

NOTES AND COMMENTS

DOCTRINE OF REPRESENTATION AND THE EXCLUSION OF ORPHAN GRANDCHILDREN UNDER MUSLIM LAW OF INHERITANCE

Abstract

Upon a person's death, they lose ownership of their properties, and their heirs inherit the properties according to their respective shares as determined by The Holy Quran and juristic verdicts in the law of inheritance. This rule is intended to prevent personal disputes within the family, and as a result, the exclusion of orphaned grandchildren may occur. The issue of excluding predeceased grandchildren in Muslim inheritance law remains a topic of debate. This is mainly due to the fact that many people lack a complete understanding of Islamic property law, which is secular and allows for the inclusion of all relatives, except for the deceased's children. To gain a comprehensive understanding of inheritance law, it is important to study the supplementary laws of wills and gifts as well. This paper will provide a summary of the Doctrine of Representation and the issue of exclusion in various Islamic legal systems, particularly *Hanafi* and *Shia* Law. The concept and meaning of this exclusion, as well as the reasoning behind it and the remedies provided to neglected heirs under Islamic law, will also be discussed.

I Introduction

MOST OF the debating area under the Muslim law of inheritance is the exclusion of predeceased grandchildren. The reason behind which is that most of the pupils have no grasp upon the over the complete property law of Islam which is purely secular in nature and does accommodate everyone leaving aside the deceased's children but all the relatives. The law of will and gift is complementary and supplementary to the law of inheritance and in order to understand the utility of the law of inheritance the study of the law of will and gift is inevitable. The property law concepts of Islam are little different from the contemporary concepts in India. A person during his/her whole life is absolute owner of his/her own property whether the property is inherited or self-acquired owned or acquired from any other sources. All the properties are one and absolute property of a person during his lifetime. There is no limited estate concept and at the same time there is no survivorship principle. But when a person takes his last breath immediately, he is disowned from all the properties and the property belongs to his heirs according to the shares of heirs given in The Holy Quran and in juristic verdicts which finds in the form of law of inheritance. Thus, a man can gift his whole property during his lifetime irrespective of his caste, creed and religion. There is no bar imposed by law on him to do so. After his demise since he lost his right in the property and the property automatically transfers among the heirs therefore, he has no right to interfere in the devolution of property after his demise. Only he is given

certain exemption to this rule *i.e.*, if during his lifetime he is looking after to any of his relation or he has too much affection and therefore he financially helps him and if he feels that his would be heirs would not take care of those relation and near and dear to whom the deceased was supporting. As far as *Hiba* is concerned it can only be completed after delivery of possession and in that case a person in order to help such type of relation, he has to disown himself and the possession and ownership would immediately be transferred to the donee and therefore an exception in the form of will has also been provided by property law of Islam and that is why since this is an exception this should not exceed the limit of one- third of total property. And in favour of the heirs a will can only be permitted by law only after obtaining the permission of other heirs otherwise the will is revocable. This rule reflects that the family should be saved from personal disputes and under this rule the exclusion of orphan grandchildren can be accommodated. In this context, a summary of “Doctrine of representation and the issue of exclusion in various Islamic legal systems particularly Hanafi and Shia Law is being presented in this piece of paper. To begin with we discuss the concept and meaning of this exclusion and what is the strategy behind it and what remedies are being provided to the neglected heirs under the law of Islam.

II Meaning and concept

For the purposes of succession, the word “representation “has two meanings, firstly, we may speak of representation to the estate of the deceased person and in this context, we mean personal representation’s., executor or administrator. The second meaning in the process whereby one person is said to represent the share receivable by him or her through another person who was himself or herself an heir.

It signifies that the heir of an heir apparent who dies before the opening of succession has the right to represent him (*i.e.*, the heir apparent) on the opening of succession, he will get his share of inheritance as the representative of heir apparent. In other words, a predeceased person is represented by his/her descendent and such decedent claims the share of the deceased as a substitute heir.

