ISLAMIC LAW OF TESTATE AND INTESTATE SUCCESSION AND THE ADMINISTRATION OF DECEASED PERSONS' ASSETS

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AS IS WELL known, the Islamic system of inheritance holds pride of place in the *Sharī'a*. There is even a Tradition which alleges that the Prophet of Islam said that a knowledge of the prescribed shares in the Islamic system of inheritance constitutes one-half of the sum total of human knowledge. I would find this spurious Tradition a great comfort if I could accept it, since I certainly know more about *this* half of human knowledge than I do about the other half! All the same—excellent, in the main, though this system of inheritance is—there are a number of points which give rise to questioning, and even hardship, in terms of contemporary society.

Here is a short list of the points which immediately occur to me, jotted down in no particularly logical sequence.

The problem of orphaned grandchildren

To put this problem in its simplest form, if A has two sons, B and C, and if B dies in A's lifetime leaving a family of several small children, these children will all be completely excluded from any share in A's estate when he dies (however much they need financial help, and regardless of whether A supported them during his life-time) if C is still alive, since he is "nearer in degree" to A than they are. This may have worked reasonably well in a tribal society, in which an uncle could, perhaps, be trusted to treat his brother's children as his own, but it often causes much suffering today.

Relief for these orphaned grandchildren can be provided in one of two quite different ways. As long ago as the 1940s a proposal was made in Lebanon that the doctrine of representation should be introduced by legislation; but the suggestion was dropped, so far as Muslims were concerned, because of the opposition to which it gave rise. But this doctrine was in fact introduced in Pakistan by the Muslim Family Laws Ordinance 1961.[1]

1. See s. 4.

This certainly protects the interests of orphaned grandchildren both simply and effectively, but it does so at the expense of radically distorting the Islamic system of inheritance. Of this a single instance must suffice. Should A die survived by a daughter and the daughter of a predeceased son, A's estate would be divided between them, in *Sunnī* law, initially in the ratio of half to the daughter and one-sixth to the son's daughter (and then if there were no other heir, three-quarters and one-quarter respectively), whereas the position would be turned upside down according to the law in Pakistan, where the daughter would take only one-third while the son's daughter would receive two-thirds.

The other way in which this problem has been tackled is the system of obligatory bequests—which now applies, although on somewhat variant principles, in Egypt,[2] Syria,[3] Tunisia[4] and Morocco.[5] According to this system the grandparent is compelled to make a bequest, in favour of such orphaned grandchildren, of what their deceased parent would have taken —provided, always, that this must not exceed the "bequeathable third"; and these obligatory bequests, which are to be divided between the grandchildren on the principle of "double share to the male", will take precedence over any voluntary bequests. If the grandparent fails to make such a bequest, moreover, the courts will act as though he had done so. This ingenious device can find a considerable degree of support in the Islamic texts; and it has the merit of meeting the needs of the orphaned grandchildren without in any way upsetting the structure of the law of intestate succession.

The problem of the paternal grandfather when in competition with germane or consanguine brothers or sisters

Here, according to the dominant *Hanafī* doctrine, the grandfather will completely exclude all brothers and sisters. And this, in its turn, may prove very unsatisfactory, since the grandfather may himself soon die and his whole estate go to his surviving children—to the complete exclusion of the brothers and sisters of the first deceased. But this rule has never been followed by any other school of law except the *Ibādī*, and even the two Companions of Abū Hanīfa substantially agreed with the *Mālikīs*, *Shāfi'īs* and *Hanbalīs* in this regard. There are, in fact, three different ways in which an estate can be shared between the grandfather and the brothers and sisters in such a case—attributed, respectively, to Zayd ibn Thābit, 'Alī ibn Abī Tālib and Ibn Mas'ūd. The Egyptians have introduced legislation along these lines,[6] and this has been followed in some other Muslim countries[7].

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2. The Law of Bequests 1946, arts. 76-79.
3. The Law of Personal Status 1953, art. 257.
4. The Code of Personal Status 1956, arts. 191-192.
5. The Code of Personal Status 1958, arts. 266-69.
6. The Law of Inheritance 1943, art. 22.
7. The Sudan and Syria.

The problem of a widow's share

One of the least satisfactory features in the Islamic law of inheritance is the widow's share, which is never more than one-quarter and in most cases (*i.e.*, where the deceased leaves any child) is limited to one-eighth—and even this has to be divided between two, three or four wives, should the deceased have indulged in multiple marriages. The wife is also commonly excluded from the *radd* (or return) in the presence of *any* other heir. But authority exists among early jurists for allowing a wife to be included with other Qur'anic sharers in the 'return'; and she would also in many cases profit greatly from the suggestion made immediately below.

The problem of restrictions on bequests

As is well known, a Muslim testator may not make bequests which, in aggregate, exceed one-third of his net estate—unless, at least, his heirs consent thereto after his death (or, in the *Shī'ī* view, also during his life time). This is in most cases eminently reasonable. But a *Sunnī* Muslim is also precluded from making any bequest whatever to one who is entitled to a share in his estate as an heir—unless, again, the other heirs consent thereto after his death. This rule is intended to prevent him from altering in any way the division of his estate between different heirs, as prescribed under the law of inheritance. Again, moreover, this is perfectly reasonable as a general rule; but circumstances often arise in which there may be excellent reasons for making special provision for a disabled child, for example, one who has been deprived of the education or financial opportunities enjoyed by the other members of the family. The *Shī'ī* law has always allowed this; and such freedom of bequest, within the bequeathable third, would seem to be the natural implication of some of the verses of inheritance in the *Qur'ān*. So, recent reforms in Egypt,[8] the Sudan[9] and Iraq[10] have made this lawful for all Muslims. It is obvious, moreover, how much the relaxation of the rule previously accepted by *Sunnīs* in this matter would benefit widows—since their husbands could then leave them a bequest to augment their pitiably inadequate share on intestacy.

