

Chapter Eighteen

General Principles of Islamic Law of Inheritance

Islam brought reforms in the law of inheritance, which may be stated briefly as follows:

1. Excellence of Islamic Law of Inheritance

Islamic law of inheritance is the most exact and scientific law and the Muslim jurists laid great importance on the law of inheritance (*Faraid*) and they would frequently repeat the saying of the prophet (peace be on him)- "Learn the laws of inheritance and teach them to the people; for they are one-half of useful knowledge."¹⁰

Modern authors have admired the Islamic system of inheritance for its utility and formal excellence. The following opinions of some of them clearly manifest the superiority of Islamic law of inheritance:¹¹

Rumsa is of opinion that the Mohammadan law of inheritance comprises beyond question the most refined and elaborate system of rules for the devolution of property that is known to the civilized world. Sir William Jones remarked, "I am strongly disposed to believe that no possible question could occur on the Muslim law of succession which might be rapidly and correctly answered."

Anderson remarked, "There is no aspect of the (Muslim) law in which the logical and technical excellencies of the Islamic system are more advantageously displayed than in the law of inheritance. Indeed, there is a famous dictum attributed to the prophet that a knowledge of the shares allotted to the various heirs under this system constitutes the equivalent of half of all human knowledge."

Fitzgerald held the opinion, "To Muslims the *Sharia* law of inheritance is ideally perfect; founded on the sure rock of divine revelation and worked out in the utmost detail by that mental ingenuity

¹⁰ Quoted in Al-Sirajiyah, tr. A. Rumsey, P. 11 (Introduction), 1890.

¹¹ Quoted from Syed Khalid Rashid, Muslim Law, PP. 340-341.

which God gave man for the purpose of understanding revelation. The logical strength of the system is beyond question."

Faiz Badruddin Tyabji said, "The Muslim law of inheritance has always been admired for its completeness."

2. Sources of Islamic law of inheritance

Muslim jurists recognize only three sources of Islamic law of inheritance namely:-

(i) The Holy *Quran*

(ii) The *Hadith*

(iii) *Ijma* or consensus of opinion

Unlike the other branches of law, no reliance has been made on *Qiyas* or analogy with respect to laying down the law of inheritance.

The following verses of the Holy *Quran* deal with the law of inheritance:

(a) "Allah (thus) directs you as regards your children's (inheritance) to be made, 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 inheritance to each if the deceased left children; if no child and the parents are the (only) heirs, the mother has a third (and father two-third); if the deceased left brothers (or sisters), the mother has a sixth. (The distribution is to be made) after payment of legacies and debts. There are settled portions ordained by Allah; and Allah is All-knowing, All-wise.: (4:11)

(b) "You (husband) will inherit one-half of the property left by your wives, provided there is no child; but if they (wives) have a child, then you are entitled to one-fourth of what has been left by your wives after payment of legacies or debt (if any); wives are entitled to one-fourth (from the property of their husband) provided there is no child, but if there is child, then one-eighth, after payment of legacies or debts. And if a man or a woman have no parents nor child, but he or she has left brother or a sister, then each of them will inherit one-sixth of the property left by the deceased. But if the number of brother or sister is more than two, then they (all) will get one-third after payment of legacies and debts so

that no loss is caused (to any one). Thus it is ordained by Allah; He is all-knowing, most forbearing". (4:12)

(c) "They ask you for a legal decision. Say, Allah directs (them) about those who leave no descendants or ascendants as heirs. If a man dies childless and he has a sister, she (sister) shall one-half of the inheritance; and if she (sister) dies childless, her brother will inherit (entire) property. And if there be two sisters, they shall have two-thirds of inheritance. But if there are brothers and sisters, the male having twice (double) the share of the female. Allah expounds to you (His laws) so that you do not err. Allah knows of all things".(4:176)

This verse deals with the right of inheritance of brothers and sisters.

Besides the above verses, verse seven, eight, thirty two and thirty three of sura An-Nisha (4:7, 4:8, 4:32, and 4:33) and verse seventy five of sura Anfal (8: 75) deal with the law of inheritance regarding the rights of distant kindred.