For example A has two sons B and C. B dies leaving behind a son D in life time of A. Now on the death of A, the succession of his property opens according to the principle of representation. D, the son of the predeceased son B, will get that share of A’s property which A would have got had he been alive at the time when the succession opens. It means D represents his father B. In the present paper we are concerned only with the second meaning.

Doctrine of representation includes in its preview the rules consequences and side effects of recognising representation as basic principle of law of succession and inheritance as explained above.

Doctrine of representation helps to decide the following two issues:

- (i) Who are heirs entitled to take a share amongst the competing relation.
- (ii) How much share is allotted to each of them.

Neither *Sunni* nor *Shia* law recognise the principle of representation to take the first issue to determine who is an heir. Both the schools apply the principle of “Nearer excludes more remote” on this issue.

For instance X dies leaving behind a son Y, predeceased son's son Z, the both *Sunni* and *Shia* school agree that Y will exclude the predeceased son's Z, because Z is one degree remote than Y hence exclude the Z on the principle, nearer in degree excludes more remote. The link which joined *i.e.*, Y, between Z and X is broken at the demise of the Y.

By applying the rule “nearer in the degree exclude more remote up to this stage *Sunni* and *Shia* laws has no difference, but in *Shia* law the daughter of the deceased also excludes the predeceased son's son because in *Shia* law there is no difference between agnate and cognate hence daughter being nearer in degree excludes son's son “Z” the more remote.

In the leading case *Moolla Cassim v. Moolla Abdul*:¹

it was observed by the Privy Council that, it is a well-known principle of Mohammadan Law that if any of the children of a man dies before the opening of succession to his estate, leaving the child behind, these grandchildren are entirely excluded from the inheritance by their uncles and aunts.

Once the question of entitlement of heirship is solved the next question is, how much share each heir will get? To solve the question of the quantum of shared *Sunni* law again does not accept the principle of representation. It considers the number of claimants and not the branches they represent. In other words, *Sunni* law determines share by applying the principle of per capita distribution. It does not recognise the principle of per stripe.

For instance P dies leaving behind three grandson(s) by predeceased son S₂, S₃ and S₄ by another predeceased son (S₁). According to the *Sunni* law the shares are allotted according to the principle of per capita and each son's son gets equally 1/3.

Here, *Shia* law accepts the principle of representation as a cardinal principle for fixation or determination of the quantum of shares in the property. The distribution of share is made per stripe *i.e.*, on the basis of branches the claimants represent under the *Shia* law, the rule of per capita distribution is not accepted and the principle of per stripe is allowed to work. So the descendants of one branch become entitled to take the share of their pre deceased father or mother as the case may be.

1 (1905) 33 Cal 173 at 178: 321 IA 177.

Hence the descendants of deceased son represent the son and take the share, which he would have taken if he was alive at the time when inheritance opens. Similarly the descendants of deceased daughters represent the son and take the share which she would have taken if she were living at the time when the inheritance opens.

This can be understood by naming five grandchildren A, B, X, Y and D. In this illustration A, B represent their father S_1 , X and Y represent S_2 , D represent S_3 . Descendants of S_1 , S_2 and S_3 take the share of their deceased fathers branch – wise. Hence the share of $A = 1/6$, $B = 1/6$, $x = 1/3$, $y = 2/9$ and $D = 1/9$.

But *Sunni* (Hanafi) law as it applies in India in a limited way recognizes the principle of representation when property is distributed among distant kindreds.

The view of Imam Mohd., renowned and famous *Hanafi* jurist as opposed to the other which in India recognise representation in a very limited sense. This is very well explained by following illustration:

A had three daughters D_1 , D_2 and D_3 . All of them died in his lifetime, D_1 left a son S_1 and a daughter D_4 , D_2 left a son S_2 and D_3 left a son S_3 , all these grandchildren of A dies in his life time leaving their children. In distant kindred class the distribution of property takes place in the time of generation where sex differs, hence D_4 represent as three female share because x has three children likewise S_1 represent one male share, S_2 represent two male share and S_3 represent one male share because each has one, two and one children respectively. After that allotment of shares the male share pool in one place and then distribute into 2:1 ratio likewise the female share also distribute in the same pattern. Under the Sunni law only to this extent, the representation is allowed to work.

