

The law of inheritance for muslims history essay



At present, the law of inheritance for Muslims is the only law that is yet uncodified in India. For other communities, the Indian Succession Act is applicable, save for Hindus who are governed by the codified Hindu Succession Act. The only exception for a Muslim is if his marriage is registered under the Special Marriage Act of 1954, following which he gains all the rights of a testator as given in the Indian Succession Act of 1925. However, in all other cases and circumstances, the inheritance is governed by the Muslim personal law, or Shariat.

Shariat is the term given to the entire body of Muslim law. It has influence from several sources, the most important of which is the Quran, the holiest of all Islamic texts, which contains the Word of God as he gave it to the Prophet Mohammed. Other influences on the Shariat are the Sunnah,[1]the Hadith,[2]and the legal traditions and interpretations given through generations of Islamic jurisprudence. However, only those components of customary Islamic law are taken as part of Shariat which are in keeping with the principles of the Quran, as this is at all times the primary source of Islamic law.

Islamic law of inheritance, like the rest of the Islamic personal law, combines elements from both the pre-Islamic traditions and rules interpreted from the Quran by the Prophet.

With the coming of Islam though, the Prophet amended the customary laws and included certain principles aimed at giving some rights to women. For example, the wife was no longer treated as the chattel of the husband, but as equals, and therefore they could inherit from each other. Female relatives

and cognates were also allowed to inherit within certain degrees. Thus, the institution of Islamic law improved both the social and economic conditions of women.[3]

When Islamic law was first adopted in the latter half of the first millennium AD, it made for unprecedented changes for the better in the inheritance rights of women, as before, they were not even entitled to own property, let alone inherit it. However, this right was somewhat restricted, and female heirs were only entitled to receive a share that was half of what male heirs got. But there were reasons for even this discrimination, which stemmed from the economic and social conditions of the time.[4]

One of the reasons for this was to prevent the transfer of family property to another family, by a married female heir. This was due to the patriarchal notions that saw children being the issue of the male, and therefore the property of a woman who inherited would then pass to the children, causing movement of property from her family to her husband's family.

Another reason was that women were simply not seen as being in as much need of wealth as the men. Since it was the male's responsibility to shoulder most of the financial burden of the family, they were seen to deserve more. A woman's inherited share could be enjoyed alone, but a man was expected to use it for the whole family.

Whatever, the justifications of the rules of Islamic succession, many argue that now conditions have changed a great deal. There are no more social taboos on women staying single and living alone, and as they become financially independent, the logic behind giving them a lesser share of

inheritance fails. Therefore many progressive thinkers in India and abroad have urged for a reform of the Islamic law of inheritance, to bring women on a level with men.

The purpose of this project is to detail the rights that Muslim women have in terms of inheritance and offer a critique. To this effect, the researcher shall look at succession under Muslim law that is both intestate, i. e. without a will, and testamentary. In this age of women's liberation, the question is often raised as to why Islamic law has not yet woken up to this fact, and continues to give preferential treatment to the male members of a family, especially in matters of inheritance as shall be detailed during the course of this project.

However, it is true that at the time of the advent of Islam, there was no concept of a woman's property rights, and therefore the Prophet's teachings were extremely progressive, in that they allowed even women the right to hold property and inherit it. Therefore, this project will open with a description of pre-Islamic customs practised by the Arab tribes near Mecca and Medina, with special emphasis given to the rights of women.

II. Understanding How Rules Of Inheritance Worked In Pre-Islamic Society

Islam began in Arabia in the 7th century AD, under the influence of Mohammed. Islamic law was actually a combination of several pre-Islamic customs and rules introduced by the Prophet.[5]At first, the reforms introduced by the Prophet were opposed, as they contrasted too greatly with the existing customs. One of the major causes of dissatisfaction was the difference between the way the Prophet viewed the rights of women and the traditions that were in place at the time.

In pre-Islamic Arabian society, the interests of the tribe superseded all other interests. As conflict between tribes was common, battle was one of the most important considerations for the pride of the tribe. As women had no role to play in battle, they were in general given very little importance in society. In fact, marriage was seen as a way to improve a man's prestige in society, especially if it was made outside the tribe, since it was a way to increase the numerical strength of the tribe, and thus its power.

In this form of tribal society, women were regarded as chattels, or the property of their husbands. She was given no say in her own marriage. Therefore, a marriage of agreement was made between the man and the woman's family. Often, women were captured and forced into marriage with their captors, or sold by their families for a mehr or bride-price, also called the dower. Another form of marriage which demonstrates the view that women were chattels was the marriage by inheritance, where an heir inherited the wife of the deceased, and was then free to do with her as he pleased, i. e. keep her or marry her off again for some mehr.[6]

In this tribal society, inheritance was based on the principle of ' comradeship-in-arms' - since men were physically stronger and better fighters, it led to the exclusion from inheritance of women, minors of both sexes and invalids as well as in the preference of the paternal to the maternal lines.[7]

There was also the custom of inheritance by confederation at this time. By this custom, two strangers would enter into a pact that the blood of one was the blood of the other, and therefore an attack on one was an attack on the

other. Thus, according to this pact, the two parties defended each other in their lifetime, and whoever died left his property to the other.[8] This included the inheritance of the wife of one by the other. Since women were treated as chattels at this point in time in Arab society, they obviously had no rights of inheritance.

