son's son

gets 2/3. There is no logical basis for bringing such a change. The objective of the law was to save the orphaned grandchildren from deprivation, but there is no specification made in the said law that it will be applicable in the cases where the orphaned grandchildren will be deprived according to the regular rules of distribution. The law was spelt in such a way that gives the impression that as if such grandchildren are always totally deprived under the sharia law. But, the fact is different. F.M. Kulay has made the point very clear with specific statistic. He 'argues that the concern of the orientalist and the apologetic, modern and progressive Muslims for the orphaned grandson is misplaced.' Kulay pointed out that there are 27 and leaving aside the two cases of emancipated slaves 25 possible situations in which a grandson is an heir of his grandfather. Out of these 25 situations, in 14 the grandson inherits the whole property excluding others totally; in 10 he inherits one-third or more; and only in one situation where there is a surviving son, whether his father or uncle, he is excluded. Thus importing generally the concept of representational rule upsets the whole structure of sharia law. Coulson rightly pointed out that '[b]ecause the Pakistani rule of representational succession by lineal descendants is absolute in its application and not confined to cases where the grandchildren would otherwise be excluded from succession, it brings about radical changes in the structure of inheritance, affecting not only the heirs' quantum of entitlement but also their priorities. This new system of distribution causes a caustic vicious injustice to some heirs and violates the Islamic law of succession. So it is clear to us that this single rule in various ways has completely destroyed the pillar of Islamic law of succession (Ellickson, 1972).

THE PROBLEM OF INHERITANCE OF ORPHAN GRANDCHILDREN UNDER ISLAMIC LAW OF SUCCESSION

Making will is an optional power, in fact, to be exercised by the Muslim testators. But considering the circumstances, in cases of the deprivation of the children from the pre-deceased children under regular succession law, the grandfather of the said grandchildren will be under a legal obligation to make a will in their favor to protect them against absolute deprivation (Hoque, 2007). Such a bequeath will be restricted up to the one-third of the total property, so that it does not violate the principles of 'Will' under Islamic law.

Impact of obligatory bequeath on sharia law of succession

It does not affect the sharia law of succession as section 4 of the MFLO does affect. This rather holistic approaches to solve the problem that take into consideration other relevant mechanisms like 'will'. Once a will is made following its restrictions of no will for more than one third of property or anything in favor of any heir who succeeds, then in no way it hampers the succession law. The advantages of such device are that – firstly, this system of will may be made applicable in those cases where the said grandchildren are excluded only. So, if any grandchild of any pre-

deceased child gets property under the original scheme of sharia law of inheritance, this rule of obligatory bequeath will not be applicable, whatever may be the actual portion of the property received by that grandchild. Instead of making it as a general rule for distribution of the property among the children of the pre-deceased children it may be applied only in the cases of exclusion (Islam, 2014). Thus, unlike section 4of the MFLO, 1961, it may avoid the cases of unnecessary interference. Secondly, since it solves the problem following a different device, so in no way it affects sharia law of succession. Consequently thirdly, no question of being affected of other heirs arises, unlike MFLO. It does not even abrogate the male female ratio of the property as it is an independent way of solving the problem, as that rule is applicable only in case of succession. Thus, it appears that following this device any clash with the Qur'anic verses regarding inheritance may be avoided technically. This is the great advantage of this formula. Just one question may be raised against it-what(power of making will) has been made optional can that power be restricted by turning it into obligatory? There are also some arguments in favor of this interpretation which are discussed under the following heading. However, even though if these arguments do not seem to be tenable and satisfactory to someone still it remains as the sole objection against this formula, whereas there are lot of direct objections against the MFLO formula of representational rule including the frustration of the whole Islamic law of succession ordained by the primary sources.

