Recommendation of the Law Commission for Possible Increase of Daughter's Share in the Succession of Parents' Property in Absence of Son

Introduction

Under the Muslim Family Laws Ordinance, 1961, of Pakistan, as adopted by Bangladesh with few technical amendments, the children as the representatives of the predeceased father get per stripes the share of the father from their grandfather, which under traditional shariah law they were not entitled to. Even daughter in the absence of son of the predeceased father gets the entire share due to her father if living. However, under normal circumstances, if father dies leaving only daughter/s, she does not get the whole property, as she is entitled to get as representative of the predeceased father under the 1961 law. The part of the property also goes to collaterals i.e. uncles. Although illogicality of the position is apparent in the face, it would need proper study, rational interpretation of the holy Qur'an and Sunnah i.e. Ijtihad to bring necessary changes in the prevailing law, which the Law Commission has attempted to do and make recommendation to the government. The Commission acknowledges with gratitude research assistance rendered to the Commission by two young Muslim law scholars, namely, Dr. Ridwanul Hoque, Associate Professor of Law of the University of Dhaka and Anisur Rahman, Assistant Professor of Law of the Eastern University.

Differential Approach of Sunni and Shia School to Law of Inheritance

Classical principle of Muslim law of inheritance that 'nearer in kinship excludes the remoter' has been conservatively interpreted by Sunni school of Islamic thought. This has long deprived the children of pre-deceased father or mother of their right to property of the propositus i.e. grandfather/grandmother when succession opens. However, Shia school has taken a different and more progressive view of the issue. According to Shia school, in both cases i.e. daughter of pre-deceased father, and daughter in normal circumstances shall inherit whole of father's property per stripes, in exclusion of the remoters i.e. her uncles in absence of son.

Rationale for Giving Inheritance Rights to the Children of Predeceased Father/ Mother

The Muslim Family Laws Ordinance, 1961 (Sec. 4) of the then Pakistan, predominantly a Sunni state, rectified the traditional law by the principle of representation, meaning the children as the representatives of the pre-deceased shall inherit his or her share from the grandfather. The previous rule of succession excluding orphaned grand children from their grandparent's property aroused much attention and controversy. Many Muslim countries adopted the doctrine of representation and allowed share to the grand children of predeceased father, though the share of such children varied from country to country. For instance, Egypt, Syria, Morocco and Tunisia have adopted this principle. The Commission on Marriage and

Family Laws in Pakistan which recommended 1961 legislation gave the following reasons and arguments for inheritance of the children of predeceased father:

a) There is no Qur'anic verse or authoritative Hadith which excludes orphaned grandchildren from inheriting their grandfather's property.

b) The exclusion was based on pre-Islamic practice, which gave all property rights to male members capable of carrying arms to defend the interest of the tribe or the family, and assumption that economic security of the female members would be taken care of by the male members, although Holy Qur'an and Sunnah later recognised many property rights of the women.

c) Where the father of the propositus has predeceased him, the grandfather gets the share that the father of the propositus would have got. This means that the right of representation is recognized by the classical Shari'a law amongst the ascendants. Therefore, it is not logical or just that it should not be recognized among the lineal descendants.

d) The Qur'an has time and again expressed great solicitude for the protection and welfare of the orphans and their property. Any law depriving them of inheriting their grandfather's property would go entirely against the spirit of the Qur'an.

Increase of Daughter's Share in the absence of Son by Ijtihad

Now the very simple and rational question is, if the daughter of the predeceased father can inherit the full share of her father from her grandfather, why she will not fully inherit her father's property after latter's death. It needs to be mentioned that legislation providing for the property rights of the children of the predeceased father in the Sunni Muslim countries was not an easy matter. They faced lot of opposition. However these countries laid emphasis on Ijtihad i.e. rational, contextual and time-needed interpretation of Qur'an and Sunnah, the gate of which was allegedly closed in the 10th century, which is not true. The notion of closure of the gate of Ijtihad gained strong ground from a decision of the Privy Council (in Aga Mahomed vs. Koolsom BeeBee(1897)24 I.A. 196, and Baker Ali Khan vs. Anjuman Ara(1903) 30 I.A. 94) which was based on insufficient understanding of the spirit of Qur'an and Hadith, blocking the road of progressive development of Muslim law.

