

## **The Law of Inheritance in Islam**

### **FEMALE HEIRS**

A statement attributed to the prophet Mohamed says "learn the laws of inheritance and teach them to the people for they are one-half of useful knowledge."

The manner in which Islamic inheritance is made is prescribed by the law in rigid and uncompromising terms. The power of the deceased to dispose of his property by will is recognized but basically restricted to one-third of his net assets. The transmission of property by way of bequest, or in accordance with the wishes of the deceased is of secondary importance and the central core of the system of succession is formed by the compulsory rules of inheritance designed for the material benefit of the family group.

The existence of different schools of law and the further variations which have been introduced into the traditional legal practice of a given area under the recent process of reform, modern Islamic law, when viewed on a world-wide basis therefore, is an extremely complex and variegated phenomenon.

The fractional shares in estate which are the entitlement of certain relatives are dealt with as an arithmetical discipline by applying particular techniques and methods of exposition adopted by the traditional Arabic authorities, and place an unnecessary strain upon the powers of comprehension of the common woman or even a modern lawyers."

Such an example is:

1) Families as grounds of inheritance Marriage: spouse relict in succession law.

Capacity of women Only in Hanafi and Shia law, has an adult woman the legal capacity to contract her own marriage guardian must conclude the contract on her behalf and any marriage contract without his intervention, in person or through his agent, is a complete nullity.

This is a quite separate issue from that of whether or not the bride's consent to the marriage is necessary. This latter question is determined by the extent of the guardian's power over his ward.

All schools recognize, in principle, that a power of 'matrimonial constraint' termed *ijbar*, is vested in a marriage guardian, who may validly contract his ward in marriage at his discretion and regardless of the ward's wishes in the matter. In Hanafi law the right belongs first to male agnate relatives in accordance with a system of priorities broadly parallel to that of priorities in inheritance -father, paternal grandfather followed by the agnatic brothers, nephews, uncles and cousins and failing them to females and non-agnate relatives. The ward may repudiate the marriage on attaining puberty.

Modern reforms In registration of marriage as a necessary legal formality in most muslim countries. In Pakistan and Tunisia, the effect of procedural regulation is to deny judicial relief to the parties to an unregistered marriage which is disputed, and this may result in an inability to establish a claim of inheritance as a spouse relict.

Marriageable age In Egypt for example, a law of 1923 provided that a marriage where the bridegroom was below the age of eighteen years or the bride below the age of sixteen could not be registered and therefore could not, if disputed be the subject of judicial relief. Capacity - the woman's consent to the marriage is now as a general rule, essential for its validity. A Maliki - woman may, now validly conclude her own marriage contract.

Women observing Idda. Idda is a period of waiting imposed upon a wife after the termination of her marriage. In cases of widowhood, the idda also serves as a mark of mourning for a deceased husband and lasts for a prescribed period of four months and ten days, or until the birth of the child in cases of pregnancy.

Difference of religion A Muslim woman is allowed to marry only a Muslim, while a Muslim male may marry either a Muslim or a woman belonging to a religion which has a revealed scripture such as Judaism or Christianity.

A spouse relict inherits only if the marriage is valid in every respect. The right of inheritance arises from the marriage contract itself and does not depend upon consummation of the marriage. Rights of inheritance cease immediately upon an irrevocable divorce and do not persist during the wife's idda.

The system and instances of divorce in Islamic law are so common and easy that many women are divorced thus leave their entitlement to inheritance.

2. Blood relationship (nasab) Asaba rights of inheritance arise only from blood relationship and not from relationship by affinity or by fosterage. In the traditional Sunni law, the family group knitted together by the web of social rights and obligations was the extended agnatic family of males linked through males to a common ancestor. Although maternal relatives do have rights of inheritance the main emphasis lies on the paternal connection and indeed the primary significance of the word nasab is that of paternity.

Legitimacy of birth is the legal postulate for admission to the family group. Illegitimacy precludes the existence of any legal bond between the blood relatives of the fathers on the one hand and the illegitimate child and its issue on the other.

In sunni law, the mother and her illegitimate child and between their respective relatives, recognize the existence of legal duties and rights including those of inheritance. There is no process by which a child can be legitimized for example by the subsequent marriage of its parents and the law does not recognize any institution of adoptive paternity. Legitimacy in the conception of the child during the lawful wedlock of its parents.

