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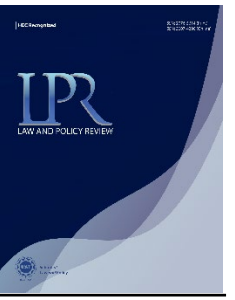

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Inheritance Rights of Orphaned Grandchildren under Section 4 of Muslim Family Law Ordinance, 1961 and its Alternative Solutions

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Abstract

Islamic law of inheritance has extensively explained the entitlement and shares of different legal heirs in the estate of the deceased person. The shares of heirs are fixed and Allah Almighty knows its wisdom. Humans cannot meticulously comprehend its logic. For inheriting the share in the estate of propositus, the heir must be in nearer degree to the deceased person and must be alive at the time of the opening of the succession. However, heirs who are in distant relation to the deceased and also who are not alive upon the demise of the deceased are excluded from inheritance. In the classical law of inheritance, children of predeceased son/daughter (i.e., grandchildren) do not inherit any share from the estate of propositus if the direct children (sons or daughters) of the deceased are still alive. Therefore, for the protection of the inheritance rights of orphaned grandchildren, Section 4 of the Muslim Family Laws Ordinance 1961(hereinafter MFLO) was enacted. Section 4 grants a share to orphaned grandchildren under the principle of representational succession. This provision of law deviates from the traditional scheme of inheritance. Finally, in the case of Allah Rakha v. Federation of Pakistan (2000), the Federal Shariat Court declared it an un-Islamic provision of law. This article explores the place of orphaned grandchildren in the classical Islamic law of inheritance. It also examines the representational succession under Section 4 along with its different alternatives. This article concludes that Section 4 is a controvertible provision and its judicial construction is also multiplicate. Therefore, it is the responsibility of the state to devise welfare schemes for redressing the economic grievances of orphaned grandchildren.

***Keywords*:** alternatives, classical Islamic law, inheritance, orphaned grandchildren, section 4, state responsibility, shares, the commission

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Introduction

Inheritance refers to the transfer of property, knowledge, and respect from one person to another (Cheema, 2017). Islamic law of inheritance is a source of pride for Muslims. No other field of law has been explained with such meticulous precision as the law of inheritance (Anderson, 1965). Its main objective is to do justice to all heirs of a deceased person (Cheema, 2017). Its basic principles are ordained by Allah Almighty and explained by the Holy Prophet (PBUH) (Chowdhury, 1964). There is little doubt about the excellencies of the entire system of Islamic law of inheritance (Anderson, 1965).

Under the traditional Islamic law of inheritance, the children of predeceased son and daughter usually do not inherit any share from the estate of propositus in the presence of the direct children (Mulla et al., 1968). Their exclusion is made on the basic rule of inheritance that nearer in degree excludes the remoter relations (Ahmad, 2022). However, to reduce the economic and social vulnerability of grandchildren, the Commission on Marriage and Family Laws (constituted in 1955 by the then Pakistani government) proposed recommendations (Huq, 2010). Later on, according to these recommendations, Section 4 of the Muslim Family Laws Ordinance 1961 (hereinafter MFLO) was enacted. Section 4 granted a share to orphaned grandchildren in the estate of their grandparent, equivalent to the share their predeceased parent would have received (Ahmad, 1959). Section 4 was severely criticized by scholars at that time (Usmani, 1963). The principle of representational succession it introduced was rejected by all Sunni schools of thought (Chowdhury, 1964).

This article aims to trace the true position of orphaned grandchildren in the traditional Islamic law of inheritance. Besides introduction and conclusion, this article is divided into three sections. The first section explains the inheritance rights of orphaned grandchildren in the traditional law of inheritance. The second section examines the proponents and opponents of Section 4/representational succession. The third section analyses different alternatives of Section 4 including the responsibility of the state toward orphaned grandchildren and other destitute individuals.

Literature Review

According to Cheema (2017), inheritance can be defined as the transfer of ownership from the estate of a deceased person to his legal heirs. The estate

can consist of both movable and immovable properties. There are three conditions for inheritance in classical Islamic law. First, the chapter of inheritance is only opened upon the death of a person. Second, only those persons who are alive at the time of the opening of succession are entitled to receive their share. A dead person cannot inherit anything. Third, before inheriting any share the entitlement of the proposed heir must be proved.