The rule perfect exclusion from inheritance to use the language of *Al- Sirajiyah*, a famous treatise of Islamic law of inheritance is grounded on two principles.

- The first is that whoever is related to the deceased through any person, shall not inherit while that person is living, as a son's son with the son.
- The second principle is that nearest blood must take.

To illustrate the principle, Justice Mehmood adopted the language of Sir William Mac Naughten “the son of a person deceased shall not represent such person, if he dies 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 of his parental uncle. For instance, A, B and C are grandfather, father and son, the father B dies in life time of the grandfather A. In this case C shall not take jure - representation but the estate will go to the other son of A.

2 Sir William H. Mac Naghten, *Principles of Muhammadan Law* 152 (Calcutta, D. E. Cranenburgh 1881).

III Orientalist and imperialist

The famous orientalist William H. Mac Naghten in his book *Principles of Muhammadan Law* taking from *Baillie's digest of Muhammad law* which is English translation of celebrated source of Islamic law applied by the British courts, define exclusion as “Exclusion is of two kinds—partial and total, and partial exclusion is a reduction from one share to another. As regards total exclusion, there are six persons who are not subject to it. These are the father, the son, the husband, the mother, the daughter, and the wife. As regards all others besides these, the nearer excludes the more remote; and persons who are related through others do not inherit with them.” Accordingly as per Mac Naghten’s understanding the son of a person if he died before his father shall not stand in the same place as the deceased would have done had he been living, but shall be excluded from inheritance if he had a parental uncle.²

However, another western scholar of Islamic Law J.N.D Anderson is little critical on the Islamic law of inheritance on certain issues including the exclusion of orphan grandchildren. In this regard he opines that “ the major defect in the Islamic law of succession namely the fact that the children of deceased parents will be completely excluded from any right to inheritance from their Grand Parent by survival of an ‘Uncle’ (in Sunni Law) or even an Aunt (in *Shia* Law), on the principle that the nearer in degree will exclude the more remote, has proved so formidable that the reformers have been unable as yet to tackle it openly; and an attempt made in Lebanon in 1950 was defeated.”³

However, through major reforms in Muslim countries this rule is also made suitable as far as exclusion of orphaned grandchildren is concerned which is admitted by Anderson himself and we will discuss it later in detail.⁴

However, an Islamic Scholar Maulvi Mohammad Usmani⁵ pleads against the exclusion of the orphaned grandchildren as according to him the grandchildren also fall in to the category of sons and daughters. He quoted original sources of Islamic law in support of his view. He referred to Holi Quran:⁶— “God ordains you in respect of your children (*aulad*) that the share of one male child (*dhakar*) is equivalent to that of two female children (*unthayain*).”

He further states that some of the *Ulama* viewed that in this verse the word *aulad* means only sons and daughters and similarly the expressions *dhakar* and *unthayain* means one son and two daughters respectively. According to them the grandson and

3 J.N.D. Anderson, *Islamic Law in the Modern World*, 76 (London, Stevenson’s and Sons Ltd.(1st Publication,1959).

4 *Ibid.*

5 The renowned Islamic Scholar is M.A from Allahabad University and retired teacher from Rampur, Uttar Pradesh. He also authored Islamic books namely *Kitab-o-Hikmat*, *Ayat-i-Mukhamat*, *Darb-i-Khalil* and several other works in Urdu.

