CHAPTER 8
SPECIAL CASES WITH SPECIAL NAMES

The object of this chapter is to deal with certain special rules and doctrines established by intelligent juristic deduction. These rules certainly form important parts of Islamic law of inheritance.

1. UMRIYATIN

1.1: Meaning:

This is directly related with the mother's share, which have the effect on father's share also. *Umriyatin* means 'Two of Umar', that implies two important decisions taken by Umar. Since these two decisions were first given by Umar, so subsequently they have been known as '*Umriyatin*' or 'Two of Umar'. '*Umriyatin*' though starts as *ijtihad* subsequently by wide acceptance of the companions it has been turned into an '*ijma* of companions'.

1.2: Object of the rule:

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 the spouse relict. The object of '*Umriyatin*' is to reduce the mother's share from 1/3 of the whole to 1/3 of residue in competition with the father, so that father still gets double of the mother's share. Because, without applying this rule mother even may get double of the father's share. The two cases of '*Umriyatin*' are also 'known as "*al-Gharrawani*", or the "Two Deceivers", the mother being deceived in the sense that "she takes one-third in name but not in substance".'[1]

1.3 Contents of the rule:

Mother is entitled to 1/3 on fulfillment of the following two conditions:

1. there is no child or son's child; and
2. not more than one brother or one sister (if any).

But, what will happen if in the same situation wife or husband exists along with the father? Specifically speaking, what will the mother get in competition with father in the following two situations:

1. Father, Mother, Husband.
2. Father, Mother, Wife.

If the principle of 1/3 is applied directly then mother may get more than the father.

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[1] N.J. Coulson, Succession in the Muslim Family, Cambridge University Press, 1971, UK, at p.46.

Illustration 1: Mother's share of 1/3 without applying 'Umriyatin'.

Heir	Share		Reasoning
Husband	½	3/6	As sharer, because there is no child or son's child.
Father	Res	1/6	As *asaba* of the 1st grade, in the absence of any son or son's son, in order of priority.
Mother	1/3	2/6	As sharer, because there is no child or son's child; and no brother or sister at all.

Illustration 2: Mother's share of 1/3 without applying 'Umriyatin'.

Heir	Share		Reasoning
Wife	¼	3/12	As sharer, because there is no child or son's child.
Father	Res	5/12	As *asaba* of the 1st grade, in the absence of any son or son's son, in order of priority.
Mother	1/3	4/12	As sharer, because there is no child or son's child; and no brother or sister at all.

Thus, it appears that in illustration 1 mother gets double share of the father, and in illustration 2, father gets 20% more than the mother. The anomaly has become extremely evident in the first case, where instead of getting half of the father's share, mother is getting just double of the father, which is contrary to one of the general principles of Islamic law of inheritance that the ratio of the property of the male and female of the same class should be 2:1.

To cure this anomaly Hazrat Umar (R.A.), the second Caliph of Islam and one of the closest companions of the Prophet (sm) declared that under this circumstance, mother instead of getting 1/3 of the whole will get 1/3 of the remainder after giving the father's share.

After the correction made by Umar (R.A.), the solution of the above two cases become as follows:

Illustration: Mother gets 1/3 of residue according to Umriyatin.

Heir	**Share**	**Common denominator = 6**
Husband	½	3/6
Father	Residue	2/6
Mother	1/3 of residue = 1/3 of (1-husband's share) = 1/3 of (1-1/2) = 1/3 of ½= 1/6	1/6

Illustration: Mother gets 1/3 of residue according to Umriyatin.

Heir	**Share**	**Common denominator 4**
Wife	1/4	1/4
Father	Residue	2/4
Mother	1/3 of residue = 1/3 of (1- wife's share) = 1/3 of (1- ¼) = 1/3 of 3/4 = 1/4	1/4

Though the rule was originally enunciated considering the first case of anomaly with the husband in competition with the father, later on it was extended to the second situation with the wife in order to maintain uniformity.

1.4: Different opinions and assessment of Umar's decision:

However, though the above interpretation given by Umar (R.A.) has been accepted and approved by the companions and majority jurists, there is another differing opinion of Ibn Abbas. When this problem was

raised before Hazrat Abdullah Ibn Abbas for solution, he said that the mother will straight get 1/3 of the entire property in both the cases. Thus, he vehemently opposed the concept to reduce mother's property to readjust it in competition with the father. He does not see any wrong in giving mother the maximum Quranic share of 1/3 as has been declared by the Quran and finds no logic to go against the Quran just to reduce it so that the father can get double of the mother and he considers it as a vague doctrine. This opinion has been recognized later on only by the Shia jurists, while all other Sunni schools and companions of the Prophet (sm) unanimously accepted the solution provided by Hazrat Umar (R).

Mohammad Mustafa Ali Khan[2] has nicely presented a comparison between these two opinions of Umar and Ibn Abbas (R) in the following words:

> Jurisprudentially the principles underlying the opinion and decision of Hazrat Umar may be reconciled with the Quranic provisions that 'where the parents are the heirs, the mother gets one third (1/3)', by interpreting the one third portion as the 1/3 of residue and not of the whole. In the face of the obvious and logical interpretation adopted by Ibn Abbas the other interpretation mentioned above, does not appear to be intrinsically sound. But the other one is more in conformity with the general policy and scheme of distribution of shares recognized by the Sunni Schools.

Then he cited the following quotation of Ibn Qudama:[3]

> The argument of Ibn Abbas would prevail were it not for the consensus of the Prophet's (SAW) companions to the contrary.

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[2] Mohammad Mustafa Ali Khan, *Islamic Law of Inheritance*, India, 1989, at p.109.

[3] Ibid., with reference to Al-Mughani, vi:180.

2. AL-MIMBARIYYAH OR PULPIT CASE

2.1: Introduction:

This is a case where the concept of *'Awl'* or 'doctrine of increase' was first established. *'Awl'* is the result of juristic deduction made by Hazrat Ali (R.A.), the 4th Caliph of Islam. However, there are differences of opinion as to the first *'Awl'* case and the inventor of this concept[4].

2.2: Naming of the Rule:

The rule of *'Awl'* as enunciated in *'Al-Mimbariyyah'* has been known as *'Al-Mimbariyyah'*, because the decision was given sitting on the *'Mimbar'* or 'Pulpit' at the mosque, that since then it has been known as *'Al-Mimbariyyah'* or 'Pulpit case'.

2.3: Contents of the Rule:

Hazrat Ali (R.A.), while he was delivering sermon sitting on the Pulpit in the Mosque, 'was interrupted by a questioner from the congregation who asked what a wife's right of inheritance was when her deceased husband was also survived by both his parents and his two daughters'[5]. Ali replied without any hesitation that 'The wife's one-eighth becomes one-ninth'.[6]

Illustration : Al-Mimbariyyah case where 'awl' was applied.

Heir	Share	Common denominator =24	Revised CD =27
Wife	1/8	3/24 Reduced to	3/27 *(1/9)*
Mother	1/6	4/24 Reduced to	4/27
Father	1/6+R	4/24 Reduced to	4/27
02 D	2/3	16/24 Reduced to	16/27

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[4] Doi said: *'There are differences opinions as to who suggested 'Awl'. Some say that it was Companion Abbas, while others said it was Sayyidna Ali some others say that it was Zaid bin Thabit who suggested 'Awl'* (Shariah The Islamic Law, Abdur Rahman Doi, Ta Ha Publishers, London, UK, 1997, at p. 315).

[5] Coulson, supra note 1, at p.47.

[6] Ibid.

3. MUSHTARAKA RULE OR DONKEY CASE

This basically resolved a conflict between uterine brothers and full brothers, where uterine brothers get the property but the full brothers though are not *de jure* excluded, are excluded *de facto*. The rule enunciated in this case makes an arrangement so that the full brothers also get some property like the uterine brothers.

3.1 Facts of the case:

A woman dies leaving her husband, mother, 2 uterine brothers and 2 other full brothers. This problem was raised before Hazrat Umar (R.A.) for solution. Umar (R.A.) solved the problem following the existing rules of Islamic law of succession which is as follows:

Illustration: Al-himariyyah case—Umar's first decision.