Mulla et al. (1968) asserts that most scholars have recognized three categories of legal heirs in classical Islamic law, such as sharer, residuary, and distant kindred. Sharers are those legal heirs whose shares are specified by the Holy Quran, Sunnah, or Ijma. According to Sunni's jurisprudence, there are twelve sharers (Coulson, 1971). If anything is left, after giving shares to the sharers, that will be distributed among residuaries following their order of priority (Cheema, 2017; Khan, 2007). Residuaries inherit on the principle that the nearer in relation will exclude the remoter in relation. For instance, in the presence of the son of the deceased, the son's son will not inherit. All those relatives who do not fall in the category of sharers and residuaries are included in distant kindred (Mulla et al., 1968).

Usmani (1963) refers to a verse from the Holy Quran (4:7) that outlines the inheritance rights of legal heirs. The verse states: 'From what is left by parents and those nearest related there is a share for men and a share for women whether the property be small or large a determinate share'. He proposes that in this ayat, Allah Almighty has explained two fundamentals of inheritance. The first principle is that inheritance is not based on poverty and neediness, but rather on the standard of relation with the deceased and nearness with him. And the second is, although all sons of Adam are relatives of each other, nearer in relation will deprive the remoter in relation. According to Munir (2018), most scholars have considered the second fundamental as a foundational principle of the law of inheritance.

Similarly, another verse of the Holy Quran (4:33) further confirms the entitlement of legal heirs to inherit from the estate left by the deceased parents and relatives. The principle of exclusion (Hajb) is another important principle in the Islamic law of inheritance. According to this principle, all legal heirs do not inherit at the same time. And, certain legal heirs are either fully or partially excluded by the nearer relatives (Ullah, 2018). Hence grandchildren are excluded in the presence of direct children of propositus (Ahmad, 2022).

According to Faruki (1965), all four schools of Sunni unanimously agree on the point that in the presence of the son of propositus, the grandchild from the predeceased son/daughter cannot inherit any share of the estate. Usmani (1963) clarifies that there is Ijma among all companions of the Prophet (PBUH), their successors, all Imams, jurists, and scholars of the ummah on the point that in the presence of a son, the grandson will not inherit. It is such strong evidence that it is regarded as indisputable among Muslims.

This research work is valuable for several reasons. It enables the lawmakers to amend Section 4 and replace it with better provisions of law. It showcases the responsibility of the state towards orphaned and needy individuals. And, it assists the policymakers in devising welfare schemes for them.

Research Methodology

This study examines the inheritance rights of orphaned grandchildren under the classical Islamic law of inheritance. It investigates the circumstances that were responsible for the formulation of Section 4 of MFLO, 1961. This paper probes into proponents and opponents of Section 4. Furthermore, it evaluates the grievances of orphaned grandchildren and suggests alternative solutions to address their economic and social vulnerabilities.

This research follows a qualitative and doctrinal approach. It is a documentary and relies upon primary and secondary sources including The Holy Quran, authentic books of Ahadith, statutes of the legislature, relevant case laws, relevant books, articles published in renowned journals, opinions of learned scholars, and online resource materials available on worldwide websites.

Inheritance Rights of Orphaned Grandchildren in Classical Islamic Law

Islamic scholars have traced the position of the paternal and maternal grandchildren of propositus in the traditional scheme of inheritance in the light of the Holy Qur'an and Sunnah. Paternal grandchildren in certain circumstances are either sharers or residuaries. And, maternal grandchildren are always considered distant kindred.

Ibn e Abbas narrated the Hadith of the Holy Prophet (PBUH) 'give the shares of the inheritance as prescribed in the Holy Qur'an to those who are

entitled to receive it, then whatever remains, should be given to the closest male relative of the deceased' (Bukhari). This hadith explains that if after giving shares to the sharer, residue remains, it will be given to the nearer residuary (Ullah, 2018). This distribution is based on the principle that nearness in relation is the key standard for inheritance. So, in the presence of a nearer relation, like a son, the remoter relative, such as a grandson, will be excluded from inheritance (Usmani, 1963).

The share of the predeceased son's daughter is explained in the Hadith of Hazrat Huzail bin Shirahbil. According to this Hadith, the son's daughter in the presence of the daughter of propositus inherits only one-sixth share, and not the one-half or whole share of her predeceased father (Bukhari). Furthermore, this Hadith clarifies that not only the son's daughter but also other legal heirs are entitled to inherit their shares including the sister, as outlined in Islamic inheritance law (Ullah, 2018).

The opinion of Hazrat Zaid bin Thabit (R.A) in the matters of inheritance is supreme (Ullah, 2018). According to Hazrat Zaid (R.A), grandsons and granddaughters are treated as if they were the children of the deceased in certain circumstances. In case, none of the sons of the deceased are alive, the grandson is treated as a son and the granddaughters like daughters. They will inherit in the same way as if children were present and inherited and they will deprive in the same way as children would deprive. And the grandson will not inherit in the presence of the son (Bukhari). There is Ijma of the whole ummah on this fatwa of Hazrat Zaid (R.A) (Ullah, 2018).