granddaughter are not *aulad*, and therefore after the death of a person his or her children will not inherit from that person's parents (*i.e.*, their own grandparents). In legal terminology these orphaned grand children would be known as *mahjub*. However Usmani testing this understanding on the touchstone of simple exegetical principles this opinion of the jurists that *aulad* means only sons and daughters and not any their descending generations seems incorrect. Usmani opined that in common parlance in the Arabic language the word *aulad* is used also to mean grandchildren in addition to children. He furnished the example of Imam Hasan and Imam Hussain are described as *Aulad-e-Rasool* (Prophets Children) though they were both in fact his daughter Fatima's children. Apart from this he furnishes another illustration *i.e.*, in the battle of Hunayan when forsaken by most of his fellow warriors, the Prophet reportedly recited in despair;⁷ I am the Prophet and not a pretender; I am the son of *Abd-al-Muttalib*. It is well known that the Prophet was *Abd-al-Muttalib's* grandson, but he described himself as his son. Because in Arabic language it was common to refer the sons and daughters of the son as sons (*aulad*).

Usmani further quoted chapter IV of the Holi Quran where expression *aulad* is not confined to sons and daughters only, but should be extended also their substitutes *i.e.*, the grandchildren on both the sons and the daughters side. He also tried to furnish the correct translation of the verse⁸ as under

God ordains you in respect of your descendants that the
Share of one male is equivalent to that of two females

Thus, it is well known that the closest heirs of the parents are their children but if the children die during the lifetime of their parents the latter love the children of the deceased as their own children and would in no case like that their property should go to relatives other than those grandchildren. He further argues that⁹ the traditional rule of Islamic law on this point has never been accepted willingly by any grandparent.

Immediately after the demise of son or daughter the father or the mother starts wondering how to save his or her grand children from the effects this traditional legal rule and often they make a will or a gift in favour of those grand children so that they are not left to the mercy of their uncles and aunts. He emphasized over Islamic view point of orphaned grandchildren in the light of Quran and *Hadith*. The Holi Quran is replete with the instructions of merciful behaviour time and again towards orphan's and their property which was usually usurped in the pre-Islamic Arabia and the orphan was laid destitute. God is not prepared to tolerate any cruelty or excess in dealing with

6 *Quran* IV: II.

7 See, Mohammad Usmani, "Orphaned Grandchildren's Right to Inheritance in Islamic Law" III (2) *Islamic and Comparative Law Quarterly* 129(1983).

8 *Ibid.*

9 *Ibid.*

orphans and those who ill-treat orphans are in His sight great sinners. The Quran ordains¹⁰

Verily those who eat away the property of the orphans
fill their bellies with burning ember and will soon be thrown in to the
Hell.

Usmani agrees that the objects and aims of the above verse and many other similar verses of the Quran warn the people against ill treatment of the orphan. The traditional interpretation of Qur'anic verse excluding orphaned grand children from the property of their grandparents is conflicting to the general prescription of Quran which bestows mercy on the orphans and creates duty on the society to be merciful and well wishing towards them. There is difference between the exclusionary interpretation of orphaned grand children from the property of their grandparents and the other verses of Quran which warns the people toward the orphans property.

As far as *Hadith* is concerned on this aspect Usmani further quotes the celebrated scholar Maulana Moududi, who interpreting verses 9 and 10 of chapter IV of the Quran and writes,¹¹ "according to a tradition after the battle of Uhad the Widow of Saad -bin-Rabbi came to the Prophet along with her two daughters and told him that their uncles had usurped their property and so she was worried about their marriage prospects. It was in this context that these verses were revealed."

Usmani, opined that the above interpretation of Maulana Moududi is in agreement with the convinced opinion that orphan grand children are not to be excluded from the estate of their grandparents.

Winding up his opinion on this aspect Usmani concludes that:¹²

Nobody can dispute the fact that, in accordance with the sound principle of "nearer excludes remoter" in the presence of a living son or daughter his or her children can not be heirs of the grandparents. In our opinion, however, this rule of law of inheritance has been unduly extended to the case of those grand children whose link- parent has died during the lifetime of the grandparents. By the process of *taqlid* (blind imitation) this undue extension of law, probably made during the hey day of evolution of Islamic legal system, has unfortunately become the established law of the Muslim world. Discarding blind *taqlid* if we ponder over this matter logically and in the light of the policy of the Quran, we will have to think about this matter afresh.

