

ISLAMIC LAW OF INHERITANCE RELATING ORPHANED GRANDCHILD: AN OVERVIEW

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This paper throws light on the Inheritance rights of orphans under Islamic law. While talking about the articles of faith, the Qur'an reminds a believer that the declaration of faith in Allah, His Book and the Last Day is not sufficient unless a conscious effort is also made to care for relatives, orphans, the needy and travellers as well as to ensure the welfare of those who ask for help. Allah's Messenger ﷺ used to do well to orphans and help them. Muslim jurists have basically based their discussion about helping poor/ destitute/ orphan children on the general understanding of the Quran and sunnah. The rights of the children are well protected in sharia. So far as rights of orphan children are concerned, Holy Quran makes special reference for protecting their rights.

Keywords: *Inheritance, Islamic Law, protection, Orphans.*

Introduction

In the Arabic language, Inheritance is known as 'Fara-idh', which is the plural of 'Fareedah', which means something that has been fixed, set or determined. This branch of knowledge is known as 'Fara-idh' because it has been fixed by Allah in the Holy Qur'an.¹ The basic principle governing the inheritance law of Islam is that it is considered as founded on the will of God, who directly imparted such rules. From this premise the other principles derive. One of these is that the

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acceptance of the share by the heir is not required. Moreover, both renunciation and transmission of this right to a third person are not admitted. Further, the heir cannot lose his right because of the will of his deceased relative (disinheritance is unknown in Islam) or because of the passing of time. The succession is considered open at the moment of the relative's death. When a Muslim dies there are four duties which need to be performed. These are payment of funeral expenses, payment of his /her debts, execution his/her will, distribution of remaining estate amongst the heirs according to Sharia. The task is to firstly, determine which of the relatives of the deceased are entitled to inherit and secondly, to determine the quantum share entitlement of each of the heirs concerned.

Needless to say Muslims must follow all the commandments of Allah (SWT) as Allah the Almighty says, "It is not for a believer, man or woman, when Allah and His Messenger have decreed a matter that they should have any opinion in their decision. And whoever disobeys Allah and His Messenger has indeed strayed into a plain error".² The particular importance of the Islamic laws of inheritance is obvious from the verses immediately following those verses giving specific details on inheritance shares - "These are limits (set by) Allah (or ordainments as regards laws of inheritance), and whosoever obeys Allah and His Messenger will be admitted to Gardens under which rivers flow (in Paradise), to abide therein, and that will be the great success".³ "And whosoever disobeys Allah and His Messenger, and transgresses His limits, He will cast him into the Fire, to abide therein; and he shall have a disgraceful torment".⁴

The laws of inheritance take on an even greater prominence in Islam because of the restriction placed by Sharia on the testamentary power of the testator. The divine justness and equitability of the Islamic laws of inheritance have been correctly appreciated by many non-Muslim scholars, who stated that the Muslim law of inheritance "comprises beyond

question the most refined and elaborate system of rules for the devolution of property that is known to the civilised world”.⁵

Orphaned Grandchild and the Islamic Law of Inheritance

The words of the Holy Quran⁶, the traditions of the Holy Prophet ﷺ and the Ijtihad of Muslim jurists have established a clear rule of inheritance that after giving from the property left by the deceased the shares fixed by the Holy Quran for ‘dhaw al-furud’ (sharers) the remainder should go to ‘asaba’ (residuary, i.e. males or females related to the deceased through males and whose shares are not fixed), in order of the proximity of their relationships to the deceased so that the nearer asaba should take the whole of it to the exclusion of the remoter⁷. The Holy Quran states: “Allah (thus) directs you as regards your Children’s (Inheritance): to the male, a portion equal to that of two females: if only daughters, two or more, their share is two-thirds of the inheritance; if only one, her share is a half. For parents, a sixth share of the inheritance to each, if the deceased left children; if no children, and the parents are the (only) heirs, the mother has a third; if the deceased left brothers (or sisters) the mother has a sixth. The distribution in all cases after the payment of legacies and debts. Ye know not whether your parents or your children are nearest to you in benefit. These are settled portions ordained by Allah; and Allah is All-knowing, All-wise”.⁸ “In what your wives leave, your share is a half, if they leave no child; but if they leave a child, ye get a fourth; after payment of legacies and debts. In what ye leave, their share is a fourth, if ye leave no child; but if ye leave a child, they get an eighth; after payment of legacies and debts. If the man or woman whose inheritance is in question, has left neither ascendants nor descendants, but has left a brother or a sister, each one of the two gets a sixth; but if more than two, they share in a third; after payment of legacies and debts; so that no loss is