There are some Hadith of the prophet (peace be on him) regarding the rights of inheritance, which are as follows:

(a) The prophet (peace be on him) said, "Give their shares to the sharers, and the residue is for the nearest male (right of residuary)." This hadith deals with the right of residuary.

(b) The prophet (peace be on him) decreed for daughter one-half and one-sixth for the son's daughter to complete two-thirds $\left(\frac{1}{2} + \frac{1}{6}\right)$ and the residue for the sister. This hadith deals with the rights of daughter, son's daughter and sister.

(c) It is reported from Umran-bin-Hushain (Allah is pleased with him). He said, "A man came to the prophet (peace be on him) and said, my son has died, what is for me out of the inheritance. He (peace be on him) replied, 'For you is one-sixth', when he returned he called him back, and said, 'For you there is another one-sixth' and when he returned, he (peace be on him) called him back and said, 'this second one-sixth is supplementary' "

(d) Ibn-E-Bureda reported from his father that the prophet (peace be on him) gave one-sixth to grandmother (mother's mother) when there was no mother. In this hadith it is found that the mother's mother represents the mother.

(e) Miqdam Ibn Maadi Kurab (Allah is pleased with him) reported that the prophet of Allah (peace be on him) said, "Maternal uncle is the heir, when there is no other heir."

This hadith has established the right of maternal uncle to inherit.

(f) Hazrat jabir (Allah is pleased with him) said that he heard the prophet (peace be on him) to say, "If the child cries on the birth, he is an heir". This hadith empowers a *foetus* (unborn child) to inherit.

(g) The Prophet (peace be on him) said, "There is nothing for a murderer for inheritance."

The hadith prevents a murderer to inherit from the property of murdered.

(h) In another hadith it has been said that the share of the father and the child (son) belongs to the residuary. It means, father and son belong to the class of residuary.¹

3. Heritable Property

All properties (*amwal*) of the deceased Muslim (*Propositus*) are subject to inheritance by his heirs. Islamic law does not recognize any distinction between-

- (i) ancestral and self-acquired property²
- (ii) movable and immovable property
- (iii) Joint and separate property
- (iv) corpus and usufruct property³
- (v) corporal and incorporeal property.

The property (*mal*) comprises all forms of property including both corpus (*ayn*) and usufruct (*manafi*). The *ayn* is the substance of a thing,

¹ All the above Hadith have been quoted from Aziz Ahmad, Islamic Law in theory and Practice, P.412-3.

² Abadi Begum V. Mirza Akmal Beg AIR (1925) Oudh-190.

³ Sardar Nawazish Ali V. Sarder Ali Reza PLD 1948, P.C. 23.

e.g. a plot of land, a house, a book, a cow etc. But *manafi* means the use, benefit or the produce of the property and not the property itself. For instance, the right to take fruits of a garden, the right to reside in a house.

4. Inheritance opens at the time of death

Islamic law does not recognize a birthright. Inheritance opens on the death of the propositus. The question of devolution of inheritance, therefore, rests entirely on the exact time of such death, the order of death being the sole guide.⁴

5. Doctrine of representation

Islamic law of inheritance does not recognize representation. The son of a deceased person shall not represent such person if he died before his father. He shall not stand in the same place as the deceased would have done had he been living, but shall be excluded from the inheritance if he have paternal uncle. However, section 4 of the Muslim Family Laws Ordinance, 1961 has recognized the doctrine of representation.⁵

6. A Male takes double of a female

Both males and females have their rights over the property of the propositus. A son, for example, takes two portions, and a daughter takes one portion; they inherit as residuaries. In the like manner, a brother takes double of a sister, when they inherit as residuary. This is according to *sura An-Nisa*, stated above.

7. Primary or fundamental heirs are never excluded

Primary heirs—father, mother, husband, wife, son and daughter are not excluded. These six persons must inherit if otherwise not excluded due to some contingency discussed under the following section.