The problem of the immediate or 'nuclear' family

The *Sunnī* law, unlike the *Shī'a*, regards the Qur'anic provisions with regard to inheritance as super-imposed on the pre-Islamic system of agnatic succession. The result is that should A die with a daughter as his only close relative she will not, in most cases, be allowed to take more than one-half of his estate, and the other half will go to some distant agnatic relative

8. The Law of Bequests 1946, art. 37.
9. Judicial Circular No. 53 of 1945, art. 1.
10. The Law of Personal Status 1959, art. 73, read with the Iraqi Civil Code 1951, art. 408.

whom he may never have met or of whom he may heartily disapprove. It is for this reason that quite a number of *Sunnīs* in Iraq became *Shī'īs*, since under *Ithnā 'Asharī* law the daughter, in such a case, would first take her share of one-half, and then the other half under the doctrine of *radd*. But the broad outline of the *Shī'ī* system of inheritance has now been enacted as the general law for all Iraqis.[11] In Tunisia, too, an amendment to the Law of Personal Status 1959 provides that a daughter or son's daughter will, in such circumstances, take the rest of the estate by 'return', even at the expense of a brother or sister.[12]

The problem of the law of waqf

We shall be considering the law of *waqf* at another session of our seminar. So, I mention it here only to remark that it is, in part, the extreme rigidity of the Islamic law of testate and intestate succession which has prompted those who possess considerable property to resort to family *waqfs* as the only way in which they can make other, and more flexible, provision for their relatives and friends. There are, however, several objections to this procedure, unless the law of *waqf* is itself reformed, for the multiplication of perpetuities is clearly inimical to national development. Again, it seems wrong that someone should be able completely to escape from his obligations to his family, or to some of its members, merely by resorting to the creation of a private *waqf*. It is for these reasons, among others, that private *waqfs* have been abolished in Syria, Egypt and Tunisia and that the law relating to such *waqfs* has been reformed in Lebanon. Under this legislation private *waqfs* may not be founded, or kept in being, for more than a limited period of time, and close relatives of the founder may not be completely excluded from sharing in their income.

The problem of one who causes the testator's death

Under the *Hanafī* law, it is notorious that one whose *direct* action causes the death of a relative, though accidental this may be, will be completely excluded from any share in his estate, while one who deliberately contrives his death in some *indirect* way will not be so excluded. This seems singularly illogical, and several Muslim countries have enacted legislation adopting the *Mālikī* law on this point—namely, that one who intentionally kills or causes the death of another, directly or indirectly, will be precluded from any right to inherit from him, while one who kills another by accident, even by a direct act, such as shooting a pistol or flinging a missile, will not suffer any such deprivation.[13]

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11. The Law of Personal Status 1959 (as amended by Law No. 1 of 1963), arts. 86-91.
12. Art. 143A.
13. See, for instance, Egyptian Law of Inheritance 1943, art. 5; Tunisian Code of Personal Status 1956, art. 88; and Moroccan Code of Personal Status 1958, art. 229.

The problem of uterine brothers surviving along with brothers of the full blood

A further point is the problem known as the *Himāriyya*. Under *Hanafī* law it sometimes happens that brothers and sisters of the full blood, who inherit as agnates or residuaries, are excluded from taking anything in an estate, while brothers or sisters of the uterine blood, who inherit as Qur'anic heirs, will be entitled to their fixed shares. The other *Sunnī* schools have all followed the later decision of the Caliph 'Umar on this point: namely, that those of the full blood may, in such circumstances, claim also to be related to the deceased through their mother, and thus entitled to participate in the share allotted to uterines. This has been now enforced in some Muslim countries.[14]

The problem of embryo in inheritance

Under the *Hanafī* law a baby who is alive when half born but then dies is entitled to inherit and pass inheritance; and so is an embryo born dead as a result of an assault (deliberate or accidental) on the mother. In the other schools, on the other hand, a baby must be alive when it has wholly emerged from its mother's body, if it is to inherit; the embryo born dead will in no circumstances succeed; and, on one view,[15] even the blood-money (*ghirra*) normally payable in such circumstances will go not to the infant (*i.e.*, its heirs) but rather to its mother, who will thus be compensated for the loss of what can still be regarded as a part of her own body.

Administration of deceased persons' assets

It is also noteworthy that judge-made law in this sub-continent has in fact departed from the pure *Hanafī* doctrine, consciously or unconsciously, in a number of different points—*e.g.*, in this context, the rules laid down by Mahmood, J. in *Jafri Begum's* case[16], regarding the devolution of a deceased person's estate, as soon as he dies, on his heirs, and their personal responsibility for their due proportion of his debts. This means, of course, that they can pass a good title in any of the deceased's properties to a *bona fide* purchaser for value; and that the creditors of the deceased are restricted to suing the heirs, sometimes one by one, for their share of the deceased's debts, and can never follow his property into the hands of a purchaser. This is directly contrary to the *Hanafī* law.

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14. Egypt, the Sudan and Syria.
15. Now adopted in the Egyptian Law of Inheritance 1943.
16. *Jafri Begum* v. *Amir Mohammad Khan* (1805) 7 All. 822.