Heir	Share	Common denominator = 6
Husband	½	3/6
Mother	1/6	1/6
Uterine brother	1/3	1/6
Uterine brother		1/6
Full brother	R	00
Full brother		00

Thus it appears that though the full brothers have been allotted a portion (residue), nothing is left as residue, so they have been *de facto* excluded. In fact, this is a distribution according to law that the property will go to the sharers and what is left that will pass to the *asaba*. Following this 'golden rule of distribution', an apparently unfair result is found. That the uterine brothers are getting the property; whereas the full brothers are getting nothing due to the technicality of the law. Because, the law is not making any declaration regarding the exclusion of the

full brothers. Full brothers, naturally, being aggrieved made an appeal to Hazrat Umar (R.A.) to revise the decision.

3.2 Arguments by the Full brothers:

At the first hearing, they put the arguments to establish their superiority in comparison to the uterine brothers. At that stage, their main argument was based on the strength of blood tie that they have double strength of blood tie with deceased since they have the same father and mother, whereas the uterine brothers have only the strength of single blood tie as they are connected to the deceased only through the mother and their father's are different persons. Thus, they claimed the superiority over the uterine brothers.

On appeal, at the time of second hearing, they have made a more specific argument that equalizes them with uterine brothers. They have mentioned that the uterine brothers are connected with the deceased through the mother, and like the uterine brothers, they are also connected with the deceased through that same mother. If the uterine brothers get the property for having the same mother, then they have also the same reason to get the property. They added that the tie from the father's side is an additional quality, even if that is not counted to give them superiority over the uterine brothers, at least, that quality or additional qualification can not be considered as a disqualification to exclude them. So, at least, if not superior, they should be given the same and equal status with the uterine brothers. Finally, they argued to ignore their relationship with the deceased through the same father, and pleaded to settle the issue based on the tie of the same mother.

3.3 Issue

Can the full brothers get any property?

3.4 Decision and its analysis:

The decision was positive. Hazrat Umar (R.A.) was convinced by the logical and reasonable arguments made by the full brothers. He revised his earlier instant decision, and declared that in this case, full brothers will be the equal partners in 1/3 of the uterine brothers. This decision seems to have been given on the basis of their later argument, as they have been treated like the uterine brothers for the purpose of distribution of the property in this case.

Illustration: Al-himariyyah case—Umar's revised decision.

Heir	Share		Common denominator = 12
Husband	½	3/6	6/12
Mother	1/6	1/6	2/12
U. Brother	1/3	2/6	1/12
U. Brother			1/12
F. Brother			1/12
F. Brother			1/12

3.5 Applicability of the Rule:

Three important points may be noticed here:

1. *De facto total exclusion is the condition precedent:* The rule enunciated in the *Himariyya* case will be applicable only in cases of total exclusions of full siblings, whether brother or sister or both, due to the presence of uterine relations.

2. *Full sister and full brother get equal shares:* If the full sisters are converted into *asaba* by the full brothers and are excluded *de facto* with the uterines, the full sisters also inherit under this

rule like the uterines, irrespective of their gender, equally, without following 2:1 principle.

Illustration: Al-himariyyah case—Full sister gets equal of full brother like the uterines.

Heir	**Share**		**Common denominator = 12**
Husband	½	3/6	6/12
Mother	1/6	1/6	2/12
Uterine brother	1/3	2/6	1/12
Uterine brother			1/12
Full brother			***1/12***
Full sister			***1/12***

3. *Not applicable in case of consanguine siblings:* Application of the rule cannot be extended to the consanguine brothers or sisters, as they are not covered by this rule for not having the same link. In other words, they do not have any maternal connection to the deceased person.

3.6 Naming of the Rule:

'*Himar*' is an Arabic term that literally means 'Donkey'. The said rule has been named as *Himariyya* because of the use of this term in the arguments of the full brothers. To mean 'nothing', they have termed their father as donkey. Their intention was to ignore their relationship with their father totally in order to establish their argument bu focusing their connection with the deceased through the mother's link. They told: "O Commander of the Faithful, ... suppose our father were a donkey (*himar*), do we not still have the same mother as the deceased?"[7] Due to this

[7] Coulson, supra note 1

statement, it has been termed subsequently by some jurists as '*Al-Himariyya*' or 'Donkey case'.

Another name by which this rule is known is '*Mushtaraka* Rule'. It literally means 'Equal partners rule' or as Coulson has translated it into 'the case of the Divided Inheritance', since the share of 1/3 is equally divided under this rule among full and uterine siblings, so that it has been known as '*Mushtaraka* Rule' and this name seems to be more convincing and appropriate.

3.7 Himariyya rule and its acceptance:

3.7.1 : Maliki and Shafi view:

These two schools have in fact accepted the solution given in the *Himariyya* case.[8] They argue that how they can the less nearer brothers inherit preventing those who are nearer in relationship with the deceased.[9]

3.7.2 : Hanafi and Hanbali:

These two Schools rejected the rule enunciated in the *Himariyya* case and they still apply the principles of *de facto* exclusion, and do not see any wrong in excluding the full siblings while the uterines succeed.[10] The Companions of the Prophet (sm) like Ali, Abdullah Ibn Masud and others (R.A.) followed by Imam Abu Hanifah, Imam Ahmad, Daud al-Zahiri, Sufyan al-Thauri and others opposed the *Himariyya* rule and said that the rule must be left as it is in the Qur'an.[11] Allah has said in the Qur'an that the UB &

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[8] Shariah The Islamic Law, Abdur Rahman Doi, Ta Ha Publishers, London, UK, 1997, at p. 306.

[9] Doi, Ibid.

[10] For reference see Shariah The Islamic Law, Abdur Rahman Doi, Ta Ha Publishers, London, UK, 1997, at p. 306

[11] Shariah The Islamic Law, Abdur Rahman Doi, Ta Ha Publishers, London, UK, 1997, at p. 306

US are to get 1/3.[12] Whatever remains will go to the full brothers as residue. No one should try to change this injunction.[13]

3.8 Arguments against the Himariyya Rule:

Six important objections have been raised by the jurists against the principle enunciated in the so-called Donkey case. They are—

1. *Violation of the golden rule of distribution::*

'Golden rule' is an unanimously accepted mode of distribution of property according to Islamic law of succession, which says that the property will be distributed among the sharers at first and if anything remains that will go to *asaba* and thus it gives top priority to the sharers. Precedents of the Prophet had drawn a clear-cut distinction between the two categories of the *ahl al-fara'id* and *asaba* as legal heirs, and laid down the golden rule that the *ahl al-fara'id* had absolute priority in the distribution of the estate, in the sense that their allotted portions were the first charge upon it, even if this resulted, as it admittedly did on many occasions, in the *de facto* exclusion of the *asaba* as residuary heirs.[14] The *Himariyya* rule affects the well established rule of Islamic law of succession that 'once an *asaba* always an *asaba*', because it converts an *asaba* into a sharer. It clearly violates the Qur'anic instruction and division of heirs.

2. *Deprives the uterines:*

By the application of the rule enunciated in the Donkey case in effect the maximum collective portion of uterines (1/3) also has been reduced, because of making the full siblings the partners with them.

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[12] Ibid.

[13] Ibid.

[14] Coulson, supra note 1, at p.75.

Reduction of this Qur'anic share obviously is in clear violation of the Quranic verse that fixes the share of the uterines.

3. *Violation of Male:Female=2:1 Rule:*

Since the full sisters have been also covered by the *Himariyya* rule along with the full brothers and in that case they get the property like the uterines that violates one of the fundamental principles of Isamic Law of succession that says 'To the male, a portion equal to that of two females' (Qur'an, ch 4:11).

4. *Illogical basis:*

Ibn Qudama criticized the rule arguing that the basic assumption, uterines cannot exclude germanes, on the basis of what the rule in the Donkey case has been formulated, is wrong and illogical.[15]

5. *Dangerous plea:*

Last criticism against the rule is that if this is granted then many other such types of apparently unfair cases will come out for bringing change and will support their argument showing it as a precedent and if all these are also recognized then a carefully formulated edifice of Islamic law of succession may fall down.[16]

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[15] Coulson summarized his arguments in the following words: 'It was settled law, ... that in competition with a husband and a mother, one uterine brother would take a portion of one-sixth and germane collaterals, even if there were a hundred of them, would share the one-sixth residue. If, therefore, there was no objection to one uterine brother taking one hundred times as much of an inheritance as a germane brother, why should not two uterines exclude the germanes altogether?' (N.J. Coulson, Succession in the Muslim Family, Cambridge University Press, 1971, UK, at p.75).