caused (to any one). Thus is it ordained by Allah; and Allah is All-knowing, Most Forbearing”.⁹ “To (benefit) every one, we have appointed shares and heirs to property left by parents and relatives. To those, also, to whom your right hand was pledged, give their due portion. For truly Allah is witness to all things”.¹⁰

One of the famous companions of the Holy Prophet ﷺ, Zayd bin Thaibit (RA), is reported as saying, “...Ones grandchild does not share the inheritance with one’s own son (if the son is alive)”.¹¹ “Grandchildren are to be considered as one’s children (in the distribution of inheritance) in case none of one’s children are still alive...So one’s grandchild does not share the inheritance with one’s son...(if the son is alive).¹² But this is the position only under the sunni law. While under the shia law even the presence of the daughter of A (i.e. aunt to A’s grandchildren) will deprive the orphaned grandchildren from inheriting A.¹³

Orientalists claim that Sharia and its rules of inheritance are archaic, in-human and inequitable and that the exclusion of orphaned grandchildren from inheriting grandparents estate is particularly harsh and unjust. MacNaghten in his Preliminary Remarks says, “the only rule which bears on the face of it any appearance of hardship is that by which the right of representation is taken away, and which declares that a son whose father is dead shall not inherit the estate of his grandfather together with his uncles. It certainly seems to be a harsh rule and is at variance with the English, Roman, and the Hindu laws. The Mohamadan doctors assign a reason for denying the right of representation, that the person has an inchoate right to the property of ancestor until the death of such ancestor, and that consequently, there can be no claim through a deceased person, in whome no right could by possibility have been vested”.¹⁴ It is respectfully submitted that it is improper and unfair to judge the suitability of a rule of Islamic law with reference to other systems which proceed on entirely different ideologies.

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J. N. D. Anderson¹⁵ says, “The rule against representation of a deceased heir-at least where the children of such heir would be excluded on the principle that the nearer in the degree excludes the more remote-causes much hardship. This is a serious defect, but on which again the reforms have felt unable to face openly (for Prophet Muhammad himself, it seems, suffered from its application)”. In his another work, Anderson wrote: “A much more important reform which has been effected, in widely different ways, in Egypt, Syria..., is designed not to further the interests of the nuclear family as such, but to fill the major lacuna in the Islamic law of inheritance in both its Sunni and Shia form. This lacuna is inevitable consequence of a rigid application of the basic principle... for this means that a man or women's orphaned grandchildren, who may have completely dependant on their grandparent during his lifetime, will be excluded from any share whatever in his estate of any of that grandparent's son. This age old rule (from which, it would seem, Prophet Muhammad ﷺ himself must have suffered) may have been completely innocuous at a time when family solidarity was sufficiently strong and when an uncle might perhaps be trusted to treat orphaned nephews and nieces on a par with his own children; but it is clearly ill-suited to the ethos and circumstances of today. The simplest way to fill this gap, at first sight, would be to give such grandchildren the right of representation, that is to step into the shoes of their deceased parent and inherit what he would have inherited had he survived the grandparent...”.¹⁶ With great respect it is submitted that Anderson's observations are neither fair nor sound. His observations are rebutted by many scholars.¹⁷ First, nobody can deny that every system of inheritance needs some principles for determining the persons who should receive and who be excluded. Second, Sharia has adopted the most natural logical, objective and least controversial principle, viz “nearer must exclude remoter”. Nobody has yet suggested a better principle. Third, if a person