In Shia law when a deceased person leaves behind both a son and a grandson from a predeceased heir then only the direct son of the deceased will inherit and the grandson will be excluded by the son. Both Sunni and Shia laws of inheritance are unanimous on this point (Khan, 2007). In Shia law principle of representation does not apply when other legal heirs of the deceased from class I are also present and they are nearer to a deceased person than grandchildren (Cheema, 2017).

Hence, Islamic scholars are unanimous that in the presence of the sons of the deceased, the grandchildren either paternal or maternal shall not inherit any share from his estate. However, in the presence of the daughter of the deceased, the paternal granddaughter inherits as a sharer, and the paternal grandson inherits as a residuary.

Likewise, in the Holy Quran shares of children are explained in verse 4:11. According to this ayat, if the daughter is one, she will inherit the one-half share from the estate of her deceased parent. If there are two or more daughters, they will get a two-thirds share of the estate. When both son and daughter are present then the share of the son shall be twice of the daughter (Cheema, 2017). Some people claim that in this ayat under the word of 'children', grandchildren are also covered. If this principle is accepted as correct then it demands to give a share to the son of the deceased and his grandson simultaneously. According to this principle, not only the orphaned grandson but also the grandson whose father is still alive would be entitled to inherit from the estate of the grandfather, along with his alive father. However, such distribution is rejected by all jurists (Usmani, 1963).

According to Usmani (1963), the word child has two meanings, one is actual and the other is metaphoric. It is a universally accepted principle, that when a word is applied in one context with its actual meaning, it cannot simultaneously be assumed to carry its metaphoric meaning in the same context. Therefore, once the word child is applied in its actual meaning as a son of propositus then under its metaphoric meaning grandson cannot be assumed. This is because a single word cannot have two different meanings in the same situation.

Additionally, Usmani argues that some people find ambiguity in the above principle, as in some situations both children and grandchildren inherit simultaneously under Islamic law. For instance, if propositus leaves behind one daughter and one grandson, the daughter inherits one-half of the estate, while the remaining one-half is inherited by the grandson as a residuary. According to the principle that the word "child" cannot be used with two different meanings in the same situation, the daughter being the actual child should inherit alone, and the grandson being a child in its metaphoric meaning should not inherit under verse 11 of Surah al-Nisa. However, in the above illustration, both inherit simultaneously and actual and metaphoric meanings are applied together so if such a collection of meanings is correct here then it should be correct in the case of orphaned grandchildren. The answer to this ambiguity is, in reality, the daughter in the above proposition comes in the category of sharer and inherits under this ayat; '… if only one her share is a half' (4:11). While, this ayat 'Allah (thus) directs you as regards your children's (inheritance): to the male a portion equal to that of two females:' (4:11) is only applicable to residuaries

and not to the sharers. Therefore, in the absence of a son, daughter gets her share under another ayat and not under this ayat. And, under this ayat, only the grandson inherits as a residuary under the metaphoric meaning of the word child and not under its actual meaning.

However, in the traditional law of inheritance, children of predeceased son are not excluded from the estate of their grandparent in all circumstances. Paternal grandchildren act as sharer or residuary in the absence of direct sons of propositus. However, the children of predeceased daughter are usually excluded because they are distant kindred and can only inherit in the absence of sharers and residuaries.

Representational Succession under Section 4

The Commission on Marriage and Family Laws (after that the Commission) was constituted in 1955 by the Pakistani government. The Commission had framed the question concerning the inheritance rights of orphaned grandchildren and proposed recommendations on it. According to the recommendations, the children of predeceased son/daughter are entitled to inherit a share from the estate of their grandparent equivalent to the share of their predeceased parent (Ahmad, 1959). In line with these recommendations, Section 4 of the Muslim Family Law Ordinance 1961, was enacted to protect the proprietary interest of orphaned grandchildren (Cheema, 2017). It grants a share from the estate to the children of predeceased son and daughter per stripe that is equivalent to the share their predeceased parent would have inherited, had they been alive to receive it. Section 4 thus awards shares to orphaned grandchildren per stripe in the estate of their deceased grandparent.

For the sake of convenience, Section 4 is reproduced below;

> In the event of the death of any son or daughter of the propositus before the opening of succession, the children of such son or daughter, if any, living at the time the succession opens, shall per stripes receive a share equivalent to the share which such son or daughter, as the case may be, would have received if alive.