The great Prophet of Islam left a very large sphere free for legislative enactments and judicial decisions even for his contemporaries who had the holy Qur'an and Sunnah before their eyes. There are practical necessities and examples of changes in Muslim law. Caliphs and their lieutenants by issuing administrative orders and regulations brought changes in certain sectors of Muslim laws on penal, political and administrative matters. Criminal, civil (except family issues), administrative, commercial and evidence related matters are still beyond the purview of shariah in our country. In fact, there is misunderstanding about shari'a in our country. Although it is supposed to be based on holy Qur'an and Sunnah, matters not clearly covered by these sources are subject to fresh interpretation even to-day, if traditional interpretation in the forms of Ijma and Qiyas is anachronistic.

Numerous convertees to Islam uphold their customary laws and usages in many spheres of life, such as, the Berber people of North Africa follow their customary law in family and inheritance though they are Muslims. The law of matrimonial property in Malaysia is a combination of Muslim law and Malay custom.

After the death of the prophet (sm) two more sources of Muslim law i.e. Ijma and Qiyas, as mentioned above, emerged to deal with the issues not clearly covered by Qur'an and Sunnah. Later several different schools of thought of Muslim law emerged among which four are important i.e. Hanafi, Maliki, Shafi and Hanboli – all taken together called Islamic Fiqh. There were both similarities and dissimilarities amongst them. It happened by the legitimate exercise of Ijtihad in absence of any clear guidance from the principal sources. This view has been reflected in the legislation and judicial decisions of many modern Muslim countries.

Examples of Exercise of Ijtihad in Modern Times

The Tunisian Law of Personal Status, 1957 prohibiting polygamy and the Syrian Law of Personal Status, 1953 empowering kazi to refuse permission to a man already married to take a second wife were the result of reinterpretation of principle from main sources of Muslim laws.(Alamgir Muhammad Serajuddin, *Shari'a law and society tradition and change in the Indian subcontinent*, 1999, Asiatic Society of Bangladesh, p. 9). Post-divorce maintenance has been substantially enhanced in many selective cases by legislation in Egypt, Iraq, Kuwait, Syria, Tunisia, Algeria, Morocco, Turkey and Malaysia, based on teleological interpretation of the Quranic verse 2:241 on post-divorce maintenance (Mohiuddin Khaled and Ridwanul Hoque, 'Right to post-divorce maintenance in Muslim Law', *Chittagong University Journal of Law*, vol. IV, 1999, p. 23.) Even Appellate Division of the Supreme Court of Bangladesh in a conservative judgement in Hefzur Rhaman vs. Shamsun Nahar Begum in 1995, remarked that statutory recognition of benefits and privileges for divorced women beyond the period of iddat would not be in conflict with Muslim law if situation and justice so demands (ibid. p. 24).

So far the sub-continent is concerned, the superior courts in Pakistan have asserted two rights which no courts in other Muslim countries had done, namely, a) their right to independent interpretation of the Qur'an and b) their right to differ from the doctrines of traditionally authoritative legal texts which are not based on any specific injunctions of the Qur'an and Sunnah (Alamgir Muhammad Serajuddin, *Muslim Family Law, Secular Courts and Muslim Women of South Asia, a study in judicial activism*, Oxford University Press, 2011, p. 110). The improvement in the law of inheritance can be possible under this device. First, the Muslim Personal Law (Shariat) Application Act, 1937 only specified the area of application of Shari'a law but it did not explain or codify any rules of Muslim law. The absence of codified Muslim law practically opened the scope of legitimate interpretation of classical law.