8. Persons excluded from the right of inheritance

The following persons are excluded:

- (i) Homicide (ii) Difference of religion (iii) Illegitimacy (iv) Alien enemy (5) Slavery.

⁴ PLD 1975 Lah. 59 (DB); PLD 1975 S.C. 324.

⁵ This law is in force in Bangladesh and Pakistan.

(i) Homicide

Under the Sunni law, a person who has caused the death of another person, whether intentionally or by mistake, negligence or accident, is debarred from the right of succession to the property of the victim. But under *shiya* law, homicide is an impediment to inheritance only when the person has been slain intentionally and unjustly. If death was caused rightfully or by mistake, the killer is not excluded from inheritance. An abettor of a murderer cannot also inherit.

(ii) Difference of religion

Under Islamic law, a non-Muslim cannot inherit and *vice Versa*. When once a person has changed his religion and changed his personal law, the new law will govern him in the matter of inheritance. So a non-Muslim cannot claim to inherit a relation who has been converted to Islam.⁶

Illustration- X, a Hindu who has a Hindu wife and children, embraced Islam and married a Muslim woman and he has children by her. On his death, his property will pass on to his Muslim wife and children to the exclusion of his Hindu children and wife. If the son of a Muslim apostatizes, and dies as a Buddhist, his Muslim father cannot inherit.⁷ So when a Muslim renounces Islam, he ceases to be a Muslim and so a non-Muslim cannot inherit a Muslim. There is no reciprocal rights of inheritance between a Muslim husband and a non-Muslim wife, even in the cases in which such unions are permitted by the law of Islam.⁸ For instance, a Muslim husband and a Christian wife.

(iii) Illegitimacy-

According to *Hanafi* law, an illegitimate person cannot inherit from the father, but he or she can inherit from the mother. When a *Hanafi* woman dies leaving a husband and an illegitimate son of her sister, the husband takes one-half as sharer and the rest half goes to the illegitimate son of the sister, as he is related to the deceased through his mother.⁹

⁶ Mohammed Abdul Aziz Kahn V. Mahbub Sinh, AIR 1936 All. 202.

⁷ Abdul Guffer (Rang., 1926), 98 I.C., 155.

⁸ R.K. Wilson, Anglo-Muhammadian Law, P. 298.

⁹ Bafatun V. Bilaiti Khanam (1903) I.L. 30 Cal. 683.

(iv) Alien enemy-

An alien enemy is excluded from the right of inheritance.¹⁰ Alien enemy means a person who is or has been fighting against the sovereignty of the state in which he is a citizen. He is deprived from the right of inheritance of a person of that state.

(v) Slavery-

A slave, in Islamic law, is not entitled to inherit from a free man. But it has become obsolete, as slavery has been abolished internationally after Slavery Act, 1483.

9. Kinds of heirs

According to *Hanafi* law, heirs are of seven types- Three principal and four subsidiary.¹¹ The three principal classes are-

- (i) Quranic heirs (*Zabul Furuz*), called sharers;
- (ii) Agnatic heirs (*zabul Ashabat*), called residuaries
- (iii) Uterine heirs (*Zabul Arham*), called Distant Kindred.

The number of sharers is twelve and the number of residuaries is eighteen.

The four subsidiary classes are the following;

- (iv) Successor by contract
- (v) Acknowledged kinsman;
- (vi) Escheat

When there are neither sharers nor residuaries nor distant kindred, the inheritance devolves on the subsidiary heirs, stated above, among whom each class excludes the next.

Successor by contract

Successor by contract arises in two ways:-

- (a) by emancipation and (b) friendship

By emancipation- If a man emancipates his slave, the master can inherit from the slave but the slave cannot inherit from the master.¹² This

¹⁰ R. Wilson, Anglo-Muhammadan Law, P. 298.

¹¹ Asaf A.A. Fyzee, Outlines of Muhammadan Law, P. 397.

¹² Hedaya, P. 513.

type of succession by contract or *wala* has become obsolete since the Slavery Act, 1843.