[16] Coulson observed: 'Furthermore, the principle of ignoring a particular type of relationship was a dangerous one, inasmuch as it could apply to other cases of succession, and so play havoc with the delicately balanced system of the two categories of heirs. For example, it was agreed in the case of the 'Unlucky Kinsman' that a consanguine sister was converted into a residuary heir by a

Thus, it appears that the Donkey case seems to violate some Qur'anic verses and well established principles of Islamic law of succession for the sake of doing apparent justice and fair treatment to some of the heirs, and thus for some heirs, the whole Islamic law of succession is being affected. That is why probably, Imam Abu Hanifa has not accepted this rule, though in many other cases, Abu Hanifa usually preferred logic and reason more than many others. Law is sacrificed here for the sake of equity. Coulson made a comment about it, which is worth mentioning here "Whatever logic might support the *Himariyya* rule, the fact remained that it contradicted the express terms of the Qur'an itself."[17]

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consanguine brother and so de facto excluded from succession in the presence, say, of a husband and one germane sister whose Qur'anic portions exhausted the estate. But it could be argued, on the *Himariyya* principle, that the relationship of consanguine sister with the praepositus remains the same whether the consanguine brother is there or not. If he had not survived, the consanguine sister would be entitled to a basic Qur'anic portion of one-sixth. Why, therefore, should she not be able to claim that the presence of the consanguine brother is immaterial and no account should be taken of him, so that she can shed her character as a residuary heir and revert to her Qur'anic status? As Ibn Qudama tartly enquires: "Why not assume here that the consanguine brother is a donkey?" (Coulson, supra note 1, at p.75-76.)

[17] Coulson, supra note 1, at p.75.

CHAPTER 9
MISCELLANEOUS ISSUES

1. Grandfather versus collateral.	7. Spes successionis
2. Waiver of right to inheritance	8. Inheritance of child in womb
3. Inheritance of pregnant woman	9. Inheritance of missing person
4. Inheritance of hermaphrodite	10. Inheritance of heirs dying together
5. Inheritance during iddah period	11. Distribution of pension, subsistence allowance, etc.
6. Inheritance of an Apostate	12. Succession in dual capacities.

GRANDFATHER VERSUS COLLATERALS

True grandfather succeeds wearing the shoes of the father, since he is the substitute heir of the father. Thus, he gets the property only when father remains absent. Father excludes the true grandfather as his connecting heir. Likewise, father also excludes the full and consanguine siblings as their connecting heir. Now, the issue is whether true grandfather will have the same effect on others like the father or it will be different because of some inherent differences between them. More precisely speaking, will the true grandfather exclude the full and consanguine siblings like the father? In other words, can the full or consanguine siblings get any property even in presence of the true grandfather? Obviously, all these questions are relevant only when true grandfather himself is allowed to get the property in due process because of the absence of father, and those siblings otherwise qualify to get the property because of the absence of any superior *asaba* like son, son's son or father.

As regards different schools, only Hanafi says that true grandfather excludes all siblings like the father. But other schools including Shias hold the view that true grandfather does not exclude those siblings unlike father and accordingly a full brother or full sister or consanguine brother or consanguine sister

may get the property even in presence of the true grandfather. Along with the issue of exclusion of the siblings they also differ regarding the mode of distribution of the property and the amount of the property which the true grandfather will get.

However, the root of these differences of opinions is found in the opinions of the renowned companions of the Prophet (sm). There is no clear Qur'anic verse or any Prophetic guideline is found in this regard, and that is why even the companions were divided on this issue. Hazrat Umar (R.A.) was afraid of adjudication such a disputed matter, which is evident from his statement where he said: 'If anyone is attracted by the prospect of rushing headlong into the depths of hell-fire, let him attempt to adjudicate a competition between the grandfather and the collaterals'[1].

However, this issue was discussed at length at first in a case which is popularly known as *'al-khuraqa'* or 'The Tatters' case where seven different solutions were found, and each of those decisions was given by a companion. In the said case, some one dies leaving mother, full sister and grandfather. The different opinion of the companions are shown below:[2]

Companions (R)	Mother	F. Sister	True Grandfather
1) Abu Bakr	1/3	X	2/3
2) Zaid b. Thabit	3/9	2/9	4/9
3) Ali	2/6	3/6	1/6
4) Umar	1/6	3/6	2/6
5) Ibn Masud (i)	1/6	X	5/6
6) Ibn Masud (ii)	¼	½	¼
7) Uthman	1/3	1/3	1/3

[1] It has been quoted by Coulson with reference to Shafi authority al-Ramji, *Nihayat al-Muhtaj*, v.20. N.J. Coulson; *Succession in the Muslim Family*, Cambridge University Press, 1971, UK; p.79.
[2] Ibid. See also *Bukhari*, Book of Faraid.

Of the above seven solutions the first three only got subsequent recognition by different jurists and schools of law. Among the first three there are basically two trends:

1. *True grandfather excludes full sister:* This is the opinion of Abu Bakr which later on has been adopted by Imam Abu Hanifa.
2. *True grandfather does not exclude full sister:* The opinions of Zaid b. Thabit and Ali in fact laid down the principle that true grandfather does not exclude full sisters. Thus, it differentiates between father and grandfather's role as regards siblings. Though the father excludes these siblings but the grandfather cannot do so. All schools except Hanafi accepted this view.

Spes successionis:

It is a mere chance of getting property by way of inheritance. That means, if a person expects that he may get certain property if some one dies and makes any agreement relating to that property based on that mere chance of getting that property, such an agreement is void *ab initio* in Islamic law. The basic reason for annulling such an agreement is jurisprudential, that the right that has not been created that cannot be subject to any agreement. There is no certainty of getting property from someone after that person's death for many reasons. According to Islamic law, succession opens after the death of a person only, so there cannot be any agreement regarding that inheritance which has not been opened yet.

Waiver of right to inheritance

Any renunciation, relinquishment or transfer of the future chance of getting property by way of

inheritance is void, according to *Sharia* law. However, there are some case laws that prevail in the Indian sub-continent, which recognized such waiver of right as valid, if that is made by an agreement for consideration.[3] However, many jurists criticized this attitude of the Courts that recognized an agreement as valid being influenced probably by English and Hindu legal systems, which in fact is void under *Sharia* law.

Declaration of 'Aaq':

A declaration that confirms that a person will not inherit from the property of that person is void and is not effective under Islamic law. Thus, no one can make such a declaration validly under Islamic law. Even a father cannot make such a declaration regarding his child who becomes disobedient to him; and the child will inherit in spite of such a declaration made by his deceased father.

Inheritance of child in the womb

The law considers a child in the womb of mother as alive and a separate entity since its conception. A child in the womb of its mother will get inheritance subject to the following two conditions:

The first condition is that the child was conceived by its mother during the lifetime of the propositus. It can be proved by modern medical examination in the context of the present human civilization. However, apart from this medical proof, it also may be proved by the presumption counting the longest period of gestation, which is according to Hanafi 2 years, other schools extend it up to 5 years and shias set it at months. Thus, according to Hanafi view, if a child is born within two years after the death of the propositus

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[3] *Krishna Behari Lal V. Gulab Chand*, 1971, A SC 1041; *Lataft V. Hayat*, AIR 1936 All 573; *Ghulam Abbas V. Qayum Ali*, 1973, AIR SC 554.

then there may be presumption in this regard that the child was conceived during the lifetime of the propositus. However, this traditional opinion may be revised in the light of modern medical development since there is no clear Qur'anic rule or authentic Hadith is found in support of the traditional views regarding the longest period of gestation of the child.

The second condition is that the child is born alive. However, no right will be there at all if it is not born alive, though the law presumed it as alive on and from the day of its conception. Thus, treating it as alive on that day bears the significance in the way that it gives him the chance of getting the property primarily which can be achieved afterwards only if it is born alive afterwards. Thus, mere conception though bears some initial legal significance but ultimately that depends afterwards totally on its being born alive.