Second, the interpretation of the rule "a nearer in kinship excludes the remoter from inheritance" and the liberal meaning of the Arabic word "Al-Khalala"(meaning child) can be used to justify the increase of share of daughter. An example from the Indonesian Apex Court can be taken in this respect.

The Indonesian Supreme Court in H. Nur Said bin Amaq Mu'minah, (reg. No. 86 K/AG/1994) based upon the liberal interpretation of "Surah al-Nisa" 4:176 where it held that child will exclude the collaterals declared that here child means either a male or female child. The traditional concept of Sunni law was different in this case. There the Arabic word 'child' was interpreted to mean only the male child. Consequently the male child would exclude his uncle from his father's property whereas the female child would not. However, the Supreme Court of Indonesia asserted that "so long as the deceased is survived by children, either male or female, the rights of inheritance of the deceased's blood relations, except for parents and spouse, are foreclosed."

Resort to Eclecticism for Increasing Daughter's Share

Eclecticism, technically called takhayyur, is the device of searching for precedents, not only in the four orthodox schools but even in the opinions of individual jurists to meet the need of modern life. It is still allowed by some jurists to follow one school in one particular issue and another in others if his conscience so permitted. We followed this principle in the Dissolution of Muslim Marriages Act, 1939, allowing a Muslim wife to seek divorce on the grounds of husband's torture and desertion for a period of four or more years.

Most of the Middle Eastern countries including Saudi Arabia have also adopted the principle of takhayyur in various matters, i.e. dissolution of marriage on the grounds stated by Maliki law though they follow Hanboli doctrine (A. M. Serajuddin op. cit, 1999, 96). Another important matter is that we need to take the help of statutory law to adopt the principle of takhayyur. Sudan has gone a step ahead by allowing issuance of judicial circulars for application of rules other than the Hanafi doctrine in relevant cases under section 53 of the Sudan Mohammedan law Courts Organization and Procedure Regulations, 1915.

Both Sunni and Shia law recognize the basic rules of inheritance laid down in Qur'an but they interpret it differently. Under Shia law all heirs of the same relationship to the deceased, whether male or female, agnatic or non-agnatic, have the same ability to exclude other heirs and to transmit their entitlement to their own heirs.(NJ Coulson, *Succession in the Muslim family*, Cambridge 1971, pp.108, 133).There is no reason to undermine the Shia version. Richard Kimber after a thorough research observes that Shia law is much closer than Sunni law in respect of rules laid down in Qur'an regarding inheritance. (Richard Kimber, The Qur'anic law of inheritance, *Islamic Law and Society,* Vol.5, No.3) Therefore there is no harm if the interpretation of Shia law is taken in increasing daughter's share in absence of son.

In this context, some modern Muslim nations have adopted combined rules from two or more different schools or have created modern inheritance laws based loosely on traditional jurisprudence but suited for modern times. The Tunisian legislation of 1959 enables a daughter or a son's daughter to exclude collateral male agnates form inheritance. The Iraqi law of 1963 enables female descendants of the Sunni propositus to exclude any collateral male agnate. Indonesia is attempting to allocate equal share for male and female so as to bring it into line with Indonesian adat, or customary law by preparing reports and bills.

Conclusion and Recommendation

The above examples and arguments amply testify that the status of daughter can be equated with that of son in certain cases of inheritance i.e. when father dies leaving daughter/s, but no son. This also conforms to frequent present-day practice in Sunni families. Parents having only daughter/daughters and no son desire that their daughters do not share the inheritance with collaterals. So they make gifts or Hiba to their daughters.

In the light of the above discussions, the Law Commission strongly recommends a new section be added after Section 4 of the Muslim Family Laws Ordinance 1961 with the provision of increasing the share of daughter/s by prohibiting any part of the property going to the collaterals i.e. uncles in the absence of son in usual course of inheritance.

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