Basis of obligatory bequeath

The system of obligatory bequeath is not an innovation in the sense that it is found conceptually in the Quran (Holy Quran 2:180) and Hadith. Almighty Allah says- "It is prescribed for you, when death approaches any of you, if he leaves wealth. That he make a bequest to parents and next of kin, according to reasonable manners. (This is) a duty upon the pious." Although the great majority of the jurist considered that this verse had been completely abrogated or repealed by the later Qur'anic rules of inheritance, a small but respectable minority (including the of Muslim jurisprudence himself, al -Shafi'I) held that the verse was repealed only in respect of those close relatives who actually received a share of inheritance ; and that it was still desirable at least for bequests to be made in favor of other close relative. This view, though is of the minority, seems to be convincing, more perfect and logical (Islam, 2012). A few jurists, notably the prolific author Ibn Hazm, a representative of the now extinct Zahiri school, went further and insisted that the Qura'nic verse implied a definite legal obligation to make bequests in favour of close relatives who were not legal heirs, and that if the deceased had failed in his duty to make this obligatory bequest the court should make it for him. Moreover, it has been narrated on the authority of Qatadah that the Prophet (PBUH) said:

“Consider (the condition of) your relatives who are in need yet have no (share in your) inheritance and make a bequest for them from your property according to reasonable manners.” The prophet (PUBH) has also said- “It is rightful upon a Muslim that he must not spend two (consecutive) nights without having his written bequest with him if he has anything that can be bequeathed.” Scholars have unanimously agreed that bequest is not obligatory for those who are not of one’s relative, and this means that the obligatory bequest be for one’s relatives.

CONCLUSION

The system of obligatory bequeath was first introduced in Egypt in 1946. It has been introduced in different states in different forms with a little modification in the original concept. In fact, this difference is based on the meaning of grandchildren and specific procedure to calculate the property. In Syria and Morocco the children of a pre-deceased son or agnatic grandson, who would be excluded from succession under the traditional law, are now entitled to either the share of the inheritance their father would have received had he survived the propositus or one-third of the net estate, whichever is less. No provision is made for children of the deceased’s daughter. In Egypt and Tunisia the children of a pre-deceased son or daughter, who would be excluded from succession under traditional law, are entitled to the share their parent would have received had he or she survived the propositus, within the maximum limit of one-third of the net estate. Thus ‘the descendant heir in question must not be one of those who deserve a share in the inheritance, and if he deserves even a small share, no bequest will be obligatory in this case’. An example of this is that a man may die and leave behind a daughter and the sons of his son who died during this man’s lifetime. In this case the son’s sons deserve inheritance, so there is no obligatory bequest for them. In Egypt, but not in Tunisia, the children of an agnatic grandson or granddaughter, how low so ever, benefit from the same rule. Coulson mentions three methods of applying the law relating to obligatory and he preferred Abu Zahra’s system in comparison with the ‘court system’ and ‘mufti system’. The method formulated by Shaykh Muhammad Abu Zahara has been termed by Coulson as a ‘sound method’. Coulson summarized this system in the following words- The estate is first apportioned as if the pre-deceased child were an entitled heir, and his or her share, or the bequeathable third, whichever is less, is taken out of the estate and allotted to the grandchild or grandchildren as a bequest. The remainder of the estate is then re apportioned between the actual legal heirs. The method consistently ensures both that the grandchildren receive what their predeceased parent would have taken, within the limit of the bequeathable third, and that the rights of the actual legal heirs inter se (in respect of the estate left after the deduction of the bequest) are not affected.

The following steps may be followed for distributing inheritance properly and correctly when there is an obligatory bequest, i.e., when he descendant heir is to be given the right of his dead father for example:

- (i) The share of the son of the deceased person who died during the life of the latter is to be defined as if he was present at the time of distribution.
- (ii) After that the share of the dead son is to be taken out of the property and given to his or her descendant who deserves the obligatory bequest.
- (iii) Then the remainder of the property is to be distributed among the real heirs each according to his or her Shar'i share. Above obligatory bequest system had been adopted by Egypt and subsequently adopted by many countries like Syria, Jordan, Iraq, Tunisia, Algeria and Morocco. Bangladesh should adopt this obligatory bequest system so that he does not violate the fundamental principles of Islamic law of succession.

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