gets excluded on a fair application of this principle, how can it be said that the exclusionary effect of the principle represents “a serious defect” or “major lacuna” in the Islamic law of inheritance. Further no point of reference or yardstick has been suggested on the basis of which the so called defect could be determined. Fourth, it is quite obvious that in order to attack the exclusionary rule, Anderson is conveniently forgetting the hard fact that those grandparents who have orphaned grandchildren completely dependant on themselves always try to save them, from all possible hardships arising as a result of their exclusion, through the devices of will or gift voluntarily made. Fifth, to say that the exclusionary rule was “comparatively innocuous at a time when family solidarity was sufficiently strong” and that “it is ill suited to the ethos and circumstances of today” has absolutely no basis in inductively verifiable facts. The statement represents merely guess work based in deductive logic which has no empirical justification. Sixth, under Islamic system of intestate succession the number of persons deprived of inheritance is much smaller as compared to the system of testate succession which is so popular in the west. Moreover, under the Islamic system of exclusion of persons from inheritance is well defined and logical while under the western systems it is based on the whims and caprices of the testator. This makes Islamic system more human and just. Seventh, when Hazrat Muhammad ﷺ, who had himself suffered under the exclusionary rule didn’t condemn it or abrogate it for the orphaned grandchildren, in the coming generation of his own ulema, for whom he had greatest love, how can others (who stand no comparison to the Prophet ﷺ) be heard attacking the rule.

Molvi Mohammad Usmani says that “orphaned grandchildren are not to be excluded from the estate of their grandparents... Islam is the religion of nature. In the presence of orphaned grandchildren, transferring the grandparent’s property by inheritance to distant relations is against the

demands of nature... The Quran is replete with awe-inspiring instructions regarding the orphans. God is not prepared to tolerate any cruelty or excess in dealing with orphans; those who ill-treat orphans are in his great sinners. The Quran declares: "Verily, those who eat away the property of the orphans fill their bellies with burning ember and will soon be thrown into the hell" (4: 10). He opines "We find a conflict between the aims and objects of this verse (and many other verses of the Quran warning people against the treatment of the orphans) and traditional interpretation of the Quranic verses excluding orphaned grandchildren from the property of their grandparents".¹⁸ If Molvi Mohammad's plea is accepted, it will lead to illogical results ^[19]. The deceased link-parent of the grand child will have to be presumed alive at the time of grandparent's death to receive inheritance from him in order to pass it on to the grandchild. But this will require another presumption to make deceased link-parent die again in order to make his own child inherit him. But such presumptive death of the link-parent will entitle other heirs of the link-parent besides his own children (e.g. his widow) to have their shares. Thus, a chain of problems will start if the principle of representation is accepted for determining the heirs of the propositus. Verse 11 (Surah Nisaa) has fixed the shares of the children on the basis of the sex: ... 'to the male a portion equal to that of two females'. If the principle of representation is accepted it shall disturb this arrangement by putting females in the place of male.

Verse 11 of Chapter 4 of the Holy Quran seems to make the basis of inheritance clear in the last sentence: "Ye know not whether your parents or your children are nearest to you in benefit. These are settled portions ordained by Allah; and Allah is All-Knowing and All-Wise". Commenting on this verse, Maulana Maududi says, "This is an answer to all those ignoramuses who do not understand this divine law of inheritance and wish to make up from their imperfect minds

the deficiency which to them has remained in the law made by Allah”.²⁰ His argument is based on the following verses of the Quran. Verse 8 of Chapter IV of the Holy Quran reads, “But if at the time of division other relations or orphans, or poor are present, feed them out of the (property) and speak to them the words of kindness and justice”. It no doubt strongly recommends to those distributing the estate of the deceased to show kindness or mercy to his relations, orphans and poor. But it does not certainly make such relations, orphans and poor “heirs” of the deceased. Further, the Holy Quran declares in verses 13-14 (Chapter 4): “Those are limits set by Allah: those who obey Allah and His Messenger will be admitted to Gardens with rivers flowing beneath, to abide therein (for ever) and that will be the supreme achievement. But those who disobey Allah and His Messenger and transgress His limits will be admitted to a fire to abide therein and they shall have a humiliating punishment”. Commenting on this verse, Maulana Maududi says, “This is a very frightful verse which gives a warning of eternal torture of hell to those who change the law of inheritance made by Allah or violate the other legal limits clearly prescribed by Allah in His Book. But it is to be greatly regretted that despite such a stern warning Muslims have, with the impudence quite like the one shown by Jews, changed Allah’s law and transgressed Allah’s limits. The transgressions committed in relation to this law of inheritance reach the limits of open rebellion against Allah... Some have given up the system of inheritance and adopted the system of ‘joint family property’. Some have made equal the shares of males and females. In addition to old rebellions the latest one now is that some Muslim states have, aping the westerners, introduced ‘death duties’. This means that one of the heirs of the deceased is the state for whom Allah had forgotten to provide a share...”²¹.