Arguments Against Section 4

Usmani (1963) criticizes the principle of representational succession under Section 4. He argues that, according to the Holy Quran, only those relatives of propositus are entitled to inherit from his estate who are alive at

the time of his death. However, Section 4 grants inheritance share to certain predeceased relatives, for example, predeceased son and daughter. Predeceased son/s and predeceased daughter/s are first assumed to be alive at the time of death of propositus, inheriting their share as if they were still living. Following that, they will assume die and their share is distributed among their children (the grandchildren of the propositus). Such a scheme for the distribution of shares is not proven from the Holy Quran, Sunnah of the Prophet (PBUH), and practices of companions (R. A). This childish scheme is only limited to the predeceased son /daughter and not extended to other predeceased relatives of propositus.

Usmani (1963) contends our lawmakers argue that Islam is the only religion that puts great emphasis on the rights of orphans. And, according to this reasoning, it is inconceivable that grandchildren should be deprived of inheriting their grandparent's estate under Islamic law. However, this argument is only valid if it is assumed that shares of inheritance are distributed based on need and poverty. Similarly, at the time of distribution of shares, it will be taken into consideration which relative is poorer. So, the poorest relative will be entitled to inherit, no matter how remote in relation he/she is to propositus. If it is admitted as correct then this would extend inheritance rights not only to orphaned grandchildren but also to each needy relative that are orphaned nephews and nieces, widowed aunts either maternal or paternal, helpless uncles (both maternal and paternal), and even poor neighbours. If Shariah wanted to facilitate the indigents and depressed people from the estate of inheritance then there was no need to elaborate the whole scheme of inheritance. It would have simply ordained to submit the entire estate of propositus into Bait-ul-maal, from where it would be reached to each deserving person. Conversely, Shariah has specified the shares of legal heirs and the reason behind their specification of shares is that these individuals have supported the deceased in their lifetime, particularly during times of calamity.

In the light of above arguments, it is evident that neediness and poverty are not the bedrock of inheritance. And, if they are the substratum of inheritance then not only orphaned grandchildren but also all deprived and depressed relatives will be its beneficiary. However, that is not the case. Under Islamic law shares of heirs are fixed and Allah Almighty knows its wisdom. Humans cannot meticulously comprehend its logic.

Several other scholars have also criticized Section 4 of MFLO (Mohmand & Asfandyar, 2018; Munir, 2018). According to Anderson (1965), Section 4 causes significant changes to the structure of the classical law of inheritance. Coulson (1971) argues that the system of representational succession in Pakistan is a complete break from traditional Shariah law. It not only affects the quantum of entitlement of legal heirs but also their order of priorities. Rahman (1986) says that as compared to the reforms in other Muslim countries, Pakistani reform is more liberal. Munir (2018) argues that the main devastating effect of Section 4 is on the rule of exclusion. It has created an exceptional treatment for otherwise excluded heirs. It gives birth to misconceptions in the minds of those who are not beneficiaries of this innovative scheme.

Furthermore, the enactment of Section 4 of MFLO has not fully resolved the issue it was meant to address. Its anomalous and inconsistent interpretations by the superior judiciary have only complicated matters further. Cheema (2023) argues that the legislature and judiciary both are confused about the provision of Section 4. Their confusion is evident from their two approaches to it. One is the reformist approach while the other is the revivalist approach. The reformist approach is the benevolent attitude towards the protection of inheritance rights of orphaned grandchildren. And, the revivalist approach is to cause the least interference in the classical law of inheritance.

Fatima (2024b) asserts that 'there is a diversity in the judicial interpretation of Section 4'. Its phrase 'opening of succession' is debatable from the perspective of its prospective and retrospective application. Therefore, a coherent construction of Section 4 by the judiciary is urgently needed.

The above discussion elucidates that Section 4 of MFLO or representational succession under it is analyzed by scholars from many aspects. Scholars are united on its controvertible nature. Furthermore, its judicial construction is multiplicate and not strikingly concordant. Judiciary and legislature both are confounded on the said provision. It appears Section 4 is a contraption to address the issue of orphaned grandchildren.