By friendship- If a man makes a contract with another, a stranger, that if he dies, the latter would inherit from him on the condition that he shall pay any fine or ransom, called *diyat*, that may be payable by the former. This rule has become obsolete because compensation for criminal offences (*diyat*) is not payable.¹³

Acknowledged Kinsman-

In the absence of the other heirs mentioned above, the inheritance will go to an acknowledged kinsman, who is a person of unknown descent in whose favour the deceased has made an acknowledgement of kinship, not through himself but through another. Consequently, a man may acknowledge another as his brother (descendant of father), or uncle (descendant of grandfather), but not as his son. Thus a person may acknowledge another to be his brother, for it is kinship through the father. But acknowledgement cannot be extended by the deceased to a person to be his son, because that is kinship through himself.¹⁴

Universal legatee-

In the default of the above, a testator may bequeath his entire property in favour of any person, who is known as the universal legatee. The law of one-third is not applicable in this case, because there is no heir and as such the whole of his property can be bequeathed.¹⁵

Escheat- On failure of all the heirs and successors mentioned above, the property of a deceased goes to the *Bait-ul-Mal*, (Public Treasury), provided that the state is Islamic one, which will spend the property for the benefit of the Muslims. Thus property shall be escheated to the state in the absence of all the heirs and successors.

¹³ Hedaya, P. 517.

¹⁴ D.F Mulla, Principles of Mohamedan Law, P. 80.

¹⁵ Asaf A.A. Fyzee, Outline of Muhammadan Law, P. 402.

10. Dual capacity

Six persons can enjoy the right of dual capacity, that is, they can inherit both as sharers and as residuary. They are (a) father (b) grandfather, (c) daughter (d) full sister (e) consanguine sister and (f) son's daughter.

If there is residue after the payment of the sharers, the residue shall revert to these persons in order of preference.

11. Right of a divorcee to inherit from the property of the husband who divorces during *Marz-ul-Maut*

A divorced wife is entitled to inherit from the property of her husband suffering from death-illness, if he dies within the period of *iddat*.¹⁶

12. Payment of legacies, debts and funeral expenses

The *Quran*¹⁷ states that the heirs are entitled to inherit from the property of the *propositus* only after the payment of legacies, if any, repayment of debts, if any, and also funeral expenses. So after discharging of the above, the residue, if any, shall be distributed among the heirs.

13. Sharers' fractional allotment of amount of share

The sharers are entitled to inherit a definite amount of share from the property of the *propositus* according to the injunctions of the Holy

Quran.¹⁸ These fractions are- $\frac{2}{3}$, $\frac{1}{2}$, $\frac{1}{3}$, $\frac{1}{4}$, $\frac{1}{6}$, and $\frac{1}{8}$

Amount of share is variable subject to changed circumstances. Detail discussion on it has been made in the next chapter.

14. Nearer in degree excludes the more remote

There are eighteen number of residuaries who inherit only when residue is left after satisfying the claims of the sharers or when there is no sharer. The residue goes to the residuaries in order of preference. The first excludes the second, the second excludes the third and so on. For

¹⁶ PLD 1976 Lah. 118.

¹⁷ Sura An-Nisha verse (4:11-12).

¹⁸ Al-Quran, 4:11, 4:12 and 11:176

example, father excludes the father's father, mother excludes the mother's mother, a son excludes the son's son.

15. Classification of the law of inheritance

Broadly speaking, law of inheritance is classified into two—*Hanafi* or *Sunni* Law and *Shiya* Law. In Bangladesh, Pakistan and India and in some Muslim states, chiefly *Sunni* Law is applied.

16. Introduction of 'Radd' and 'Aul'

These two doctrines were innovated during the period of *Khalifatur Rashedin* to meet the challenge of new problems relating to inheritance. Consensus grew on these two doctrines which are now established rules and applied by different schools of Islamic law, but doctrine of 'Aul' or increase is not recognised by the *Shiya*.¹⁹ These two principles are explained in the next chapter.