Maulana Maududi is in agreement with other Muslim jurists that orphaned grandchildren may better be helped

through 'will' when there is no inheritance for them. He says: "Every person has the power to make a will up to one third of his property. This rule about will has been laid down so that such person may, in his discretion, fix a portion from the estate for one or more of those relatives who are not entitled to receive a share from the estate under the law of inheritance, or of other persons, whom he finds deserving of help. For example, he may by will fix a portion for any orphaned grandson or granddaughter in existence; or a widow of the predeceased son spending hard days; or brother, or sister, or brother's wife, or brother's son, or sister's son or any other relative standing in need of help"²². One example of a change in inheritance law in several countries, though subject to juristic debate, which has been widely justified on the basis of the Qu'ranic verse of bequest and social practice is the obligatory bequest for orphaned grandchildren²³.

An orphaned grandchild is unlikely to inherit from a grandparent under Islamic inheritance principles. The issue of inheritance has been addressed in the verses of Surah Nisaa. The Islamic approach to the wealth of inheritance is derived from these verses and from the practices of the Prophet ﷺ in this regard. The basic postulates of this approach are as follows:

- (1) None has the right to a person's wealth as long as he is alive.
- (2) Those of his successors who died during his own life time will not be entitled to inheritance from his wealth. The wealth of inheritance itself comes into being with the death of the person.
- (3) It will be only those of his successors who are alive at the time of his death who will be entitled to a share of his wealth of inheritance.
- (4) Inheritance is basically allocated to close relatives. Marriage and blood relations will naturally fall into this category.

- (5) Close relatives of the deceased will obstruct the right to inheritance of the more distant ones in the same line of succession. By close relation is meant parents, husbands, wives, sons and daughters. Nobody else can claim any right in the presence of these closest of relatives.
- (6) The accepted standard for allocating the wealth of inheritance is the nature of one's relationship with the deceased person; never the financial condition or the requirements of the claimant himself.
- (7) In the absence of the closest relatives, or links of the deceased, the right of inheritance is then conferred upon the next link in the line of succession. It is for this reason that if there is no father, it would go to the father's brother and if there is no son then to the grandson.

In the light of these basic postulates, in case of orphan's share, no system of law – not even Islam, for that matter– can successfully implement full justice in this regard. Few of the models presented below that can serve to successfully demonstrate these facts can be put forth as:

- (i) The deceased person leaves behind two children. One is handicapped, the other is fully fit. The first cannot earn his living. The second can work and earn wealth. How will the wealth of the deceased be allocated in this case? In the interest of justice, the one who is able to earn his own living must be given a lesser share while the one who is unable to do so must be allocated a larger portion. However, can any system render this justice a law?
- (ii) The deceased leaves behind three children. The eldest is aged forty. He is a businessman. He started off as a co-worker in his father's business and his own enterprize has now come of age. The second is a

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physician. He had studied using the wealth of his father. Today he virtually mints money. The third is a lad of eighteen- a student. His father died before he could attain to any position. How is the wealth to be allocated in this case? Both the elder sons earn their own income; indeed, they had started their earnings with the wealth of their father. As for the younger son he never had much from the earning of his father even when he was alive. Here, too, it will be just that the younger son should, at least, get a larger portion in the share of his father's inheritance. Is it possible to make a law that would facilitate the allocation of the inheritance wealth in this manner?