10 Quran, IV:10.

11 A.A Maududi, *Tafhim al-Quran*, I:352.

12 *Supra* note 6 at 131.

However, a celebrated scholar and jurist Arshad Masood¹³ is not in agreement with the version of Maulvi Mohammad Usmani as stated above, who suggested giving fresh thought to the rule excluding grandchildren from inheriting their grandparents in the presence of their uncles (or under the aunts under *Shia* law). Usmani has viewed the abolition of the rule not by educating any legislative interference but by giving a noble interpretation to the Holy Quran. Masood shows that Usmani's plea does not hold any water because it is lacking with logic and policy of the Quran as he has claimed. Masood in support of his view argues that the principle of exclusion is an established principle of law of inheritance and cannot be done away without juristic exercise.

The opinion of Muslim jurist that the word *awlad* used in the opening portion of chapter 4, verse second means only son and daughter and not their descending generations. It seems to be incorrect because in common parlance in the Arabic language the word *awlad* is used also to mean grandchildren in addition to children, as interpreted by Usmani. Masood also mentioned the further argument in against the rule of exclusion of orphaned grandchildren and supported his stand from Quran and *Hadith* as mentioned above. However, Masood categorically refuted Usmani's argument. He argues as under:

- i) Every word is used in real or primary sense and may also be used in a metaphorical or secondary sense. Real sense of a word is which only the word itself and no substitute word will convey. Thus metaphorical meaning of *awlad* as grandchildren referred to by Usmani cannot be real meaning in the case of exclusion. Every word shall under the same condition and circumstances carry only one sense which may be either real or metaphorical. It cannot carry both senses simultaneously.
- ii) Every word is presumed to carry its real meaning for which the word has been coined. Unless it is shown that only metaphorical sense is indicated. *Awlad* is the plural of *walad* which is derived from *walada*. It means "he begot", i.e., "to beget" in English usage. So *walad* means one who is begotten which may be either a male or a female. The real meaning of the *walad* to all Muslims whether *Sunni* or *Shia* is one begotten from one's own loins, for example a son or a daughter. Its metaphorical meaning is one begotten through a male intermediary for example son's son; son's son's son's daughter; son's son's daughter. Thus the issues of one son are like one's own because the lineage in Islam is traced through father. Therefore all males or females begotten through a female intermediary are agnatic relations known as *asaba* (residuiaries). Those begotten through a female intermediary are not included by the *Sunnis* even in the metaphorical meaning of *walad* because the daughters children belong in

13 Former Professor Faculty of Law, AMU, Aligarh, Also former professor Ahmadu Bello University, Zaira, Nigeria.

lineage to their own father. Therefore all relations whether male or female are cognatic relations known as *dhaw al arham* (distant kindreds), a term which also includes those agnates who are not inheriting as *asaba*. However, to the *Shias* all children begotten through a male or a female, intermediary are included in the metaphorical meanings of the word *awlad*.

The word of Holy Quran, the tradition of Holy Prophet (PBUH) and *Ijtihad* of Muslim Jurists have established a clear file of inheritance that after giving from the property left by the deceased (as reduced by fulfilling his will and paying his debts) the share fixed by Holy Quran for *dhaw-ul-furd* (shares) the remainder should go *asaba* (residuary) *i.e.*, male or femalerelated to deceased through males and whose shares is not fixed) in order of proximity of their relationship to the deceased so that nearer *asaba* should take the whole of it to the exclusion of the remoter under this rule of a person.¹⁴

While under *Shia* law even the presence of a daughter will deprive the grandchildren from inheriting him.¹⁵ Masood also quoted a tradition of prophet attributed to *Zayd bin Thabit*, which is as under:¹⁶

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).