Arguments in Support of Section 4

However, certain other scholars favour Section 4 of MFLO. Faruki (1965), an exponent of the principle of representation, argues that there is

no explicit Quranic text that excludes grandchildren from inheriting in the presence of their uncles. 'Exclusion is merely a discordant by-product of a classical construction of a hadith found in both Muslim and Bukhari' (p. 263). He further argues from where a rule is derived that nearer in degree will exclude the remoter in degree. Nearer means nearer to propositus. For instance, propositus has two sons A and B and both sons have their descendants. Therefore, propositus has two lines of descent that is one from A and other from B. A predeceased the propositus, and now between A and his descendants, there is no one. Thus, his descendants are now nearer to propositus. On the other side, B is nearer to propositus and in case of his death, his children will automatically become nearer to propositus. Correct application of the principle of Islamic law strengthens the immediate family. Hence in case of the death of son A, his children are the immediate family of propositus. Whereas in the presence of another son B, his lineal descendants are distant relations and B alone constitutes the immediate family of propositus. However, exceptions to the rule that nearer in relation excludes the remoter are also found in the classical law of inheritance as the mother's mother is not excluded by the father and both inherit their shares $1/6^{th}$ and $5/6^{th}$ respectively. Similarly, full sister fails to exclude uterine sister and mother, and all inherit their shares. If the rule of exclusion is powerless here then how much powerful should be the claim of orphaned grandchildren who are a direct lineal descendant of propositus.

If the above arguments of Faruki are analyzed it appears that they are depthless and cursory. Nearness in relation is the key to inheritance under Islamic law. However, this nearness is dual both the inheritor and the propositus must stand in near relation to each other. If the one is nearer and the other is distant share will not be inherited. As in the above illustration, in the absence of A, the propositus is nearer to the grandsons and therefore should inherit. However, on the other side in the presence of B, the grandsons are not nearer to the propositus and should not inherit. So, one is nearer that is propositus and the other is distant that are grandsons therefore latter will not inherit any share. Furthermore, in Islamic law of inheritance, heirs inherit their shares in their capacity and not by representing other heirs. In the case of the mother's mother and father of the deceased, both are sharers who inherit their shares in their capacities. However, the father also inherits as a residuary here. Similarly, if the only heirs of a deceased person are a full sister, uterine sister, and mother, then these all are also sharers and inherit their specified Quranic shares, and no

one can exclude another in this case. And no question of proximity is here therefore there is no relevancy of the principle nearer in relation excludes remoter in relation.

The principle of representational succession is not alien to Islamic law. Imam Muhammad has used it for determining the shares of distant kindred. Even it has been extensively used by the Ithna Ashari sect for ascertaining the shares of legal heirs. Furthermore, a system of representational succession correctly identifies the position of orphaned grandchildren as a close relative. This system rightly identifies the structure of the present-day Muslim family (Faruki, 1965).

Philwari (1959) is another exponent of reforms in the Islamic system of inheritance. He argues that the Quran is not devoid of temporary principles. Its rules are not permanent. It just guides eternal values. Similarly, not only the inheritance rights of orphaned grandchildren but also the whole inheritance law has no permanent nature. Rather this law has one supreme value which is its spirit and goal and that is no one remains poor in society and no one possesses more money than one's needs. Through these arguments, he justifies the reforms that aim to reduce poverty and the grievances of the needy. Furthermore, he proposes no express Quranic text ordains the exclusion of orphaned grandchild. These arguments of Philwari are extremely vague. If one ponders over it, it appears no ruling of the Quran is permanent, and the law of inheritance is not an exception of it. And, these being provisional and non-binding, therefore, depends upon one's discretion to follow or reject. What are eternal values or these are in space and how to achieve these with temporary Quranic principles? No clear answer to these queries.

Scholars have solicited reasons in favour of Section 4. However, the fact is, that the underpinning arguments of Section 4 are slighter and shallow.

Challenge to the un-Islamic Nature of Section 4

Section 4 of MFLO was first challenged in the case of Mst. Farishta v. Federation of Pakistan (1980). Learned counsels had extensively produced arguments in favour as well as against Section 4. However, arguments against Section 4 were in more weightage. The court held that Section 4 is repugnant to the injunctions of the Holy Quran and Sunnah. The court observed that Islamic law of inheritance has only granted share to those legal heirs who survive the propositus. But Section 4 has awarded shares to

the children of predeceased son and daughter by considering their predeceased parent alive. The Holy Quran has emphasized the rights of orphans but it does not mention any specific share for them. Especially for orphaned grandchildren as evident from verse 8 of Surah-al-Nisa. Equally important is, the law of inheritance is ordained by the express injunctions of the Holy Quran and interpreted by the Sunnah of the Holy Prophet (PBUH). Allah Almighty has also prescribed rewards for obedience and warning for disobedience of the Holy Prophet (PBUH).