"The Egyptian Legislator (Art.43) rules that if a man dies leaving his wife or divorcee during her iddat, her unborn baby shall inherit from him if born alive within 365 days at most from the date of death or separation. The Algerian Legislator (Art.43) holds that the child's parentage shall be established if it is born within 10 months from the date of separation or death. Syrian Article 300 reads as follows : "if a man dies leaving his wife or divorcee during her iddat, her unborn child shall not inherit from him unless it is born alive with proven parentage to him I the manner shown under this law", namely if it is born less than 180 days after the declaration of the termination of the iddat and less than one year after separation or death (Art. 131)."[4]

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[4] Jamal J. Nasir, *The Islamic Law of Personal Status*, Graham & Tortman, London, 1986, p.219.

Inheritance of pregnant woman

If any heir is discovered to be pregnant at the time of distribution of property of the propositus and if it is seen that if any child is born afterwards then that child will be treated as an heir of the said deceased person, then such a case may be solved according to either of the following two ways:

1. Distribution of property will be delayed till birth of the said child in the womb. In such a case, property will be distributed after the birth of the child as alive or as dead, as male or female, as single, twin or triplets, accordingly.
2. Or, property may be distributed, provided the share of that child is to be reserved. In such a case reservation of maximum probable property is preferred. Thus, son usually enjoys greater share and that is preferred to be reserved. Property may be also reserved taking into consideration of chance of twin or triplets. According to Abu Hanifa and some other Malikis, the share of four sons or daughters—the bigger amount thereof—is to be kept aside for the fetus and the rest of the heirs are to be given the least shares as a way of taking precautions.[5] According to Abu Muhammad, the share of three sons or the share of three daughters—the bigger amount thereof—is to be kept for the fetus.[6] And still, according to Abu Yusuf, the share of one son or one daughter—the bigger amount thereof—is to be kept for the fetus.[7] However, after such reservation, after the birth of the child, if the child is born alive, then according

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[5] *Simplified Islamic Jurisprudence based on the Qur'an and the Sunnah*, compiled and translated by: Muhammad M. Abdul Fattah, Dar Al-Manarah, Egypt, vol. 2, pp.1133-1134.
[6] Ibid.
[7] Ibid.

to its gender, and number as the case may be, the property is to be redistributed and adjusted. If there is any surplus or any dead child is born then that is to be redistributed among the then heirs proportionately.

However, in consequence of pregnancy of one of the heirs the other heirs' situations may be of the following three types:

1. *No effect:* There may be some heirs under such circumstances that they will not be affected in any way by birth of any child or any dead child. For example, if some one dies leaving son and a pregnant wife then the pregnant wife will get 1/8 under every circumstance.

2. *Possibility of exclusion:* There may be some other heirs whose fate may be dependant on the result of the pregnancy. For example, if some one dies leaving his brother, pregnant wife and daughter—then the brother will get the property (here residue) only if the pregnant wife does not give birth any son.

3. *Variation in the share:* There may be some other heirs whose position will be varied according the child born later on. For example, in the above example daughter will get ½ as a sharer, but if any son is born afterwards then she will be converted into asaba and will get less as asaba. Likewise, there may be many other such examples.

So, if any child is born and distribution takes place beforehand, then it is to be revised according to the further situation.

Inheritance of missing person:

If a person is missing at the time of death of any person, and if the missing person if really remains alive at that time, would be considered as an heir of the said propositus, then how will the property be distributed? In such a case his share is to be reserved till his reappearance or legal presumption regarding his death. However, if it is found or presumed legally that such a missing person in fact has died before the death of the said propositus, then his share is to be redistributed among the then heirs proportionately. But, how long will such property be reserved? There is no support from the primary source in this regard and the jurists differed widely starting from seven years up to ninety years. Among them only Shafi's later view seems to be reasonable that fixes such period at 'seven' years[8] and Shia view is also logical that fixes it at ten years. However, section 108 of the Evidence Act, 1872 says that a person who has not been heard of for seven years is to be presumed to be dead.

Inheritance of hermaphrodites:

If neither manhood nor womanhood appears or becomes predominant in a person, that hermaphrodite will be treated as a female for the purpose of Islamic law of succession, according to Imam Abu Hanifa.[9] In other cases, that person will get the property as a male or female whichever becomes more apparent in that person.

Inheritance of two or more heirs dying together

With the exception of the Hanbalis, the Sunni schools hold that where relatives die in the same calamity, or

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[8] *Minhaj-et-Talibin, A Manual of Mohummedan Law*, Translation by Howard, E.C. 1912 p. 253, quoted by Mustafa Ali Khan, *Islamic Law of Succession*, New Delhi, 1989, p.186.

[9] Fatawa-I-Alamgiri, vol.10, p.437.

in other circumstances where the order of their deaths is unknown, neither of them inherits from the other.[10] A group of people may die together, as when their boat is drowned, and there is a family relationship which connects them yet it is not known who among them died first—in this case all of them are to be regarded as having died at the same time, the property of each one of them is to be given to his living inheritors, and these deceased persons are not to inherit one another, i.e., the distribution of the inheritance of any one of them is not to be affected by his relation to any of the other deceased people and only the living heirs are to be treated as the only heirs of the person in question.[11]

Inheritance during iddah period

There will be mutual right of inheritance if anyone spouse dies during the iddah period in a revocable divorce. However, if death occurs during iddah period in an irrevocable divorce, there will be no right of inheritance for the other spouse. But, if the husband pronounces talaq during his death-sickness and dies in that sickness during the iddah period, then in every case she will inherit the husband, but no such right will arise for the husband if the wife dies during *iddah* period and the *talaq* was of irrevocable nature.[12]

Distribution of pension, subsistence allowance, etc.

The arrears of a pension or maintenance allowance, etc., which are received after the death shall also be divided according to the rules of inheritance.[13] If such allowances continue even after the death of the person, then only the person(s), in whose name it happens to be in the Government record, shall be entitled to receive it. [14]

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[10] Coulson, supra, p.201-202.

[11] Fattah, supra note 5, pp.1133-1134.

[12] Doi, supra, 321.

[13] Malik Bashir Ahmad Bagvi, *A Learner's guide to the Division of Inheritance*, Kitab Bhavan, New Delhi, 1981, p.23.

[14] Ibid.

Inheritance of an Apostate

If an apostate dies or is killed or joins a *darul-harb* (a place or country which is in a state of war against Islam) and a judge gives a verdict that he has joined such a place, some scholars maintain that the part of his property that he earned during his being a Muslim is to be distributed among his Muslim heirs and what he earned during his apostasy is to be taken by the public treasury and some others are of the opinion that both earnings are to be distributed among his Muslim heirs.[15] But the apostate will not inherit from any of his Muslim relatives. Interestingly, according to Ash-Shafi, Malik and the more famous view of Ahmad in this regard, an apostate is not to inherit or be inherited and his property is to be taken by the public treasury.[16]

Succession in dual capacities

If someone becomes in a peculiar position of dual relationships with the propositus, then will get the property in both capacities. For example, X marries her cousin (paternal uncle's son), and then she dies leaving her only daughter and husband. In such a case her husband will get ¼ as husband and then also residue property will be added with his ¼ as asaba as her uncle's son. The distribution is shown as under:

Heir	Share	Reasoning
Husband (cousin—paternal uncle's son)	¼ +res = ½	¼ as sharer because there is a child, and another residue as asaba as uncle's son in the absence of any asaba of superior class.
Daughter	½	As sharer, because she is one in number and there is no son.

[15] Fattah, supra note 5, pp.1135.
[16] Ibid.

CHAPTER 10
DOCTRINE OF REPRESENTATION

1.1. Introduction

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 has become accepted through the promulgation of the 'Laws Continuance Enforcement Order, 1971'.[1]

[1] It was issued on 10 April 1971 that says '... all laws that were in force in Bangladesh on 25th march, 1971 shall subject to the proclamation aforesaid continue to be so in force with such consequential changes as may be necessary on account of the creation of the sovereign independent state of Bangladesh formed by the will of the people of Bangladesh'.

Section of the MFLO affected the whole structure of Islamic Law of succession. Except Bangladesh no other country has adopted this change, which initially took place in Pakistan. Interestingly, this law has faced many judicial challenges in Pakistan since its promulgation. In Bangladesh, however, it has not been yet focus of academic discussion or judicial interpretation.