Here, it becomes clear that it is not possible for mere laws and regulations to implement justice in all respects in the case of inheritance and other economic problems. Indeed, Islam seeks to create a situation wherein justice can be established in such matters by heightening the moral consciousness of man and by encouraging the showing of mercy and kindness to those undergoing tribulations. In fact, the creation of such a law would then destroy all the foundational premises which Islam puts forward in the matter of inheritance.²⁴ Islam is never a collection of inheritance laws alone, it prescribes a set of social security measures too. In fact, the very basis of inheritance itself lies in that sense of duty towards mutual security and cooperation. The son is duty-bound to protect the father even as the father is so towards the son. It is, furthermore, the duty of the grandfather to protect the children who have lost their father. Indeed, the Quran views the indifference shown to orphans as being tantamount to the very denial of religion itself²⁵. The Prophet ﷺ had taught never to do anything that would in any way infringe upon the respect that is due unto the orphans. It is, in itself, the duty of every Muslim to protect the orphans who have no family ties, whatsoever. Then does the duty of the Muslim in protecting

those of the orphans who are actually related to him need any further recommendation? The responsibility of protecting them mainly rests with the grandfather. In the event of the grandfather's demise, it is the paternal uncle who must then assume the responsibility of guardianship. It is for such reasons that the Quran has made wassiyat compulsory^[26]. Indeed, the messenger of God had greatly encouraged the practice of Wassiyat. He had also discouraged the avoidance of it²⁷. The Prophet ﷺ had taught that Wassiyat is not meant for one's immediate successors. "There is no Wassiyat for the successors"²⁸. The verse of the Holy Quran (002.180: It is prescribed, when death approaches any of you, if he leave any goods that he make a bequest to parents and next of kin, according to reasonable usage; this is due from the Allah-fearing.) quoted makes it clear that it must be made to those closest of relatives who come next to the immediate successors. This will, very importantly, include the orphaned grandson. This is what Islam has done in the case of the orphaned grandson.

Legislative Trends in some Countries

The Muslim Family Laws Ordinance, promulgated by Ayub Khan in 1961, adopted many of the recommendations of the Commission on Marriage and Family Laws, including the recommendation that some-thing should be done to protect the interests of the orphaned grandchild as heir to the grandparent. The Ordinance proceeded to guarantee to the children of a predeceased child (either sex) a share of their (paternal or maternal) grandparent's estate; on what would appear to be the clear reading of the terms of the ordinance, the orphaned grandchildren became entitled to that share of the estate of their grandparent which would have passed to their parent had he or she been alive at the time of the grandparent's death. What is revolutionary about the Pakistani legislation is that it introduces the principle of representation

to overturn the “nearer excludes the more remote” rule and to define those entitled to participate in the inheritance. Since the deceased daughter’s children “represent” her no less than a deceased son’s children “represent” him, the most profound alteration introduced by the Ordinance in the traditional law of succession obviously is in regard to the position of the daughter’s children in Sunni law. Contrary to the legislation of Syria, Morocco, Jordan and Algeria, the predeceased daughter’s children are treated identically with the predeceased son’s children; and that, contrary to the legislation of Egypt, Syria, Morocco, Jordan and Algeria, no orphaned great-grandchildren (children of a predeceased child of a predeceased child) benefit from the Pakistani reform. Further, there is no maximum limit on the share which may be taken by the orphaned grandchild, and the grandchild need not be totally excluded from a share under the traditional law before the terms of the ordinance are attracted. These last two distinctions between the Pakistani and the Middle Eastern reforms derive from the Pakistani rejection of the law of bequests as the juristic basis of the reform²⁹.

Tanzil-ur-Rahman, a staunch opponent of section 4, after attacking the reform on the ground that it was opposed to shari’a added: Presuming at one moment the deceased son as alive and considering him to be dead the next, is an absurd proposition. Secondly, if the deceased son is considered alive at the time of death of the grandfather but is again considered to be dead, how and under what law the division of his legacy could be kept confined to his son and daughter? It is quite possible that the deceased son leaves a widow and other relatives alive as well. ... The framers of present law (section 4 of the Muslim Family Laws Ordinance) kept in view only one aspect of the hardship to grand-children and, possessing no complete knowledge of the niceties of the Law of Inheritance, have arbitrarily interpreted the Qur’an and the Sunnah. Obviously this law contravenes the provisions of the

Qur'an and Sunnah of the Holy Prophet ﷺ and the consensus of the 'ummah and practice of 1400 years³⁰.