From the above tradition Masood draws inference that in the presence of sons and daughters and grandsons and granddaughters do not inherit from their parents and why a grandchild who has become orphan in the lifetime of grandparent cannot inherit his grandparent in the presence of his uncle (who as his father *asaba* takes the entire estate). When the grandchild's own father died the uncle received nothing from him by way of inheritance, it is therefore, not unfair that when the uncle's father has died the grandchild should receive nothing from him by way of inheritance. This is perfectly logical arrangement which the entire Ummah has accepted over the centuries.¹⁷

Masood has categorically answered all the arguments initiated by Usmani in the light of Holy Quran and the traditions of the Prophet and lastly he concluded that in the light of these counter rejoinder in the light of original source of Islamic law stated that it becomes clear that Usmani's plea gets no support from the Holy Quran. Rather

14 For details see, Arshad Masood, "Rejoinder to Maulvi Muhammad Usmani, Orphaned Grandchildren's right to Inheritance in Islamic Law" 3 (2) *Islamic CLQ* 129 – 31 (June 1983) in *Islamic Law* 281(1983).

15 Al-hilli, Muhaqiq Abu Jafer, *Share-al-Islam* vol II 183 as cited *ibid*.

16 Sahih- al-Bukhari (M.M. Khan) *Ankara* 479 (1977).

17 Al-Jassas, *Abkam Al-Quran*, Vol. II, 96 and Sarakhsi, *Kitab al-Mabsut* XXIX, 141.

the Holy Quran stands to oppose it. He further concluded that we shall never lose sight of the most important fact that it is Allah and not the estate of propositus who is the provider, nourisher, sustainer and cherisher of orphaned grandchildren (or for the matters of all other beings).¹⁸

The exclusionary rule of inheritance coupled with the softening devices of bequeath and gift formed such a balanced as well as rounded system of succession that all the rightly guided caliphs, companions of Holy Prophet (PBUH) their successor followers of successors, imams and jurist of different school of Islamic Jurisprudence followed down to 10 century.

However, it may be mentioned after going through the views of the above two scholars (one oriental and one modern) that the permission given by the Holy Quran and Holy Prophet to every Muslim to make will up to one-third or a gift up to the whole property devices have been provided for reducing possible hardship that the rule might cause the persons excluded inheritance particularly orphaned grand children. It will not disturb the noble law of inheritance which is one-third of the total knowledge¹⁹ and is appreciated not only by Muslim scholars but western scholars and orientalist also.

IV Will and gift as complementary and supplementary of law of inheritance

The exclusion of orphaned grandchildren from inheritance from their grandparents could never be serious practical problems because the cases of exclusion have not been too numerous. The deceased parents of orphaned inherit, and the grandparent normally used the devices of will and gift to provide for orphaned children and in the context of humanitarian ethos of Muslim society orphans usually received help, assistance, support from their nearer relative particularly uncles and aunt.

The Islamic law is divine law and the basic rules derived from the Divine Book, Quran, rule regarding the inheritance is also derived from the Quran and *Hadith*. Quran speak regarding allotment of share:²⁰

To (benefit) every one (Nisha)
 We have appointed
 Share and heirs
 To property left
 By parent and relatives
 To those, also, to whom

18 See for details *supra note* 13 at 281-298.

19 Muslim jurist gave deal of importance to the laws of inheritance and they never tried of repeating the saying of the Prophet "Learn the laws of inheritance and teach them to the pupil", See Siraj Khan A.Rumsey (Cal) 2nd edn. as cited in Asaf A.A. Fyzee, *Outlines of Muhammadan Law*, 314 (2008).

20 Quran IV:33.

Your right hand was pledged
 Give their due portion
 For truly God is witness
 To all thing

After giving the Quranic share the left property go to residuary (*Asaba*) class. The son's son is also in residuary class. In residuary class the rule established in the light of Quran, *Hadith* and *Itibad* of the Muslim jurist the rule is nearer should take whole and exclusion of remoter.