However, this decision of the Peshawar High Court was challenged before the Shariat bench of the Supreme Court in Federation of Pakistan v. Mst. Farishta (1981). The Shariat bench had questioned the very jurisdiction of the Peshawar High Court. It held that Section 4 being a special law comes within the purview of Muslim Personal Law, therefore it is excluded from the jurisdictional domain of the Peshawar High Court. Shariat bench reversed the findings of the Peshawar High Court on a jurisdictional basis and made Section 4 an active provision of law.

However, the un-Islamic nature of Section 4 of MFLO was again challenged before the Federal Shariat Court in Allah Rakha v. Federation of Pakistan (2000). Federal Shariat Court held that Section 4 is against the injunctions of Islamic law and therefore it shall cease to hold effect from 31st March 2000. The court observed that shares as well as the entitlement of different heirs have been clearly and unambiguously defined in Shariah. The children of predeceased son and daughter are excluded from the estate of a grandparent in the presence of sons and it is well elucidated in hadith. Additionally, the court observed that when there is a clear-cut text there is no need for Ijtihad.

Different Alternatives of Section 4

There are different alternatives to Section 4 of MFLO such as gift, waqf, voluntary bequest, obligatory bequest, and the responsibility of the state. If these alternatives are acted upon then the sufferings of orphaned grandchildren can be reduced within the limits of Islamic law. Furthermore, in Islamic law gift is a voluntary transfer of property by a Muslim to any person either heir or non-heir. Gift can be made of any part of the property (Powers, 1993). Unlike bequest, there is no restriction of one-third in the transaction of a gift (Abbasi & Cheema, 2018). Hence, grandparent can gift whole or part of his/her property to grandchildren.

Waqf is a permanent dedication of property by a Muslim for religious, pious, and charitable purposes (Mulla et al., 1968). In family endowment proprietor may specify the lineal descent group (Powers, 1993). Likewise, a grandparent can waqf his/her property for the benefit of his/her grandchildren (Mulla et al., 1968).

A voluntary bequest is a transfer of property up to the limit of one-third. Once it is made, its execution becomes obligatory (Rahman et al., 2020). It gets support from Islamic law. It is ordained in the Holy Quran to make a bequest in favour of parents and near relatives (2:180). Similarly, it is also evident from the Sunnah. When Sad bin Abu Waqqas (R.A) intended to make a bequest for the whole or one-half of his properties, the Prophet (PBUH) stopped him and made the bequest valid up to one-third (Bukhari).

Islam has put the responsibility of supporting orphaned grandchildren on specific heirs. Grandfathers can bequest up to one-third of their estate in favour of a grandson (Usmani, 1963). In the case of Mst. Farishta v. Federation of Pakistan (1980), the court addressed the procedure of voluntary bequest by grandfather. The court observed that an orphaned grandchild, during the lifetime of his grandfather, could approach the district judge within the local limits of whose jurisdiction, the property of his grandfather is situated. Grandchild could approach the court either himself or through his next friend. So that court advised the grandfather to make a will in favour of the grandchild, specifying the share which the grandchild would inherit from the estate of their predeceased parent, if the latter had survived the grandfather. It is suggested only to remind the grandfather of his duty towards his grandchild.

Rahman et al. (2020) argued that when a bequest is made obligatory by legal sanction it is called an obligatory bequest. The proponents of obligatory bequest argue that it has derived its authority from the ‘verse of bequest’ of the Holy Quran (2:180). Furthermore, according to Coulson (1971), a respectable minority including Imam Shafi is of the view that ‘verse of bequest’ is not wholly abrogated. This verse is partially repealed in favour of those parents and relatives who have received their shares under inheritance. However, concerning other relatives who do not receive any share in inheritance the said verse is fully applicable.

Several Islamic countries have made legislation on obligatory bequest (Rahman, 1986). For instance, in Egyptian and Tunisian provisions,

children of predeceased sons and daughters are entitled to inherit from the estate of their grandparents. Similarly, in Syria and Morocco legislation is also made for grandchildren (Coulson, 1971). However, in Syrian and Moroccan provisions only the paternal grandchildren are beneficiaries and no provision is made for maternal grandchildren (Rahman, 1986).

Equally important is, to obtain the advantage of obligatory bequest, the intended beneficiary must be the grandchild of the deceased, who would be excluded under the traditional law of inheritance. A grandchild will inherit the share which if his/her predeceased parent would survive the propositus and receive within the maximum limit of one-third. Furthermore, if the grandparent has not made any bequest in favor of the grandchild, the court will assume that he has made it and enforce it (Fatima, 2024a).

