

INHERITANCE AND WILLS **IN ISLAM (SUBMISSION)..**

By Mabrook Ismaeel

In Islamic society, as in most other societies, inheritance represents the most important method of transferring wealth from one generation to the next.

Islamic society derives its inheritance laws from the interpretation of the various schools of jurisprudence of the verses that relate to inheritance in the Quran, not from the Quran itself.

Even a cursory examination of the laws governing inheritance in most Islamic countries discloses a set of complicated rules that are difficult to understand and, consequently, apply. The courts are kept busy trying to untangle the morass, and their rulings hardly satisfy the litigants, usually siblings, who invariably feel that they were unfairly treated by the deceased father or mother.

Needless to say, the rules set out in the Quran are not applied correctly if at all. In fact what is applied is the hadeeth and Sunnah which are invariably the sources of the interpretations of the schools of jurisprudence.

The Quran lays down rules that are essentially simple if correctly applied and, above all, It enjoins people to write a will for the equitable disposition of their assets after their death.

The inheritance laws in the Quran are to be found mainly in chapter 2, Al-Baqarah and chapter 4, An-Nissaa'; a total of fourteen verses. There are several other verses that relate indirectly to inheritance such as verses 106 through 108 in chapter 5, Al-Maai'dah, which dictate that the will be witnessed by two witnesses and sets out the qualifications of those witnesses. Other verses deal with the administration of the property of infants.

Wills are not encouraged in most Islamic societies and are, in some jurisdictions, indeed prohibited in spite of the existence of ahadeeth condemning intestacy. In any case the testator is restricted to willing a maximum of one third of his estate and usually only to other than his legal heirs.

The rules that are applied in most Islamic jurisdictions are derived, as mentioned earlier, from the madhahib or Sunni schools of Islamic jurisprudence, Abu-Hanifa, Ash-Shafe'i, Ibn-Hambal and Maalik. These are the four major schools; there are

several minor ones including the Zaydiya, the Ja'fariya and the Wahaabiya which is applied in Saudi Arabia. Most Sunni Islamic jurisdictions apply one or the other of the four major schools. Egypt applies Abu-Hanifa while Turkey has abandoned Islamic law in favour of Swiss family relations statutes; it co-opted the entire Swiss law. Iran and other Shi'a jurisdictions follow their own schools' understanding of the ahadeeth their jurists deem applicable.

The restrictions on the proportion of the will is based, by the jurists, on their incorrect construction of a famous hadeeth wherein the Prophet, peace be upon him, in response to a question from Sa'd Ibn Abi-Waqqas - who was sick and believed that he was about to die - if he should bequeath his entire estate to charity, to the exclusion of his only daughter, refused; Sa'd then suggested one half of the estate and again the Prophet refused, upon which he proposed that he will only one third. The Prophet reluctantly approved suggesting that even that was too much. He also advised the dying man that it was better to leave his child rich rather than poor. There are several versions of this hadeeth in Al-Bukhari.

The Prophet, peace be upon him, was thinking logically and had the testator's and his child's best interests at heart. In suggesting that even one third of the legacy was too much to bequeath to charity, he was taking the particulars of that individual case into consideration and was giving his personal opinion thereon; he was not setting limits on the use of wills and certainly not laying down precedent. Nothing in the tone of that hadeeth would indicate that the Prophet intended that the maximum amount to be willed was one third of the legacy.

The Islamic scholars, as usual, ignored the Quran, misconstrued the Prophet's words and misinterpreted his intent thereby robbing the inheritance laws of their flexibility and, not least, of their equability.

The Quran commands us to use the instrument of the will to transfer our property after our death. The first reference to inheritance in the Quran occurs at chapter 2, Al-Baqarah verses 180 through 182 which enjoin "(180)It is decreed for you that when death approaches one of you, if he leaves property, he shall write a will in favour of the parents and relatives equitably. This is a duty upon the righteous (181)If anyone changes a will after he has heard it, the sin of altering the will shall befall those responsible for altering it. God is Hearer, Knower. (182)If one sees gross injustice or bias on the part of the testator and takes it upon himself to effect a reconciliation between them to restore justice to the will, he commits no sin. God is Forgiver, Most Merciful."