God gave clear jurisdiction in various places of the Quran regarding the rights of orphans and destitute persons. Quran says:²¹ "And their wealth there is acknowledged right for the needy and destitute".

The clear meaning of this verse is that anyone who asks for help and anyone who is suffering from deprivations has right in the property and wealth of Muslim, irrespective of fact whether he belongs to this nation, that nation, to this country, to that country, to this race or to that race. If you are in the position to help or if you come to know that he is in need, it is your duty to help him. God has established his destitute right over you which you have to honour as a Muslim. Quran says in the next verse as follows:²²

Save god, and joint not
 Any partner with him
 And do good,
 To parents, kind folks,
 Orphans, those in need,
 Neighbour who are near,
 Neighbour who are stranger,
 The companion by your side,
 The way farer (ye need),
 And what your right hand possesses,
 For God loveth not
 The arrogant, the Vainglorious

Not only the kindred but even orphans, the poor if present at this time of the distribution of property, should be given something and spoken kindly.²³

But if at the time of division,
 Other relatives, or orphans,

21 Quran II:12.

22 Quran IV:36.

23 Quran IV:8.

Or poor, are present,
 Feed them out of the (property)
 And speak to them
 Word of kindness and justice

We regard the orphan people should think what would happen to their own child if they happen to leave them behind in a helpless condition, they should not therefore do them wrong. Quran ordains: ²⁴

Let those (disposing an estate)
 Have the same fear in their minds
 As they would have for their own
 If they had left a helpless family behind
 Let them fear God, and speak,
 Words of appropriate (Comfort).

There are rules of course for the disposal of intestate's property. But it is good that a dying man or woman should have his/her own free will, think of his parents and next of kin, not in a spirit of injustice to others, but in the spirit of love and reverence for those who cherished him Quran says regarding bequest: ²⁵

It is prescribed for the God fearing
 When death approaches
 And of you, if he have
 Any goods, that he make a bequest
 To parent and next of kin
 According to reasonable usage
 This is due

An oral will is allowed, but it is expected the testator will be just to his heirs and not depart from what is considered to be equitable. For this reason, definite share were laid down for their later. ²⁶ It defines and limits the testamentary power. But do not abrogate for example amongst kin there are persons (e.g., an orphan grandson in the presence of surviving sons), who would not inherit under the intestate scheme, and the testator might live to provide for them. Again, these may be outsider who he may wish to provide and jurist have held that he has power of disposition upto one third of his property.

24 Quran IV:9.

25 Quran II:180.

26 Quran IV:11-14.

The Prophet (PBUH) said it is not right for a Muslim who has property to bequeath that he should pass two nights without having a written will with him.²⁷

From the above explanation of holy verses and the Prophet's traditions, it is clear that God imposes the duty on a Muslim to help the needy and orphan children. The orphan child of the pre deceased son is the kins and according to the Quranic verse this is the duty of Muslim to help, maintain and make will in favour of orphan children.

The above observation and explanation of the verse of Quran also clearly show that in fact the more possible reason behind the survival of the rule against representation seem to be the fact that the law of inheritance in Islam is very much connected with the provisions of Will and Gift and the provisions of Will and Gift fulfil the requirement of this gap which arises the rule of nearer excludes remoter.

V Obligatory will and role of Muslim countries

As we have discussed above, this type of problem of inheritance is resolved on the ground of doctrine of representation under the Islamic law of property by providing a substitute of will. This institution of will was made obligatory in some Muslim countries. Such provisions are found to mitigate possible hardship of predeceased children. Such legal provisions are enacted in the Syria, Egypt,²⁸ Morocco,²⁹ Iraq,³⁰ Jordan, Kuwait and Tunisia³¹ and as well as in this sub-continent namely Pakistan and Bangladesh.³²

Syria, Egypt and Morocco evolved a system of obligatory Bequeaths. Under the Egyptian law of testamentary Disposal there is a provision, that a grandparent must make a bequest to grandchildren of their pre deceased child who would have inherited on intestacy had he survived. It has been provided that such "obligatory Bequeath" should not exceed more than one-third property of deceased. In case of grandparent fails to make such bequeath its existence could be presumed by the court. The obligatory bequest has a priority even over the regular bequeath.