In 1956 Report of the Commission on Marriage and Family Laws [Pakistan], the question for consideration was: Is there any sanction in the Holy Qur'an or any authoritative Hadith whereby the children of a pre-deceased son or daughter are excluded from inheriting property? It was admitted by all the members of the Commission that "there is no sanction in the Holy Qur'an or any authoritative Hadith whereby the children of a pre-deceased son or daughter could be excluded from inheriting property from their grandfather. It appears that this custom prevailed amongst the Arabs, and the same custom has been made the basis of the exclusion of deceased children's children from inheriting property of their grandfather. It may be mentioned that if a person leaves a great deal of property and his father has predeceased him, the grandfather gets the share that the father of the deceased would have got. This means that the right of representation is recognised by Muslim law amongst the ascendants. It does not, therefore, seem to be logical or just that the right of representation should not be recognised among the lineal descendants. If a person has five sons and four of his sons pre-deceased him, leaving several grand-children alive, is there any reason in logic or equity whereby the entire property of the grandfather should be inherited by one son only and a large number of orphans left by the other sons should be deprived of inheritance altogether. The Islamic law of inheritance cannot be irrational and inequitable. Moreover, as the right of representation entitles 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. There are numerous injunctions in the Holy Qur'an expressing great solicitude for the protection and welfare of the orphans and their property.

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Any law depriving children of a pre-deceased son from inheriting the property of their grandfather would go entirely against the spirit of the Holy Qur'an." In this commission dissenting opinion was given by Maulana Ihtisham-ul-Haq Thanvi: "Inheritance is based on the degree of kindred and to parcel out the property of grandfather among his pre-deceased sons' children at the cost of his other sons is to strike at the very root of the system of inheritance. The fact that at times the grandsons are reduced to penury is quite a different issue and is purely a matter of luck". In 1985 Report of the Status of Women Commission (Pakistan), some recommendations were laid down: "A special provision in the Inheritance law be evolved to ensure that a family man deposits his will of property with the Government appointed authorities at the age of 45-50. The making of a will for the child/children of a deceased son/daughter by the grand parents should be made obligatory – and the quantum should be upto 1/3rd." With regard to Section 4 of the Muslim Family Law Ordinance (1961) Pakistan is not the only country providing for orphan grandchildren. For example, in Turkey, "In case of pre-deceased son or daughter his or her share is transferred to his or her descendant son or daughter upon the death of the grandparents". Similar provisions exist in Bangladesh and Iran.

Egypt, the Law of Bequest 1946 (Sections 76-79) ensures an inheritance for orphan grandchildren³¹ in the form of obligatory bequest:

- (i) If a deceased person has left behind grandchildren, male or female, whose link-parent died before or with such person, a bequest in their favour will be binding on such person. The amount of such bequest shall be equal to the share which the link-parent concerned would have inherited in case of his or her death just after the death of the propositus. It shall not, however, exceed one-third of the estate. Such an obligatory bequest shall not be due if the propositus has already

made in their favour either a bequest or a gift equivalent to what would otherwise be the amount of such bequest. The principle shall be applicable to the descendants of a predeceased daughter of the first generation only; among those of a predeceased son all agnatic descendants how lowsoever will have its benefit. Each ascendant shall exclude his own descendants only. The share of each predeceased descendant shall be divided among his or her heirs in accordance with the rule of 'double share for the male'.³²

- (ii) Where the *propositus*³³ has already left a will in favour of a grandchild entitled to an obligatory bequest, if the optional bequest exceeds the amount of obligatory bequest, the excess will be governed by the general law of wills. If the amount of the optional bequest is less than the obligatory bequest, the deficiency shall be made up. If an optional bequest has been made in favour of some of the grandchildren only, the rest of them shall be given their due. The aggregate of the said optional bequest and what is given to the latter shall not exceed one-third of the estate.³⁴
- (iii) If an obligatory bequest cannot be paid out of the remainder of one-third of the estate, optional bequests shall be applied, as far as necessary, to the payment of the obligatory bequest.³⁵
- (iv) What remains out of one-third of the estate after the payment of the obligatory bequest shall be applied to pay optional bequests if any.³⁶