Since 1961, from the date of adoption of this Ordinance, there are many persons who supported it; and also many others who have opposed the law seriously. Many jurists and writers termed it as a conflict between traditionalists and the modernists. The jurists who opposed it have been popularly portrayed as 'traditionalists' and the 'supporters' of this law have been termed as 'modernists'. But I differ with this divisional approach as I think that it should be discussed academically following the principles of Islamic law. Professor Serajuddin has rightly pointed it out that 'It will however, be wrong to assume that only the traditionalists are opposed to orphaned grandchildren's inheritance'.[2] He added that 'Justice Aftab Hossain, an opponent of section 4 of MFLO, is well-known for his liberal and enlightened views on *Sharia* law.'[3] Again, 'Herbert J. Liebesny, an internationally acclaimed scholar on Islamic law, thinks that section 4 is contrary to the *Shariah* law.[4] Anderson has also shown that it upsets the whole structure of Islamic law of succession.[5] Thus, instead

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[2] Serajuddin Alamgir Muhammad, *Shari'a Law and Society Tradition and Change in the Indian Sub-continent*, Asiatic Society of Bangladesh, 1999; p.89.

[3] Ibid.

[4] Ibid. pp. 89-90.

[5] Anderson, J. N. D., *Recent reforms in the Islamic Law of Inheritance*, 357, as cited by Serajuddin Alamgir Muhammad,

of terming some as 'traditionalists' or 'modernists', the law needs to be discussed rather dispassionately.

1.2 The problem of the orphaned grandchildren under Sharia and Section 4 of the MFLO 1961:

Because of the two fundamental principles of Islamic law of succession, exclusions based on hierarchy of degree and nearness of relationship, under certain circumstances, the children of the predeceased child of a deceased person could not get property under *shariah* law of inheritance. For example, if someone dies leaving one son and son's son from another predeceased son, then according to the classical *shariah* law of inheritance, the son will get the entire property and the son's son will be totally excluded. Undoubtedly, such a law causes hardships to the descendants of the predeceased children.

Thus, in order to remove the sufferings caused to such orphaned grandchildren, section 4 of the Muslim Family Laws Ordinance, 1961 was passed which says—

> In the event of the death of any son or daughter of the propositus before the opening of succession, the children of such son or daughter, if any, living at the time the succession opens, shall per stirpes receive a share equivalent to the share which such son or daughter, as the case may be, would have received if alive.

This law instead of identifying the actual cases of exclusion generalized all such cases, and provided a

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Shari'a Law and Society Tradition and Change in the Indian Sub-continent, Asiatic Society of Bangladesh, 1999; p.90.

new scheme of distribution of the property importing the concept of the doctrine of representation into the corpus of Islamic law of inheritance. Thus, according to section 4, whether a said orphaned grandchild is excluded actually under existing interpretations of *sharia* law or not, will get the property under the new scheme. According to this new scheme, such a grandchild will get the portion of his/her deceased father/mother what he/she would have received if alive.

1.3 Background of enacting section 4 of the MFLO 1961: An examination of the justifications made by the 'Commission':

This law was in fact passed as a consequence of the Report of the Commission on Marriage and Family Laws. On the 4th of August 1955, the then Government of Pakistan formed a seven member Commission on Marriage and Family Laws to analyze the family law provisions with special emphasis to the protection of women's rights. It is evident, technically speaking, from the terms of reference,[6] that the Commission was not authorized to make comments regarding the problem of succession of orphaned grandchildren. However, the Commission made its suggestion for the incorporation of representational rule in cases of succession of the orphaned grandchildren. The points and suggestions made out by the Commission are analyzed below:

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[6] See **The Gazette of Pakistan**, Extraordinary Published by Authority, Karachi, Thursday, August 30, 1956; Government of Pakistan Ministry of Law Notification, Karachi the 30th August, 1956, pp. 1197-8.

Basis of exclusion:

As regards the basis of exclusion of the children of a pre-deceased son or daughter the Commission mentioned that there is no Qur'anic verse or Hadith establishing exclusion of the said grandchildren. It was argued that the existing rule of exclusion has in fact been taken from the customs of then Arab society before the advent of Islam. Maulana Haq[7] opposed this contention and alleged that this exclusion was made based on both the Qur'an and Hadith. He also cited the relevant verses and Hadith in support of his disputation.

The fact that must be kept in mind that Islamic law is a total scheme. A law may apparently look like illogical or incomplete, if is considered in isolation from the entire scheme and other related provisions. That is why an issue has to be examined in the light of all relevant provisions of Islamic law. Apart from inheritance, there are provisions relating to will and gift under Islamic law, by which a person can obtain property. Because of the typical rules of exclusion, sometimes an apparently nearer relative may be excluded and in that case we have to look for remedy elsewhere and that instruction is in fact given in a Qur'anic verse that says—

> 'It is ordained for you, when death approaches any of you and he is leaving wealth, that he should make a fair bequest (*wasiyyah*) for the parents and near relatives—a duty upon the righteous.'[8]

Thus, this Qur'anic verse in fact encouraged people to make a will in favour of the appropriate persons.

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7 Ibid., pp.1602-1603.
8 Sura Al-Baqarah 2:132.

Doctrine of representation:

The Commission has imported the concept of 'representation', which is unknown to both Sunni and Shia law of succession. According to Islamic principles, every one gets the property in his or her own capacity, subject to the rules of exclusion. However, the Commission also equated the case of grandchildren with that of the grandfather and argued for the application of the representational rule. The Commission observed that 'as the right of representation entitle[d] a grandfather to inherit the property of his grandsons even though the father of the testator has pre-deceased him, why can the same principle be not applied to the lineal descendants, permitting the children of a pre-deceased son or daughter to inherit property from their grandfather'. [9] But it does not seem to be correct and convincing, at least, for the following reasons:

1. At the death of the father, grandfather becomes the nearest one to the deceased in the line of the ascendants through the father, so he gets property based on nearness of the relationship.

2. The Commission failed to set any clear Qur'anic verse or Hadith in favour of the rule of representation; rather they relied on merely logic. But Islamic law cannot be interpreted solely based on logic or assumption without linking it to any primary authority.

3. The cases of the descendants and ascendants are not same. It has been cited by the Commission that grandfather gets property of

[9] Supra Note 6, pp.1197-1198.

his grandsons 'even though the father of the testator has pre-deceased him' is true in case of the grandchild as well as, when it comes in the same way. With the death of the father grandfather becomes the nearest one and no more bar in the way of succession remains. If some one dies leaving one son with another son's son from a pre-deceased son, then son's son does not become the nearest one unlike the true grandfather.

Qur'anic injunction regarding welfare of the orphans:

The third plea taken by the Commission is that the Qur'an puts much emphasis on the welfare of the orphans. But it has not been substantiated that the doctrine of representation is the only way to ensure the welfare of the orphan children. Thus, such a direction cannot be implemented violating some other clear (*Muhkamat*) verses of the Holy *Qur'an* regarding distribution of property. For example, if some one dies leaving a son's son from one pre-deceased son and son's daughter from another pre-deceased son, then according to *shariha* son's son will get 2/3 and son's daughter will get 1/3. But under such a situation, SS and SD—each of them will get ½ according to MFLO, which clearly violates the *Qur'anic* verse that says—'a male receives a share equal to that of two females'[10]. No new rule can be deduced by way of interpretation from a *Qur'anic* verse, which clearly violates another clear Qur'anic verse.

Rejection of 'Will' as a solution:

[10] Sura An-Nisa 4:11.

There is an alternative solution that was suggested by some persons before the Commission. That is to make a *'will'* by the grandfather in favour of the said grandchildren. Curiously though, the report contained a long introductory note, it did not discuss at proper length such a great issue of obligatory bequeath to examine the merits and demerits of it. Instead, the Commission merely with reference to a stray example summarily dismissed this idea terming it as a concept that failed to do complete justice.

At the time of preparation of the report by the Commission, the system of obligatory bequeath was successfully working in Egypt. But, unfortunately the Commission rejected it altogether without making any in depth analysis of the system. The Commission gave an example that '[i]f a person have five sons and four of his sons pre-deceased him, leaving several grandchildren alive' then the provision of will for 1/3 of the property will not do full justice. But a question may be posed easily that 'what will happen if the scenario becomes just opposite to it'? Obviously, the 1/3 rule of bequeath then can better ensure justice towards the said grandchildren. Quantity of the property in a fractional way is in fact always relative. One-tenth property of someone may be in some cases more than the whole property of some other persons. The Commission using the word 'full' with justice created further ambiguities. In another place of this chapter, it has been shown that in some cases, such a grandchild gets less even under MFLO then the *shariah*.