17. Right of inheritance of missing person (*Ma'fud*)

Under *Hanafi* Law, a missing person (*Ma'fud*) is to be treated alive till the lapse of 90 years from the date of his birth.²⁰ But section 108 of the Evidence Act provides that when the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him, if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it. But this section supercedes the Muslim Law.²¹ So if a person die leaving a legacy in favour of another who is missing, the legacy will be kept in abeyance until it is ascertained whether he is dead or alive, as in the case of a partition of inheritance. But how long? Some say 90 years, others 70, while the other say 60 years. So there is a divergence of opinion regarding the period of waiting. But the correct view is this that the judge may give proper direction depending on the circumstances of any particular case.²²

¹⁹ Ameer Ali, *Muhammdan Law*, Voll. II, P. 133, (reprinted in 1985).

²⁰ Shawkat Mahmood, *Principles and Digest of Muslim Law*, P. 290.

²¹ AIR 1921 All. 172.

²² Ameer Ali, *Muhammdan Law*, Voll. II, P. 94, (reprinted in 1985).

18. Right of an unborn child to inheritance

An unborn child (*foetus*) in the womb is entitled to inheritance. The amount, to be reserved, is variable depending on the position of other heirs. If a man, for example, dies leaving a pregnant wife, and a mother who acknowledges the pregnancy, in which case the wife is paid an eighth and the mother a sixth, because if the *foetus* be born alive, the wife would receive an eighth, and the mother a sixth, but if it be not born alive, the wife would receive a fourth, and the mother a third. One-sixth and one-eighth are, therefore, paid immediately, as these are their portions in all events.²³

19. Death in Common Calamity

If more than one person dies in a common disaster, like an earthquake, train or bus accident, and if it not possible to prove the sequence of death, the estate of each of them (dead persons) would be inherited by his heirs, and there would be no mutual rights of inheritance between them. Thus the property would be distributed among the surviving heirs.²⁴

²³ Hedaya, P. 216.

²⁴ Syed Khalid Rashid, Muslim Law, P. 349.

Chapter Nineteen

Sunni Law of Inheritance

I. Explanation of some terms and concepts used in the law of Islamic Inheritance

- (i) 'Agnate' means a person related to the deceased through male links only; for example, the son's son or the son's daughter, the father or the father's father.
- (ii) 'Cognate' means a person related to the deceased through one or more female links; for example, the daughter's son or the daughter's daughter, the mother's father or the father's mother's father.¹
- (iii) 'Deceased' or '*propositus*' means a person whose relatives are to be determined for distributing his estate from the same stock, or common ancestor. Where a term of relation is used without any qualifying words, it must be presumed that the relation is referred to the deceased.² Thus 'son' means the son of the deceased.
- (iv) 'Distant kindred' or '*Zabul Arham*' means those blood relations who are not competent to be either sharers or residuaries.
- (v) 'Estate' means all heritable property of the deceased at the time of his death after deducting his funeral expenses, debts and legacies, if any.³
- (vi) 'Residue' means that portion of the estate which is left over after satisfying the claims of the sharers; and so a 'residuary' means a person who is entitled to receive the 'residue'. In Arabic, residuary means *Zabul-Ashabat*.
- (vii) 'Sharer' means a person who inherits a definite fraction of the estate as prescribed in the Holy Quran. In Arabic, he is known as '*Zabul Furuz*'.
- (viii) 'Son's son' how low soever (h.l.s) means a male agnate in the descending line; for example, a son's son, a son's son's son and so on.
- (ix) 'Son's daughter', how low soever, means a female agnate in the descending line; for example, a son's daughter, a son's son's daughter and the daughter of a son how low soever.
- (x) 'True grandfather means a male ancestor between whom and the deceased no female intervenes, for example, father's father, father's father's father how high soever (h.h.s).

Asaf A.A. Fyzee. *Outlines of Muhammadan Law*, P. 403.

Faiz Badruddin Tyabji. *Muslim Law*, P. 218.

Tyabji, P. 217.