In Morocco such obligatory bequeaths operate only in favour of the children of pre-deceased son, and not of the daughter (same is the rule in Syria).

Pakistan goes a step ahead of all these Middle Eastern countries in effecting a clear and total break with traditional *Shariah* doctrine, when Muslim family follows the

27 *Kitab –Al Waisyya*, Book 13 Number 3987.

28 N.J. Coulson, *Succession in the Muslim Family*, 31 (1971).

29 Moroccan Code of Personal Status, 1958

30 Chibli Mallat, *Introduction, in Islamic Family Law 3* (Chibli Mallat and Jane Connors eds., 2nd ed. 1990) Also the Law of Personal Status 1959.

31 Tunisian Law of Personal Status, 1956.

32 Yasir Billoo, "Change and Authority in Islamic Law: The Islamic Law of Inheritance in Modern Muslim States," *University of Detroit Mercy Law Review* 84 (5) (Summer 2007): 637-654.

ordinance passed in 1961, providing for the rule of representational succession by lineal descendant as an integral part of the laws of inheritance. Section 4 of Muslim Family Law Ordinance, 1961 reads as follows: In the event of death of death of any son or daughter of the properties before the opening of succession son and daughter if any, living at the time of succession opens shall per strips receive a share equivalent which son or daughter, as the case may be would have received if they were alive.³³

This section which was imposed by nuptial law, administrator General Muhammad Ayub Khan, would surely be perceived no less than orientalist like the Mac Naghten, which reflect the representational system of succession prevailing in Roman Law, English Law and Hindu Law.

In passing these laws, the reforms had disregarded the traditional opinion of companions of the Holy Prophet (PBUH) and a vast majority of Muslim jurists. But the minority of companions of Holy Prophet (PBUH) and jurists like Taus Hassanal Basri, Ibn Hazm which favoured the existence of a duty in the deceased to make a Will in favour of such relations as are excluded from inheritance were considered and preferred.

An enthusiastic supporter of the orphaned grandchildren's claims to be given a right to inherit the grandparent estate in the presence of their uncle and aunt.

Under *Shia* law, find so saved Juristic basis for the now ruler reform by Pakistan Muslim Family law ordinance 1961 certainly protects the interest of orphaned grandchildren both simply and effectively, but it does not so at the expense of radically distorting the Islamic system of inheritance a single instance must suffice.

Should A died survived by a daughter and a daughter of pre-deceased son A, estate would be divided between them in *Sunni* law, initially in the ratio of half to daughter and one sixth to sons daughter (and if there was no other heir three quarter and one quarter respectively), whereas the proposition could be turned upside down according to law in Pakistan, where daughter would take only one third which son's daughter would receive two third.

VI Conclusion

The above Quranic verses and Prophetic traditions explicitly reveal that there is no problem of following doctrine of representation in strict sense because under this doctrine if, the orphan grandchildren is excluded from the property of grandparents they can easily be accommodated through the law of gift and will and it has now been applicable in almost all the Muslim countries in the name of obligatory bequest. The people who don't try to understand the Islamic law of property as a whole sometimes

33 A.W.M Abdul Huq, "S. 4 of the Muslim Family Laws Ordinance, 1961: A Critic", *The Northern University Journal of Law*, Vol I (2010).

confuse and create the confusion among others that Muslim law of inheritance is a little harsh about the orphan grandchildren. However, if we study the law and its application in Muslim countries it is clear that if the law is strictly adhered to the doctrine of representation as it is the unique law of inheritance among all systems. But the Islamic law on the other hand provides its complementary and supplementary provisions in law the law of gift and will and these provisions do ensure the property rights of orphan grandchildren in a better manner and place them in a better economic position.

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