Inheritance in pre-Islamic customary law proceeded according to the four following principles:

The nearest male agnate or agnates succeeded to the entire estate of the deceased.

Females and cognates were excluded.

Descendants were preferred to ascendants and ascendants to collaterals.

When the agnates were equally distant to the deceased, the estate was divided per capita.[9]

The Prophet recognised the injustice of this system, and holding that such discrimination was against the principles of Islam, introduced several reforms to the system of inheritance. It is important to note that the Prophet chose only to bring changes, however drastic, in existing custom rather than create entirely new practices. For example, several classes of relatives who had no inheritance rights previously were granted them in the Quran. Agnates no longer had sole inheritance rights, but cognates were given them as well. Females were now allowed to inherit, and now the wife was entitled to inherit from the husband. Additionally, ascendants now had the right to inherit even when there were male descendants. However, the inheritable share for

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women was limited to half that of the male.[10]This was justified by the law of recompense, as the woman was entitled to a dower and maintenance, and she was also unable to take part in the defence of the community. Also, she did not have to provide for the family, as this was the duty of the men, who therefore were held to deserve more of a share in property.[11]

On the whole, the advent of Islam greatly improved the conditions of women in many matters. Though these rights may not seem substantial today, they were truly revolutionary in the 7th century AD, where women were accorded a much lower status than men almost all over the world.

III. Intestate Succession In Islam for Women

The advent of Islam led to many reforms in the law of inheritance as it was practised in Arabia, which resulted in an improvement in the conditions of women, compared to what they had previously enjoyed. For example, women had previously been completely denied a share in inheritance, as they were regarded as part of the property. The law of primogeniture[12]was followed in Arabia prior to Islam, and thus not only women, but minors and the old and infirm were also excluded from inheritance, based on the principle that only those fit to wield arms were fit to inherit. This changed with the coming of Islam, and now females were made co-sharers in property with the males. Islam also clearly defined the shares of inheritors and limited the amount of one's property that could be bequeathed to one-third of the total, thus promoting a fair and equitable system for the distribution of property.[13]In India, the rules of inheritance for Muslims are governed by the Shariat[14]and not any secular law, as is the case for most other

religious communities. Though Islamic law was revolutionary in its treatment of women when first established, it has in the 20th century come under severe criticism for failing to evolve to keep pace with changing trends and practices especially when considering laws relating to women. Therefore, the researcher shall in this chapter give an account of the nature of inheritance in Islam and women's rights therein.

Muslims consist of two major sects, the Sunnis and Shias.[15] In India, the majority of Muslims belong to the Sunni sect, but a sizeable portion is Shia. Though theologically both sects are extremely similar, there are still some differences in the legal systems of each sect. For one, the Sunnis have four major legal traditions - the Maliki, Hanbali, Shafi and Hanafi, which is the most common in India. Inevitably, the question would come up before law as to what legal system would be applicable to Indian Muslims.

This happened in the case of *Rajah Deedar Hossein v Rane Zuhoor-oon Nissa*. [16] In this case, there was a dispute between the appellant, who was the brother of the deceased and the respondent, who was the deceased's widow. The question around which the case hinged was over which law of succession was to prevail, the Shia or Sunni, as the moot point of the case had two different answers depending on which law was applied. In its judgment, the Court relied on the Regulation of 1793 to adjudge that though the majority of Muslims in India are Sunnis, cases involving Shias would be decided according to their own separate system of law. This judgment is still valid, though the different statutes of Muslim law, such as the Shariat Act of 1937 and Dissolution of Muslim Marriages Act of 1939, apply uniformly to all Muslims, regardless of sect.