The Commission ultimately recommended the rule of representation as a solution without making any elaborate analysis of the impact of this rule. The Commission tried more to talk about giving property

to the said grandchild. The debate is not about giving property to the said grandchildren, but the debate is about the process. Obviously, a formula cannot be accepted that frustrates the whole scheme of Islamic law of succession. The welfare of the said grandchildren has to be ensured discovering a mechanism within the provisions of Islamic law, which can work harmoniously with other existing principles, which can rightly be called a piece of *ijtihad*.

1.4 IMPACT OF SECTION 4 MFLO 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 *Shariah* 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. Some of such instances are—

1. ***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. 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, a distant kindred can not get any property in presence of any sharer or agnatic heir except the husband and widow. This is the basic 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 or daughter's daughter, gets the property with the heirs of the first and second group.

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

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

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

Heir	Share	Reasoning
Son Daughter Daughter's daughter	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.

Under MFLO, a 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 a 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 MFLO: *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.

2. *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'.[11] 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 can not 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.*

[11] This rule of 'double share for male' is applicable in cases of the pairs of son and daughter, son's son 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 son 1)	½ as residuary	Representing his father (PDS1)
Son's daughter (offspring of the pre-deceased son 2)	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'an 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,

Both under sharia and MFLO: *male is getting double share of the female.*

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

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.

3. *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 his father (PDS), whereas he would be totally excluded by *Sharia* because of the hierarchy of degree by the presence of son.

4. *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 PDS 1)	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 PDS 1)		
Son's son (of PDS 2)	½ representing his father PDS2	

In the above examples, someone dies leaving 2 son's sons 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 independent 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.[12]

5. ***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 and one son's son, then according to *sharia* the 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

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[12] In this connection see the Report of the Commission on Marriage and Family Laws in **The Gazette of Pakistan**, Extraordinary Published by Authority, Karachi, Wednesday, June 20, 1956, based on which MFLO was enacted.

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 orientalists and the apologetic, modern and progressive Muslims for the orphaned grandson is misplaced.'[13] 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.[14] 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.[15] 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.'[16]

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[13] As has been cited by Serajuddin Alamgir Muhammad, *Shari'a Law and Society Tradition and Change in the Indian Sub-continent*, Asiatic Society of Bangladesh, 1999, pp.88.

[14] Ibid.

[15] Serajuddin Alamgir Muhammad has cited it in his *Shari'a Law and Society Tradition and Change in the Indian Sub-continent*, Asiatic Society of Bangladesh, 1999, p.88 with reference to F. M. Kulay, "Grandsons Inheritance at Islamic Law –Much Ado About Nothing", ICLR 13 (1993), 62-3.

[16] Coulson N. J., *Succession in the Muslim Family*, Cambridge University Press, 1971; p.152.

6. ***It diminishes the differences between male and female heirs and also undermines the superior female heir:***

Under the MFLO, the son's son and son's daughter enjoy the same status, as each of them is treated as representative of his/her father and thus enjoys the status of a son. Anomalously, it is still recognizing the fundamental difference between son and daughter at the first level, but does not recognize the same in the next level. This double standard affects other heirs which sometimes even undermines the superior female heir (daughter) both in status and proportion of the entitlement in comparison to other female heirs from the pre-deceased son of inferior status. If some one dies leaving a daughter and a brother, then the daughter will get ½ and the brother will get another half as a residuary. This *Sharia* rule is still applicable. Instead of this daughter, if there is a daughter from the pre-deceased son, then the distribution remains same as she gets ½ and the rest goes to brother according to *Sharia*. But in the second case, according to section 4 of the MFLO, son's daughter will get the whole property excluding brother totally. This is an anomaly in the sense that while daughter is not excluding brother, son's daughter is excluding him and she is getting also more property than the daughter. Thus the son's daughter is awarded with a superior status even than the daughter. If they really did not prefer any difference between male and female, then paradoxical stand is seen when they give such preference still to the son's daughter only due to the reason for her being the daughter of a son. If in such a case, there would be a daughter's daughter instead of son's daughter then she would not exclude brother even according to MFLO, because she is the daughter of a daughter. Thus it seems that their idea was not

based on any clear standpoint, and thus it resulted to a number of anomalies and contradictions.

7. ***Abolishes the original status of the son's daughter as a sharer with the impact of reducing the number of 'Qur'anic heirs' (sharers) from 12 to 11:***

Under MFLO the status of son's daughter has been changed and now she is always enjoying the status of an agnatic heir representing the son and gets the residue like the son even in the absence of her male counterpart. Thus, in no case now the son's daughter will be treated as a sharer under MFLO, the heir of the first class. Because, section 4 generally applied the rule of representation in case of son's daughter and so even if she is not excluded by the *Sharia*, still the MFLO will be applicable and will confer with her the hypothetical status of her dead father. In practice, by the application of section 4 son's daughter will never get any property as a sharer in her own capacity. So, consequently, the total number of sharers now has become eleven, which is contradictory to the established number of sharers for long as twelve.

8. ***Violates the principle of 'Tasib':***

Son's daughter is originally a sharer and by *tasib* she is converted into a residuary only by her male counterpart and gets the residue. Thus, under *sharia* law according to the doctrine of *tasib* a son's daughter can never be an *asaba* in her own without her male counterpart, whereas under MFLO she is always treated as an *asaba* in her own even in the absence of any of her male counter parts.

Following miscellaneous points are also worth mentioning here to assess the real impact of section 4 on Islamic Law of Inheritance:

1) Daughter's daughter and daughter's son—each of them is a distant kindred, belongs to the third category of the heirs, who now upgraded to the first grade of heir enjoying the status of a daughter.

2) Interestingly, sometimes by the application of section 4, the property of the children from the pre-deceased children may be reduced then what *sharia* allocated for them. A dies leaving one ss from PDS1 and 2 ss from PDS2. In this case, according to *sharia*, each of them will get 1/3 while according to MFLO son of the PDS1 will get ½ and each of the other 2 ss will get 1/4 . Thus MFLO is making a clear discrimination by doing different treatment with sons of the same type. Again, if the PDS2 has 1ss and 1sd then, according to *sharia* each ss (both of PDS1 and PDS2) will get 2/5 and the sd will get 1/5. But, in such a case, according to MFLO son of the PDS1 will get ½, son of the PDS2 will get 1/3 and the sd will get 1/6. Thus, the ss from PDS1 is given priority as he gets more than other ss and other ss's portion is reduced from 2/5 to 1/3, as well as sd's portion has also been reduced from 1/5 to 1/6. These are the clear weak points of the law, which were even not contemplated by the advocates of this theory who recommended for this legislation. Thus, the criticism that the system of obligatory bequeath up to one third done in Egypt becomes very inadequate portion in case of having children from four pre-deceased children alive along with only one son, becomes obsolete, as the same may happen also under certain other circumstances even by the application of MFLO.

3) It reduces sometimes the property of the widow or husband unnecessarily and increases the property of daughter's children who already got property under *Sharia*. Following are the illustrations of such anomalous cases:

Under Sharia: *Husband gets ½ in the absence of any child or son's child.*

Heir	Share	Reasoning
Husband	1/2	As sharer, because there is no child or son's child.
DD Or DS	R (1/2)	As *zabil arham* in the absence of any sharer or agnatic heir except the husband. Thus, though she is a distant kindred from the line of pre deceased daughter, still she is not excluded, rather gets a handsome portion which is half of the whole property under the present circumstance.

Under MFLO: *Husband gets ¼ even in the absence of any child or son's child.*

Heir	Share	Reasoning
Husband	1/4	As sharer, though there is no child or son's child, but there is a daughter's daughter/DS who is presumed to be a daughter and thus she reduces the share of husband like the daughter.
Daughter's daughter Or daughter's son	½ increases to ¾ by *radd*	As sharer representing her mother she gets property like a daughter who gets ½ in the absence of any son if she becomes single. Then following Sharia principle of Radd she is getting the residue property which have been added as additional with her original share. Thus, she is taking advantages from both Sharia and MFLO, while husband's property is being reduced without any justification.

Sharia: *Wife gets ¼ in the absence of any child or son's child.*

Heir	Share	Reasoning
Wife	1/4	As sharer, because there is no child or son's child.
Daughter's daughter Or daughter's son	Residue (3/4)	As *zabil arham* in the absence of any sharer or agnatic heir except the husband.