The obligatory bequest has also been criticized by many scholars. Munir (2018) argues that bequest is a voluntary disposition by the testator and to make it obligatory is against the very notion of a person's free will and liberty. According to Carroll (2002), its benefit is restricted to orphaned grandchildren only. Whereas no benefit is extended to other legal heirs that is surviving parent, spouse relict, orphaned nephews/nieces of predeceased child (Rahman, 1986). Fatima (2024a) proposes obligatory bequest is not an ideal solution and the legislature without addressing its necessary queries should not legally implement it in Pakistan.

Responsibility of State

In the case Mst. Farishta v. Federation of Pakistan (1980), the court had discussed the procedure of voluntary bequest in favour of a grandchild. After that court observed, that if the grandfather does not pay any attention to such advice and the court thinks the grandchild needs maintenance then it is the responsibility of the state to take proper actions for the well-being of the grandchild.

It is the basic duty of the Islamic State to take care the orphans (Ahmad, 2022). The Holy Quran enunciates the rights of orphans upon the Islamic State only after the rights of the Holy Prophet (Peace be upon him) and his family (8:41). Anyhow these rights are concerning the booty acquired by the state through war. Even Hazrat Umar (R.A) called the State Treasury an 'Orphan's Trust'. Orphans are principal beneficiaries of state expenditures and development schemes (Ahmad, 1959).

Munir (2018) suggests it is the responsibility of the state to take care of the needy and orphaned. It seems that the state is not willing to perform its function and throws its duty upon the shoulders of the grandfather by making will obligatory. This responsibility cannot be shifted to individuals. Moreover, according to Fatima (2024a), the most appropriate way to tackle the economic necessities of orphaned grandchildren is through the welfare and development programmes of Muslim states.

In Abdul Majeed v. Additional District Judge (2012), the court observed that the grandfather is not legally bound to pay maintenance to minors. In this case, the grandfather was a 76-year-old man. He was a pensioner with a meagre income of Rs.5688/- per month. He was directed by the family court to pay maintenance allowance to his paternal granddaughter and grandson. He filed an appeal before an Additional District Judge, which failed and now he comes before the High Court.

The court observed that the grandfather along with the responsibility of his aged wife is unable to provide maintenance to grandchildren. The court during the interpretation of Articles 5 and 7 of the Constitution of the Islamic Republic of Pakistan 1973 (hereinafter the Constitution) highlights the relationship between the state and its people. The court further observed that the Constitution is a social contract that is entered by the state through elected representatives in assemblies with the people. The definition of state includes not only federal government and provincial governments but also different organs and authorities. Moreover, Article 14 of the Constitution protects the dignity of man. Principles of Public Policy as enunciated in Chapter 2 impose obligations on each organ of state as well as persons performing function on its behalf to act according to them. Specifically, Article 35 of the Constitution imposes a duty upon the state to protect families and children. It is generally perceived that the principles of public policy are not enforceable and added to the Constitution for its glorification. It is a wrong perception. Article 29(3) imposes a duty upon the president and governor of each province to present a report before the parliament or provincial assembly regarding the implementation of these principles. Members of assemblies are required to have a discussion on this report. Moreover, the court relied upon Haji Nizam Khan v. Additional District Judge (1976), case. In that case court observed that though superior judiciary cannot direct any organ of the state to act according to the principles of policy. However, the judiciary is not barred from setting

standards for itself or for subordinate courts to act according to these principles of policy.

The state under its constitutional responsibilities has established social welfare institutions at the federal and provincial level. At the provincial level, Punjab Bait-ul-Maal Act 1991 was passed, for the collection of charitable funds. Section 5 of this Act deals with the utilization of Bait-ul-Maal on widows and orphan children. Similarly, the Pakistan Bait-ul-Maal Act 1991 was enacted at the federal level. Furthermore, Section 4 of this Act elaborates on the utilization of the money of Bait-ul-Maal on needy, orphans, and destitute people. In addition to this, the Zakat and Ushr Ordinance (XVIII) 1980 was promulgated. Section 8 particularly deals with the utilization of zakat. The Local Government Ordinance promulgated in each province has also assisted poor and needy persons.

Zakat occupies a central place in the Islamic economic system. It is a religious fiscal obligation for Sahib-e-Nisab Muslims (Saikhu, 2024). In the light of these Acts, orphaned grandchildren are the beneficiaries of the zakat amount.

The court observed that the system of zakat can be linked with Family Courts and it is subjected to two conditions. First, if the Family Court has passed an order of maintenance against the person who is unable to pay the same due to his poor economic conditions. Second, the person in whose favour the maintenance order is passed also falls in the category of eligible persons for the zakat fund. Then, a court can issue suitable directions to the zakat and ushr council in this regard.