Presumption of paternity Presumption of paternity arising from marriage, that a child born to a married woman is the legitimate child of her husband is expressed in the Arabic maxim: "al-walad li'l-firash", meaning " the child belongs to the marriage bed"

Acknowledgement of paternity An acknowledgement (iqrar) of paternity is not a process of legitimation but the formal recognition of a status of legitimacy which exists in fact. It may be implied by the deliberate conduct of a person who treats a child as his legitimate child. Subject to repudiation by an acknowledgee who is adult and sane, an acknowledgement of paternity is binding for all purposes and irrevocable.

Eqyptian legislation provided: That one solar year was to be regarded as the maximum period of gestation. In mo-----law - the attention of the court so as the assistance of medical experts may be invoked for a solution.

1. It would appear that the traditional procedure of li-'an, though almost obsolete in practice, is still in law available to a husband in order to disown a child when he cannot establish non-access within the gestation period. 2. Li-'an in Tunisian law, states:- "If a husband disowns the child with which his wife is pregnant, or the child which is presumed to be his, this repudiation will not be effective withot a decree of court and in such a matter all legal means of proof may be used...if the court confirms the repudiation of paternity...it shall pass a decree of illegitimacy and of physical separation between the spouses."

Priorities in inheritance Dual basis of entitlement. The wife of sa'ad b. al-Rabi' came to the prophet with her two daughters and said: "O prophet, these are the daughters of 'Sa-ad b.al -Rabi Their fathers died a martyr's death beside you in battle. But their uncle has taken Sa-'ad's estate and they cannot marry unless they have property." After this the verse of inheritance was revealed and the prophet sent for the uncle and said to him: "Give the two draughts of Sa'ad two- thirds of the estate, give their mother one -eighth and keep the remainder yourself."

The pre-islamic Arabia system of inheritance was designed to keep property within the individual tribe and maintain its strength as a fighting force. The tribe was patriarchal and patrilineal.

Women occupied a subordinate and subjugated position within the group whose bond of allegiance was that of asabiyya- descent through male links from a common ancestor.

A woman who married into another group belonged henceforth, along with her children, to the tribe of the husband. The maternal relationship therefore lay outside the structure of tribal ties and responsibilities. In these circumstances, the proper exploitation and preservation of the tribal patrimony meant, inter alia, the exclusion of females and non-agnate relatives from inheritance and the enjoyment of a monopoly of rights of succession by the male agnate relatives, or asaba, of the deceased.

Hence, the initial appropriation of Sa-'ad's estate by his brothers, as his nearest male agnate, to the exclusion of the wife and daughters.

Socially, Islam emphasized the more immediate family ties existing between a husband, his wife and their children, and aimed at elevating the status of the female within this group. As mirrored in the novel rules of succession introduced by Islam. Politically the bond of a common religious faith, transcended tribal ties within the brotherhood of Muslims there was no place, in theory for intertribal hostilities and warfare. In Sunni view, the rules of the Quran on inheritance do not altogether abrogate but merely modify the customary system of succession by superimposing upon it a new class of legal heirs.

The male agnates still exist and inherit, but now after the satisfaction of the claims of those relatives nominated by the Quran.

Thus the Islamic of inheritance rests basically upon the recognition of two distinct categories of legal heirs - the male agnates or *asaba*, the heirs of the tribal customary law, and the new Quranic heirs who are called *ahl al-faraid* (those entitled to prescribed portions). Early Muslim jurists fused together these two distinct basic elements gradually into a cohesive system.

But this process of amalgamation was not a simple one, and almost all the major complexities of the law stem from its dual basis and the attempt to harmonise the claims of these two categories of legal heirs.

Classification of heirs 1. Quranic heirs (*ahl al-faraid*) 2. male agnates (*asaba*) 3. distant kindred (*dhawu l-arham*) priority in succession is a term strictly used in the present context to distinguish between those surviving relatives of the *praepositus* who are legal heirs and those who are not, in the sense that a relative who has priority over another totally excludes the latter from any rights of inheritance. When it comes to the subsequent issue of the distribution of the estate among the legal heirs, the Quranic heirs may be said to have priority over the male agnates in so far as the satisfaction of their allotted portions is the first charge upon the estate.