In Syria (1953) and Morocco (1958) the children of a predeceased son who would be excluded from succession under sharia law, are now entitled to either the share of their father which they would have taken, had he survived the *propositus* or one third of the net estate, whichever is less. But till now

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no provision has been made for the children of the deceased 's daughter³⁷. In Tunisia (1957) the problem of the orphaned grandchild was addressed through legislation making the estate of the grandparent of the excluded grandchild /children liable for an "obligatory bequest" in favor of the grandchild/children. The latter is (are) entitled to the share of the inheritance which would have come to the predeceased child of the propositus (paren't of the grandchild / children) had such child been alive at the time of P's death, subject to a maximum (regardless of how many claimants there may be and irrespective of the fact that the several orphaned grandchildren claim through more than one predeceased child of P) of one-third of P's net estate. Another four states acted in the matter after the Pakistan legislation of 1961– Kuwait (1971), Jordan (1976), Iraq (1979), and Algeria (1984). These states followed the legislative pattern of the Middle East and provided for obligatory bequests.

The device of the obligatory bequests which has been adopted in Syria (Art. 257) and in Kuwait (Art. 291.3) was confined to grandchildren through a predeceased son or son's son. By contrast, the Egyptian law (1946, Art. 76) and the Tunisian law (Art. 191) include in their scope the children of a predeceased daughter or of a predeceased son's daughter.

Algerian Family Law (Articles 169-72) is the introduction of the right of representation. The latter is a Western juridical doctrine completely unknown to the Islamic law of inheritance, since it fundamentally contradicts the Islamic agnatic rule, according to which the closest heir excludes the most distant. However, not all the implications of the principle of representation are accepted. The reason for this is the following: On the one hand, the amount due to the grandchildren must be the same as what their predeceased father would have received had he lived; on the other, according to the Islamic sharia, the law makes this rule conditional by the imposition of the following: (a) that such amount must not be more than the bequeathable third (Art.

170); (b) that grandchildren cannot represent their predeceased parents if they are already quota-sharers, or a bequest was made in their favor, or the deceased person, during his life-time, gave them, without return, an amount equivalent to what grandchildren can claim by this bequest; (c) however, if the bequest in their favor was less than the share to which they are entitled, they can claim the difference between the two (Art. 171); (d) lastly, the well-known Quranic provision to give a male a double share is in force (Art. 172).³⁸

Conclusion

Islamic law of Inheritance has been fixed by the Allah in the Holy Quran. The words of the Holy Quran, the traditions of the Holy Prophet ﷺ and the Ijtihad of Muslim jurists have established a clear rule of inheritance that after giving from the property left by the deceased the shares fixed by the Holy Quran for ‘dhaw al-furud’ (sharers) the remainder should go to ‘asaba’ (residuary, i.e. males or females related to the deceased through males and whose shares are not fixed), in order of the proximity of their relationships to the deceased so that the nearer asaba should take the whole of it to the exclusion of the remoter. Islam is never a collection of inheritance laws alone, it prescribes a set of social security measures too. In fact, the very basis of inheritance itself lies in that sense of duty towards mutual security and cooperation. The son is duty-bound to protect the father even as the father is so towards the son. It is, furthermore, the duty of the grandfather to protect the children who have lost their father.

Notes

1. Encyclopedia Iranica Articles, <http://www.iranica.com/articles/inheritance>.
2. Holy Quran 33:36.
3. Holy Quran 4:13.
4. Holy Quran 4:14.

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5. Rumsey, A. 1880, Moohummudan Law of Inheritance, pp. iii; *In* Hussain, A. The Islamic Laws of Inheritance, <http://www.Islaam.com>, (Professor Almaric Rumsey (1825-1899) of King's College, London).
6. Holy Quran 4: 7, 11, 12, 33.
7. Al-Bukhari, *In* Khan, M.M., 1977, Kitab al-Faraid, Ankara, 477, vol. VIII.
8. Holy Quran 4.11.
9. Holy Quran 004.012.
10. Holy Quran 004.033.
11. Sahih al-Bukhari, *In* Khan, M.M., Kitab al-Faraid, 1977, Ankara, p. 477, vol.VIII.
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