The very first mention of inheritance in the Quran commands us to transfer our property to our heirs by means of a will. Moreover, our Lord makes it a duty upon the righteous.

The bulk of the inheritance laws in the Quran come in a block of eight verses at chapter 4, An-Nissaa', verses 7 through 14.

These verses speak to the inheritance rights of women and spouses among other things and lay down the rule in case of intestacy. Thus at verse 11 of the same chapter, we are informed, in part, "God decrees a will for the benefit of your children; the male gets twice the share of the female. If the heirs are women, more than two, they receive two thirds of the estate. If only one daughter is left, she gets one half. The parents of the deceased are each entitled to one sixth if he has left offspring. If he left no children and his parents are the only heirs, his mother gets one third. If he has siblings then his mother gets one sixth AFTER THE FULFILMENT OF ANY WILL the deceased has left and after the payment of all debts...."

The wording of this verse makes clear the will of God. This distribution decreed by our Lord covers any part of the estate over and above a will and after paying off any debts incurred by the deceased or the estate. Thus God tells us that in cases where we leave no will, He provides one for us. This is clearly the exception, in view of the decree and duty at 2:180, not the rule.

The evidence for the foregoing is to be found in the same chapter at verse 7 which reads "The men shall get a share of what the parents and the relatives leave behind and the women shall get a share of what the parents and the relatives leave behind, be it small or large, a definite share."

Since no share is specified, it is fair to assume that though the right to inherit is established, the value of the share, depending on the circumstances, is discretionary.

It is noteworthy that in verse 12, which addresses the inheritance of spouses, the phrase 'after the fulfillment of a will and after the payment of any debt' is repeated three times.

Our worthy scholars ignored all of this, misinterpreted their ahadeeth and made the default will, provided by God to cover intestacy, the rule, thereby freezing the proportions and obviating the need for us to make wills and, in the process, created a fertile field for quarrels and disputes among the heirs with the concomitant bad blood and family rifts.

The reasoning in favour of a will is simple and obvious.

To demonstrate, let us examine a few common cases. A man has two children, a boy and a girl; the girl had a bad marriage which broke up and left her with young children in restrained financial circumstances, while the boy is doing well and earning a good living. Common sense and equability would dictate that the man should give her whatever she needs to maintain herself and her children at a decent standard of living equivalent to her brother's, or at least as would be expected in her social circle, regardless of the proportion of the estate that that might represent.

In actual practice, if the father gifted the difference to the hapless daughter before his own death, there would be no repercussions; if, however, he willed her the difference by way of bequest, such a will would be invalid on the grounds that a legal heir cannot be the beneficiary of a will.

It is to be noted that the only difference between the gift and the will is one of timing; the former realizes the father's legitimate intent while the latter frustrates it.

Similarly, if that man had two sons, one god fearing, obedient and kind and considerate to his parents while the other is a rebellious, uncaring, insensitive profligate. Would it be equitable to give the latter a share equal to that of his good brother? The obvious answer is no. In fact giving him anything might simply speed his decline. His father may deem it necessary, for the good of the wayward son's children, if he had any, to disinherit him and will his share to them by way of a trust if they are minor, or directly if they are grown up.

A third case that comes to mind is that of a man with several children who have children of their own. One of the man's children predeceases him. In the Hanafi jurisdiction the children of the deceased son receive no part of their grand- father's estate. However, the jurists - realising the gross injustice that that rule represents to the deceased son's children - prescribe, of all things, a will to be made by the grandfather in favour of the grandchildren bequeathing to them their father's share of the legacy. This is referred to as "wassiyah wajibah" - literally, "a will that should be made". However, the value of the will cannot exceed one third of the estate even though the dead son's share may be more than one third. The difference above the third will be unjustly lost to the children who are the true beneficiaries and given to someone who is not entitled to it. This is, at least, an injustice and if the children are young and fall under the definition of 'orphans' it becomes a mortal sin that violates chapter 4, An-Nissaa', verse 10 of which more later. God does not condone injustice and He is aware of all we do.

The "wassiyah wajibah", in itself, is a tacit admission that the Quranic commandment - the very word of God - is best; the jurists are forced to go back to the will to correct a glaring injustice wrought by the system they devised. God's system is the only one that will bring about justice and harmony in any society. Our scholars seem bent on deviating from it. Do they not know that God gets it right first time, every time?