Under MFLO: *Husband gets ¼ even in the absence of any child or son's child.*

Heir	Share	Reasoning
Wife	1/8	As sharer, though there is no child or son's child, but there is a daughter's daughter/DS who will represent the daughter and thus she reduces the share of husband like the daughter.
Daughter's daughter/ daughter's son	½ increases to 7/8 by radd	As sharer representing her mother she gets property like a daughter who gets ½ in the absence of any son if she becomes single.

4) It sometimes reduces even the share of the mother violating the original principles of Islamic law of succession. It also affects the father, reducing his portion ultimately. For example,

Under Sharia: *daughter's daughter does not reduce mother's share..*

Heir	Share	Reasoning
Mother	1/3	There is no child or son's child and no collaterals.
Father	Residue	As *asaba*, since there is no child or son's child.
DD	Excluded	Being a distant kindred in presence of the sharer and *asaba*.

Under MFLO 1961: *the daughter's daughter, distant kindred, also affects mother's share.*

Heir	Share	Reasoning
Mother	1/6	In presence of child (hypothesis), presuming the status of daughter's daughter as daughter.
Father	1/6+R	In dual capacity as with the daughter in the absence of any son, obviously, presuming the status of daughter's daughter as daughter.
DD	½	Representing the pre deceased daughter.

However, the Court in Pakistan[17] said that 'grand-child is not entitled to more share than what could be inherited from the parents according to Islamic law'. Again, Karachi High Court[18] has in fact made the scope of application of section narrower that it is popularly believed, saying that application of this section will be limited to the cases of actual deprivation instead of general application in all cases of orphaned grandchildren.

1.5 Conclusion

To conclude, it appears that the concept of representation as has been imported by section 4 of the Muslim Family Laws Ordinance, 1961 has in itself intrinsic conflict with Islamic law of succession. It upsets the whole structure of Islamic law of inheritance. It also violates the rule of *ijtihad*, as an *ijtihad* cannot be done that results violation of any

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[17] *Mst. Zarina Jan V. Mst. Akbar Jan*, 1975 PLD 1975 Peshwar 252, *Regular Second Appeal No. 139 of 1967, decided on 25th July 1975.*

[18] *Fikree V. Fikree Development Corporation Ltd.*, 1988 PLD Kar. 446.

Qur'anic verse.[19] At the same time, it created injustice to others by concentrating justice only to the orphaned grandchildren. In doing so, it created more problems than solutions. Unnecessary interference is another great defect of this law as in many cases it provides a new scheme of distribution for the orphaned grandchildren though they were not actually deprived under the existing *shariah* law. It seems that the framers also did not contemplate certain consequences of the application of this law. Thus, it can be commented easily that this law was drafted without making ample groundwork either in extent or eminence or in both. The jurists like Coulson and Anderson, who ultimately supported it, have not denied the fact that section 4 of the MFLO violated the principles of Islamic *Shariah* law. Herbert J. Liebesney also thinks that it violated the *Shariah* law and termed it as 'the most express deviation yet introduced'.[20] Considering a few similarities with *Shia* principles of distribution per stripes, sometimes it is wrongly argued that section 4 has been made based on *Shia* interpretation of succession. It is worth mentioning here that a son always excludes a grandchild even according to *Shia* law of succession like the laws of *Sunni*. Thus, section 4, in fact, fundamentally differs from both *Sunni* and *Shia* laws of succession.

To face a legal problem all relevant laws must be discussed instead of just relying on the direct provisions so as to find out the probable solution within that legal system. Unnecessary incorporation of foreign elements, especially in the corpus of personal

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[19] It has been shown earlier that application of section 4 sometimes may result to violation of the Qur'anic principle 'a male gets a share equal to that of two females'. See supra note 11.
[20] Herbert J. Liebesney, "Stability and Change in Islamic Law", The Middle East Journal 21 (1967), 34.

laws, is not desirable. In Bangladesh no judicial authority is found yet on it. Undoubtedly this is an important area of Muslim Personal Law that ought to have further in depth academic scrutiny, and the law may be reconstructed, if is required, by necessary legislation or through judicial activism in Bangladesh.

2. The problem of inheritance of orphan grandchildren under Islamic law of succession: The concept of obligatory bequeath as a solution:

Basic theme of the obligatory bequeath generally: '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. 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 is rather a holistic approach to solve the problem that takes 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 favour 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 grand child. 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. Thus, unlike section 4 of 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 arise, 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 favour 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 Qur'an 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. [21]

Although the great majority of jurists 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 father 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 favour of other close relatives.[22] This view, though is of the minority, seems to be convincing, more perfect and logical. A few jurists, notably the prolific author Ibn Hazm, a representative of the now extinct Zahiri school, went further and insisted that the Qur'anic 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.[23]

Moreover, it has been narrated on the authority of Qatadah that the Prophet (PBUH) said:[24]

> "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."[25]

The prophet (PBUH) has also said that—

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[21] Holy Qur'an 2:180.

[22] Coulson N. J., Succession in the Muslim Family, Cambridge University Press, 1971, p.146

[23] Ibid.

[24] *Al-Fiqhul-Muyassaru Minal-Qura'ni was-sunnah, Simplified Islamic Jurisprudence Based on the Qur'an and the Sunnah*, Compiled and translated by Muhammad M. Abdul-Fattah, Edited by Reima Y. Shakeir, published by Dar Al-manarah, Egypt, *vol.2*, 2004, p.1137

[25] Narrated by Abdur-Razzaq and others. See for reference ibid.

"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."[26]

Scholars have unanimously agreed that bequest is not obligatory for those who are not of one's relatives, and this means that the obligatory bequest be for one's relatives.[27]

Different types of obligatory bequeath: The system of obligatory bequeath was first introduced in Egypt in 1946.[28] 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 praepositus or one-third of the net estate, whichever is less.[29] No provision is made for children of the deceased's daughter.[30] In Egypt and Tunisia the children of a pre-deceased son or daughter, who would be excluded from succession under the traditional law, are entitled to the share their parent would have received had he or she survived the praepositus, within the maximum limit of

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[26] Narrated by Al-Bukhari, Muslim, and others.

[27] *Al-Fiqhul-Muyassaru Minal-Qura'ni was-sunnah, Simplified Islamic Jurisprudence Based on the Qur'an and the Sunnah*, Compiled and translated by Muhammad M. Abdul-Fattah, Edited by Reima Y. Shakeir, published by dar Al-manarah, Egypt, *vol.2*, 2004, p.1138.

[28] Coulson N. J., Succession in the Muslim Family, Cambridge University Press, 1971, p.145

[29] Ibid. pp.144-145

[30] Ibid. p.145.

one-third of the net estate.[31] 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'.[32] 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.[33] In this case the son's sons deserve inheritance, so there is no obligatory bequest for them.[34] In Egypt, but not in Tunisia, the children of an agnatic grandson or granddaughter, how low so ever, benefit from the same rule.[35]

Coulson[36] mentions three methods of applying the law relating to obligatory bequeath and he preferred Abu Zahra's system in comparison with the 'court system' and 'mufti system'. The method formulated by Shaykh Muhammd Abu Zahara[37] has been termed by Coulson[38] 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

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[31] Ibid.

[32] *Al-Fiqhul-Muyassaru Minal-Qura'ni was-sunnah, Simplified Islamic Jurisprudence Based on the Qur'an and the Sunnah*, Compiled and translated by Muhammad M. Abdul-Fattah, Edited by Reima Y. Shakeir, published by Dar Al-manarah, Egypt, *vol.2*, 2004, p.1139.

[33] Ibid.

[34] Ibid.

[35] Coulson N. J., Succession in the Muslim Family, Cambridge University Press, 1971, p.145.

[36] Ibid. pp.146-149.

[37] Professor of Islamic Law at the University of Cairo, in his Ahkam-al-Tarikat wa'l Mawarith (cairo, 1963), pp.284.

[38] Coulson N. J., in his *Succession in the Muslim Family*, Cambridge University Press, 1971, p.148.

legal heirs. This 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. [39]

The above system which has been accepted by Egyptian legal system as authentic has been made very clear in a more simplified way with examples by Muahammad M. Abdul-Fattah[40], a renowned Egyptian scholar, in the following words—

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

1. 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.
2. After that the share of the dead son is to be taken out of the property and given to his descendant who deserves the obligatory bequest.
3. Then the remainder of the property is to be distributed among the real heirs each according to his or her *shar'i* share.