Furthermore, the court observed that when the Family Court determines that the father or grandfather is unable to pay maintenance to their dependents, the court shall conduct an inquiry for pauperism as provided in the Code of Civil Procedure,1908, and directed the plaintiff to implead the state as the respondent in the pending suit. After that, the court shall direct the Bait-ul-Maal, Local Government, or other relevant authorities regarding regular payment of maintenance to minors.

In this case, the court directed the DCO Faisalabad to register the names of both grandchildren as regular beneficiaries of the District Bait-ul-Maal with Rs. 5000/-per month. The grandson is entitled to maintenance till his age of majority, while the granddaughter is entitled till her marriage.

Additionally, the court ordered that a 10% annual increase will be made in their fixed maintenance amount.

When this judgment is critically analyzed, it becomes evident that it is pronounced in the suit for recovery of maintenance for minors, when the father or grandfather though alive but not able to provide financial assistance to them. It establishes the responsibility of the state in the light of the constitutional provisions. It provides a whole mechanism for providing financial assistance by the state to poor and needy persons. This judgment has also precisely discussed the relevant provisions of different legislations to overcome the grievances of orphans and other destitute people.

However, one thing is common among this judgment, obligatory bequest, and representational succession. All aim to provide financial assistance to needy orphaned grandchildren from the estate of a grandparent. Furthermore, under this judgment state responsibility comes into effect only when both grandparent and grandchildren are in poor economic conditions. Obligatory bequest and representational succession both are granted share to grandchildren as a matter of legal right from the grandparent's estate without considering their financial condition. Both these systems suffer from several anomalies and ambiguities. Nevertheless, the mechanism provided for state responsibility under this judgment could be extended to obligatory bequest and representational succession. And benefit could be restricted to those grandchildren only who are in fact in poor economic condition. Under this judgment state's responsibility is not limited to the orphaned grandchildren only. Rather it extends its benefit to all orphans as well as other needy and destitute people including widows without disturbing the classical scheme of inheritance law and restricting the testamentary liberty of deceased grandparent. It is a form of social welfare state which is in complete conformity with Islamic principles of social justice.

Conclusion

To conclude, the rules of inheritance are laid down in the Holy Quran and elaborated by the Sunnah. Islamic scholars have discussed the law of inheritance in detail. Certain principles are declared as foundational principles in determining the shares of heirs. These principles include, the shares of heirs are fixed by Allah Almighty; the nearness of the heir with

the deceased person determines their entitlement; succession is opened at the death of an individual; and only those heirs who survive the propositus are entitled to receive their shares from his estate. Heirs who die during the lifetime of propositus are not entitled to inherit any share. Therefore, a predeceased son or daughter does not inherit any share from the estate of their deceased parent. The children of this predeceased son and daughter also do not inherit any share from the estate of their grandparent.

The concept of representational succession under Section 4 has disrupted the classical scheme of inheritance. Its innovative scheme of distribution of shares is vehemently opposed by learned scholars. Its controversial nature was first challenged in Mst. Farishta v. Federation of Pakistan (1980) case where the court declared it un-Islamic. However, in the appeal, the Shariat bench reversed the decision of the lower appellate court and gave its findings on technical grounds. Consequently, Section 4 was upheld. Later, in the Allah Rakha v. Federation of Pakistan (2000) case, the Federal Shariat Court declared Section 4 to be against the injunctions of Islam. An appeal is pending against this decision, and until the appeal is resolved, Section 4 remains operational.

Besides Section 4, there are other alternatives for redressing the grievances of orphaned grandchildren. These alternatives include proprietary transactions by grandfather, the obligatory bequest, and the responsibility of the state. Proprietary transactions are at the discretion of the grandfather. This means that the grandparent has the freedom to make gifts or waqf or voluntary bequest in favour of his/her orphaned grandchildren. However, the status of obligatory bequest is controversial, it is executed by the force of law irrespective of the discretion of the grandparent. It is enforced in many Muslim countries and suffers from a lot of anomalies. Finally, the only possible alternative for redressing the grievances of a grandchild is the responsibility of the state. The whole framework of state responsibility is excellently discussed in the light of legal provisions in Abdul Majeed v. Additional District Judge, Faisalabad (2012), case. Though judgment is particularly pronounced in a suit for recovery of maintenance, it provides useful guidelines to the state for redressing the welfare needs of not only orphaned grandchildren but also other destitute people.

Conflict of Interest

The author of the manuscript has no financial or non-financial conflict of interest in the subject matter or materials discussed in this manuscript.

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