Other jurisdictions, however, may pass the deceased son's share of his father's estate on to his children as a matter of course.

God, in His infinite wisdom and mercy, by mandating a will made His law flexible and equitable to fit all circumstance, but our scholars robbed it of both these vital qualities.

The other famous hadeeth, also in Al-Bukhari states 'There shall be no will in favour of a legal heir!'; it has become an axiom. It is this hadeeth which prohibits the making of a will in favour of legal heirs; it is not traced back to the Prophet, may peace be upon him. The scholar's argument in support of this axiom is that the legal heir shall get the share set out at 4:11. That argument flies in the face of the commandment at 2:180 which imposes a will in favour of the parents who are legal heirs whose shares are set out at 4:11. It also ignores the injunction at 4:7 which states that the men and the women shall inherit their parents and their relatives without, however, specifying the value of the share. The jurists failed to appreciate the implications of the default will and intestacy. It is only if 4:11 is put into its correct perspective, as a default will provided by God for intestates, that 2:180 makes any sense at all.

We hasten here to point out that there are no contradictions or inconsistencies in the Quran. The interpretations of the traditional schools of jurisprudence present us with a clear inconsistency between 2:180 and 4:11.

In spite of the inherent weaknesses of the inheritance laws in the West, there tend to be fewer disputes, in those jurisdictions, over inheritance because wills are strongly encouraged and because people tend to accept the testator's absolute right to dispose of his property in any manner he sees fit. Glaring injustices are, of course, referred to the courts, but generally it is accepted that there is precious little difference between bequeathing property and gifting it to its intended recipient on the morning of the testator's death. Both courses of action convey the testator's intent and the courts have been cautious in changing the intent of the testator unless there are compelling reasons for doing so.

In Islamic jurisdictions too, if the testator, on his deathbed, gifted property to one of his heirs thereby changing the proportions laid down by the inheritance laws, no-one would challenge the legality of such action. If, however, he were to bequeath that self same property similarly changing the proportions, such action would be, for some illogical reason, invalid.

Chapter 4, An-Nissaa', verse 10 is very interesting in that it is one of those verses that have been almost universally ignored by Islamic governments; it reads "Those who consume the orphans' wealth unjustly eat fire in their bellies and will suffer in Hell".

Islamic governments tax the property inherited by orphans; some of them impose a double tax, once on the estate before it passes to the heirs (death duties) and again when the heirs receive their shares of the estate (inheritance taxes). God does not exempt governments from the consumption of orphans' wealth.

The verse cited above is the corollary of chapter 6, Al-An'aam, verse 152 which commands, in part, "You shall not touch the orphans' wealth except in the most righteous manner, until they reach maturity...." Our Lord's commandments are

clear and unequivocal; He makes no exceptions, and it is doubtful that taxing or double taxing the orphans' wealth is touching it 'in the most righteous manner'. Female orphans are especially hurt by such taxes as it is not uncommon for the government to get more of the estate than they do.

Is it any wonder then that Islamic societies are in such a poor state?

The fixing of the distribution and the restrictions on the will have also had the effect of violating chapter 4, An-Nissaa', verse 8 which commands "If during the distribution of the legacy there are relatives, orphans and needy people present, you shall give them therefrom, and treat them with kindness." The commandment embodied in that verse is universally disregarded because it was widely thought to have been 'abrogated' in spite of a hadeeth denying its abrogation.

It has been argued that applying the proportions laid down at 4:11 is the best option as these proportions are those dictated by God Himself. This argument fails to take into consideration the fact that God dictated these proportions as those to be applied if the deceased has left no will; in other words God, here, gives us the best second choice. God has also given us the best option by imposing upon us the duty to make a will. God upholds the testator's right to dispose of his property - which is entrusted to him during his lifetime by its real owner, God - in any way he sees fit with the proviso that he maintain righteousness and observe God.

The interpretations of the jurists have unfortunately not wrought the equitable distribution of wealth and have caused havoc in family and social relations by concentrating wealth in fewer hands in violation of God's clear commandments.

If we obey God's commandments instead of second guessing Him, He will most assuredly bless our societies and grant us the goodly life on earth He has promised His righteous servants.