INTESTATE SUCCESSION FOR MUSLIM WOMEN

Islam provides fixed shares of heritable property of the deceased that can be inherited by the relatives of the descendants. This heritable property is calculated after subtracting several items from the total value of the property. These are:

Funeral expenses

Expenses of obtaining Probate and Letters of Administration from the court

Wages for personal service to the deceased within three months of his death

Debts[17]

Bequests, which are limited to one-third of the total property.[18]

When calculating the shares of women, it is important to remember that Islamic law does not mandate that a wife's mehr amount, if still not paid or maintenance should be included within her share. These are reckoned as debts of the deceased, and must therefore be accounted for with other debts incurred. This would then be paid in addition to the full amount that she would be entitled to out of the heritable property.[19]

Heritable property includes both moveable and immoveable property, and unlike in Hindu law, no distinction is made between ancestral and self-acquired property. Also, no Muslim has a right in property by birth by law, and the entire property devolves upon heirs only at the moment of death. In general, a female's share of inheritance is half that of a male's of equal nearness to the deceased. Thus, if a Sunni female dies leaving a husband

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and distant kindred, her husband gets half and the rest is divided among the distant kindred. But when a male dies, his wife would only get a quarter, with the rest left for the distant kindred. This pattern continues for all classes of heirs, which differ for Shias and Sunnis. This is justified on the basis of reasons already explained, and therefore the researcher shall not discuss them again.

INHERITANCE IN SUNNI LAW

In Sunni law, the first category of heirs is relatives by marriage and blood, sub-divided into sharers, residuary and distant kindred. In the absence of the first category, unrelated successors may inherit, being acknowledged kinsmen and the universal legatee.[20] This category failing, the property would escheat to the State or Treasury. These heirs inherit in the order which they have been named, and depending on the number of heirs, later classes may get excluded.

The sharers, who are first in inheritance, are the wife (and husband), mother (and father), true grandmother[21](and grandfather), daughter, son's daughter, uterine sister (and brother), full sister and consanguine sister. However, since descendants are preferred to ascendants, presence of the deceased's son makes the deceased's father a residuary. These sharers all have pre-determined shares depending on their closeness to the deceased, but all female sharers get half of what males are entitled to. In fact, this applies to residuaries and distant kindred too.

The residuaries consist of descendants, ascendants, descendants of father and descendants of true grandfather, in that order of succession. The nearer

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in degree exclude the more remote, but males do not exclude females of the same degree. This applies in all categories. Though no definition is given anywhere of distant kindred, they may be taken to be those blood relatives who are neither sharers nor residuaries.

When there are more than one class of heirs, different rules apply. When either sharers or residuaries exist, the distant kindred get completely excluded. However, when there are both sharers and residuaries, the claims of sharers are settled first and then the residue is distributed among residuaries - hence the name given to the class. In some cases, an heir may inherit in more than one capacity.[22]For example, the decision given in *Damodar v Shahjadibi*[23]held that if the widow of a deceased Muslim if related to him also by consanguinity may inherit from him in both the capacities.

INHERITANCE IN SHIA LAW

Shias divide heirs on two grounds: heirs by blood relationship and heirs by marriage, i. e. husband and wife. Blood relations are divided into three classes, each of which is divided into two. These classes are created on the basis of nearness to the deceased. Thus, Class I heirs are parents and children and other lineal descendants. Class II are grandparents (true or false) and brothers, sisters and their descendants. Class III heirs are paternal aunts, uncles, descendants and ascendants and maternal aunts, uncles, their descendants and ascendants. In all these classifications, there is no lineal limit. Class I heirs exclude Class II which in turn excludes Class III. Though heirs of different sections in a class do not exclude each other, the nearer

degree in each section excludes the more remote. However, heirs by marriage are never excluded, but inherit together with the nearest heir by consanguinity accorded to pre-ordained rules. Like Sunnis, Shia heirs inherit fixed shares, but these shares are different in the Shia system. However, the inheritance rules for women are the same, and they get half of what male relatives of equal degree are entitled to.[24]

IV. Conclusion

In the course of this project, the researcher has attempted to demonstrate the nature of the Islamic law of inheritance, and see how it applies to women. This law is heavily criticised in the present day since it continues to discriminate against women, by giving them only half the share of property that men get. Circumstances have changed completely in the last century, and now women's role is no longer confined solely to the house. There are many working women today, many of whom even live independently. There are even instances where the woman becomes the prime bread-winner for the family. Therefore, the old argument that men should be given more inheritance because they need to provide for the whole family fails, and women are also involved in providing.

This discrimination is the reason many believe that reforms are urgently needed in the Islamic law of inheritance, to bring women on par with men. It is also used by supporters of a Uniform Civil Code. But any attempt by the legislature to push through such reforms would surely not be welcomed by the Muslim community. Opponents of the UCC say that amending the Muslim personal law would violate Article 25 of the Constitution which grants

freedom of religion. This is because the Muslim personal law comes from the Shariat which is an integral part of Islam.[25]

The researcher agrees that reforms in the Islamic law of inheritance are the urgent need of the day. But it would be most effective if the change was to come from within the Muslim community. At the time of the advent of Islam, the Prophet showed how progressive the new religion was, when he gave rights of property ownership and inheritance to women. All that is needed for Islam to be embrace reforms is for it to be freed from the suffocating grip of orthodoxy. That this is possible is seen in Turkey, an Islamic nation that already has legislation giving equal shares in property to widows and daughters, compared to males.[26]