Indeed the result of this golden rule of distribution may be that in certain circumstances the satisfaction of the Quranic portions completely exhausts the estate so that nothing of the inheritance remains for the male agnates as residuary heirs. In these cases, the residuary heirs are excluded from inheritance not directly by any rule of law which declares their relationship with the *praepositus* to be inferior to that of the other claimants, but indirectly by the fact that a certain number of other heirs happen to have survived. These cases are, therefore, perhaps best regarded as cases of *de facto* exclusion, to distinguish them from the cases of *de jure* exclusion where one relative is deemed by law to have a superior tie of relationship and thereby excludes other relatives from inheritance. It is the principles of such *de jure* exclusion that provide the logical starting point of the law of inheritance.

Example A daughter or granddaughter does not exclude any ascendant nor any agnatic collateral relative, male or female, although she does exclude uterine brothers does not exclude any brother or sister not even the uterine whose sole connection with the praepositus is through herself - or any remote male agnate.

Nor does any sister or the uterine brother, as a quranic, heir exclude any relative of the inner family. The power to exclude other relatives from succession remains essentially the prerogative of the male agnates. To the rule that a quranic heir excludes no other relative of the inner family, the two solitary exceptions are: a) the exclusion of the uterine brothers and sisters by the daughters or granddaughters b) the exclusion of the grandmother by the mother. There is no exception at all to the rule that a quranic heir does not exclude any male agnate.

As a general rule a substitute heir is excluded from succession by the respective primary heir, on the principle that the nearer in degree excludes the more remote, but is not excluded by any other relative. To this rule there are two exceptions. a) an agnatic daughter is not de jure excluded by the daughter from succession but is excluded by the son. The rule of degree operates within the class of agnatic descendants as a whole on the basis that a male always excludes any more remote descendants, male or female, but a female does not. b) According to the doctrine of sunni majority, a paternal grandmother is excluded by the fathers as well as by the mother of the praepositus. This doctrine rests upon the rule of priority by degree. Apportionment of an estate does not involve any distinction between moveable and immovable or between real and personal property. The estate available for the legal heirs consists of all the assets of the deceased that remain after the satisfaction of funeral expenses, debts and valid bequests. Each heirs entitlement is simply expressed in terms of a fractional share and attaches in specie to the various properties which make up the inheritance.

In sunni law, female heirs suffers from no disability to succeed to land or real estates. However, in other sects, land and real estates are only inherited by male, whereas females especially wives have a right of use and life interest or till remarriage.

Impediments to inheritance are personal acts or attribute which disqualifies from succession an individual who would otherwise be an entitled heir on the grounds of marriage or blood relationship to the praepositus.

These are three (i) homicide of the praepositus by the heir (ii) a difference of religion between the heir and the praepositus, (iii) land difference of domicile between the heir and the praepositus.

In the case of Zubeda Said Abdallah -v- Abdullah Mbarak Awadh An application by the widow against orders of the Kadhi's court. The chief Kadhi Sheikh Nassor Ali Nahdy had ruled that the appellat transfer title deeds to the respondent who was a brother to the deceased, and deposit rent income she collected to the court and observed that according to Islamic law of succession, the testamentary gift or will of the deceased was illegal and

void, and that the deceased was supposed to include his brother Abdullah Mubarak Awadh in the succession.

The high court on appeal reversed the finding of the chief Kadhi and noted that the property was in Trust for the children in the name of the appellant.

\*\*\*\* have been few compared with reforms in other branches such as criminal law and family law, but the fact remains that changes have been introduced.

Religion There are many religion individuals and even tribes as a whole who although Muslims, do not follow Islamic law but customary law including coastal people and certain people in the Marsabit and Tana River District.

A Muslim male may marry Jewish or Christian woman, although a Muslim woman cannot validly marry any but a Muslim husband. But while in general a husband owes the same marital duties particularly in matters of maintenance and support, towards his non-Muslim wife as he does towards his Muslim wife, the non-Muslim wife suffers certain disabilities. Her right of custody, for example, over the children of the marriage is not so extensive as that of a Muslim mother, because of the undesirable influence that her different religion might have upon the Muslim child. But more particularly,, a non-Muslim wife has no right of inheritance from her Muslim husband.

Since the law of inheritance is designed to distribute property among surviving relatives within the community of Muslims, naturally enough the difference of religion between Muslim and non-muslim, seen as a difference of communal allegiance constitutes a general bar to inheritance