These steps can be applied to the following example:

A woman has died leaving behind husband, a maternal brother, and a daughter of her daughter who died during her (the deceased woman's) life. The inheritance can be distributed as follows:
Originally and if the dead daughter were to be alive, the husband would take one fourth of the property, the

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[39] Ibid. pp.148-149.

[40] *Al-Fiqhul-Muyassaru Minal-Qura'ni was-sunnah, Simplified Islamic Jurisprudence Based on the Qur'an and the Sunnah*, Compiled and translated by Muhammad M. Abdul-Fattah, Edited by Reima Y. Shakeir, published by Dar Al-Manarah, Egypt, *vol.2*, 2004, pp.1139-1140.

remainder would go to the daughter, and the maternal brother would be excluded by the daughter.

If the share of the dead daughter was to be given to her living daughter, the latter would take more than one-third of the property. Therefore, she is to take only one third (as the bequest is not to exceed this limit) and the rest, which is also one-third, is to be distributed between the husband (who has already taken one third as his ordained share) and the maternal bother, who is to take a share after the new amendment."

2.1 Egyptian model: Inheritance and obligatory bequest

In Egypt, above problem has been solved by making a provision for obligatory bequest. Egyptian model has been clearly enumerated by an Egyptian writer in his recent writing in the following words:[41]

Definition and legality

If a person has a descent heir[42] (like his son) and this descendant dies during this person's lifetime, he must make a bequest for the children of this descendant with an amount equal to that which the dead descendant would receive if he did not die, or with some part of his

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[41] This is taken from 'Simplified Islamic Jurisprudence Based on Qur'an and Sunnah', compiled and translated by Muhammad M. Abdul-Fattah, edited by Reima Y. Shakeir, Dar Al-Manarah, Egypt, 2004, vol.2, pp.1136—1139. The original work is in Arabic and title of the book is 'Al-Fiqhul-Muyassaru Minal-Qur'ani was-Sunnah. Since the concept of obligatory bequest is a much discussed issue, and such a problem has been solved in Bangladesh through section 4 of the MFLO 1961 which has been also opposed by many jurists and the system of obligatory bequest has been more appreciated as a proper solution—so considering significance of this system how does it work in Egypt that has been quoted directly from this book as authentic source of Egyptian law on this subject.

[42] A descendant heir here means that the heir in question is both a descendant of the deceased person and one of his inheritors at the same time, such as his son.

property up to one third of it, and one third is much as the Prophet (PBUH) said[43] when speaking about bequests. This is called "the obligatory bequest". If such a person dies before making a bequest for his descendant's children, they are to be given out of his property an amount equal to that which he was to bequeath during his lifetime. This is because it is a debt on his part, and if he dies before writing his bequest in this regard, this debt is not to be cancelled because of his death.

Almighty Allah says, ... "It is prescribed for you, when death approaches any of you, if he leaves wealth, that he make a bequest parents and next of kin, according to reasonable manners. This is a duty upon the pious." (Qur'an: 2:180).

And 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."[44]

In addition to this it has been narrated that the Prophet (PBUH) 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".[45]

Scholars have unanimously agreed that bequest is not obligatory for those who are not of one's relatives, and this means that the obligatory bequest be or one's relatives.

Along with these items of proof the genral meaning of the fo0llowing Qur'anic words may be considered in this connection : "And give to the kindred his due..." (Qur'an: 17:26).

It may moreover be said that a descendant—who is referred to min the obligatory bequest—contributes—in

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[43] Narrated by Al-Bukhari, Muslim, and others.
[44] Narrated by Abdur-Razzaq and others.
[45] Narrated by Al-Bukhari, Muslim, and others.

many cases—to making the wealth of his father, so it is a sign of justice that his children be given out of this wealth.

Finally, some scholars say that the obligation of making bequest means that whoever makes it will be rewarded for that and whoever does not make it will be sinful. And, Allah knows best.

The conditions obligating the obligatory bequest

There are two conditions, which obligate the obligatory bequest, and without them it is not a must that such a bequest be made:

1. 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.

2. The deceased person must not have given the descendant heir in question any part of his property without remuneration—as a gift for example—equal to the amount he would make in an obligatory bequest. Yet, if he gave him less than that, he is to be given what completes the amount ordained for such a bequest.

The way of distributing inheritance with the obligatory bequest

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

1. 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.

2. After that the share of the dead son is to be taken out of the property and given to his descendant who deserves the obligatory bequest.

3. Then the remainder of the property is to be distributed among the real heirs each according to his or her *Shar'i* share.

However, Jamal J. Nasir explained the Egyptian model of obligatory bequest with reference to the relevant statutory provisions in this regard, which is worth mentioning here:[46]

> According to the Explanatory Note to the Egyptian Will Act No. 71/1946, this is a disposition created as remedy to a growing source of complaints, namely the position of the grandchildren whose parents die during the lifetime of their father or mother, or die, or are deemed to die with them, e.g. as a result of a sinking ship, building collapse, or fire. Such grandchildren rarely inherit on the death of their grandparent, as they are often excluded from inheritance, even though their dead parents might have contributed to the growth of the grandparent's wealth. Indeed, on the death of their father, they might have been supported and maintained by their grandfather who would have left them part of his property but died too soon for that, or was prevented from so doing through some temporary events.
>
> On these grounds, Article 76 rules that if the deceased has left no will for the descendants of a child of his who died before, or is deemed to have died with him, bequeathing to such grandchildren the share of the estate that would have devolved on the child had he been alive, there shall be a mandatory will in the amount of such share within the limits of one-third of the estate, provided that the said descendant is not an heir, and that the deceased has not given thereto, for no consideration, by another disposition, the amount due thereto. If the gift is less than the said amount, the will shall be for the balance. Such a will shall be to the benefit of the first class descendants of lineal daughters or

[46] Jamal J. Nasir, The Islamic Law of Personal Status, Graham & Tortman, London, 1986, pp.244-245.

sons, how-low-soever, with every ascendant excluding the respective but not any other's descendant. The share of every ascendant shall be divided among the descendants thereof according to the rules of inheritance as if the ancestor(s) through whom they are related to the deceased had died after him. Under Article 77, if the beneficiary who is qualified to benefit of a mandatory will has been left in a will by the deceased a bequest in excess of what is due thereto, the excess shall be deemed a voluntary will. If the deceased left a will for only some of those qualified for a mandatory will, the rest shall be entitled to their due. Under Article 78, the mandatory will shall take precedence over all voluntary wills.

2.2 Obligatory bequeath in different countries:

Egyptian law is the pioneer in the field of obligatory bequest, which has been adopted subsequently by many countries. Following is a brief list of the states which adopted above system of obligatory bequeath in line with the Egyptian model:[47]

1. ***Syria:*** The whole doctrine of the Mandatory Will with all the provisions related to in the Egyptian Law has been adopted by the Syrian Legislator (Chapter 5, Art. 257, paras. 1/a, b and c and 2).

2. ***Jordan:*** Jordan accepted it under Art. 182, which is the only text therein dealing with the will.

3. ***Iraq:*** The Iraqi Legislator added the doctrine of Mandatory Will under Article 74, paragraphs 1 and

[47] Nasir, supra, 246.

2 of Law No. 188/1959 as amended by Law No. 72/1979.

4. ***Tunisia:*** The Tunisian Legislator added the whole doctrine under the heading of "Mandatory Will" in Articles 191 and 192, as per Law No. 77/1959 dated 19 June 1959.

5. ***Algeria:*** There is no mention of the Mandatory Will in the Algerian Law No. 84-11/1984 under that name, but identical provisions are enacted under the heading "Tanzeel", i.e. according a grandchild the status of a child for the purposes of inheritance. (Book Three : On Inheritance; Chapter Seven, "Tanzeel". Arts. 169-172, inclusive).

6. *Morocco:* The same expression with similar provisions is used in Article 83, paragraph 3 of the Moroccan Law.

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sher's note

s presented the rules of Islamic law of inheritance in a One of the special features of this book is that it explained methodologies in a lucid manner, which will be helpful for the ve the problems of inheritance. The illustrations of different e made the rules easier for better understanding of Islamic nce.

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