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GENDER RIGHTS AND LAWS OF SUCCESSION IN ISLAM

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ABSTRACT:

The world today is going through one of the most unexpected phases. Our Society has been experiencing a mixed range of feelings when it comes to the field of holding opinions and voicing for gender rights or property disputes. There is an extreme lack of knowledge when it comes to assigning gender roles and well as the property distribution amongst men and women. Often, many family disputes arise due to the lack of information regarding the property share of each individual member of the family. The paper is focused on bringing light on such factors that lead to problems regarding property share in Islam. Through this paper, the authors aim to highlight the importance of the different gender roles and the Islamic rules and regulations regarding the share of the property. Through this paper, the authors aim to make the readers aware of the various important Islamic terms used in different schools of thought. The paper would conclude with the suggestions for methods, solutions as well as the reform of laws pertaining to the aforementioned issues.

Keywords: Property, shares, Islamic rules and regulations, gender roles, gender disputes.

Research Question:

- Whether the Sunni and Shia laws of Inheritance follow the Sharia laws?
- Whether Muslim women are discriminated in the process of inheritance?
- Whether the presence of men have an impact on the share of muslim women?

Research Objective:

- To understand the laws regarding succession in Sunni and Shia school of law.
- To understand the division of property amongst the various sharers as per Sharia law.
- To understand and analyze the succession laws with regard to Muslim women.
- To study the impact of the presence of men on the share of the property of women.

INTRODUCTION:

In Muslim laws the giving away of property or the inheritance of property is on the basis of the verses mentioned in the Qur'an as well as the inheritance process is practiced as it was preached by Prophet Mohammed. Inheritance can be termed as the succession that is done through a testament or a last will. It is also mentioned in the Qur'an that each individual Muslim person may write their last will, however, this has not been made mandatory. The verses in *surah al-Maa'idah* of the Qur'an has also mentioned in it the importance of the witnesses at the time of giving the testament¹.

The successions laws are bifurcated in twofold a testamentary and intestate. The situation wherein a person decides the right future owner of his property is known as a testamentary state, whereas when there exists a compulsion of adhering to the succession laws for the property of a deceased person that is known as the intestate system of succession.²

The important rule of the inheritance of property is that the entire process of inheritance is in compliance with the rules and regulations stated in Qur'an, Hadith and Fiqh.

When a Muslim die there are four duties which need to be performed. They are:

1. Pay funeral and burial expenses.
2. Paying debts of the deceased.
3. Determine the value/will of the deceased (which can only be a maximum of one-third of the property).
4. Distribute the remainder of estate and property to the relatives of the deceased according to Shariah Law³

All these above payment dues must be from the on-third of the property of the deceased person and the rest of the portions must be given to the legal heirs.

Another important aspect as to the inheritance of property under the Shariah law is that there must be a blood relationship, or the relationship should be legal in order to enter into the process of inheritance. The laws of inheritance from illegitimate relations are distinctly described in the different schools of thought. For example, in the Hanafi, Maliki and Shaffie schools there exists a provision wherein the mother and her relatives can transfer the property from on to their

¹ Tahir Mahmood, Muslim Law in India and Abroad, 2nd ed

² Hamid khan, 2007. The Islamic Law of Inheritance, pp.25-65, Oxford University Press

³ Sir Abdur Rahim, 2000. The Principles of Muhammadan jurisprudence, P.346, Pakistan Law Publishing Company

names from the illegitimate person. Hanbali schools have permitted the male agnates of the mother to transfer the property from the illegitimate person. However, in the Shia school, no such provision exists where the mother and her relatives can inherit property from the illegitimate person.

Faraid is the term which signifies the exact share or the accurate amount as to how the property must be divided amongst the different relatives or the legal heirs. The legal heir by whom the property is inherited is termed as *warith* this term can only be used for those who can legally acquire the property of the deceased person. Between sons and daughter, the inheritance property is divided on the basis of 2:1 proportion which means that the son would be entitled to 2/3 of the property and the daughter would be entitled to 1/3 of the property

The Qur'an had also introduced revolutionary changes to the laws of inheritance to a deceased's person's property. Chapter IV of the Qur'an title *Al-Nisa* includes in it the reforms that were made in order to cater to the needs of women had did not have right in the inheritance of property in the pre-Islamic stage. Through this reform all the women i.e. mother, daughter, sister, widow everyone was given a share in the property of the deceased person. This revolutionary reform led to the prevalence of justice for the women of the society who were deprived of such justice.⁴

The rules regarding succession are different in Sunni laws and Shia laws. Although there exists commonality with regard to the Qur'anic principles, shares, heirs and the hierarchy of priority and the same primary denominator⁵.

DISQUALIFICATION FROM INHERITANCE OF THE PROPERTY:

DIFFERENCE OF RELIGION:

The most important principle amongst Muslim inheritance laws is that the property can only be inherited from a Muslim person. The property can not be inherited from a non-Muslim person nor can a non-Muslim person inherit the property from a Muslim person. However, the Caste Disabilities Removal Act, 1850 had altered this provision and had added the rights of a converted Muslim person.⁶ In a situation where there is a Hindu married man and who has a

⁴ Tahir Mahmood, *Muslim Law in India and Abroad*, 2nd ed, p 190.

⁵ Sahih al-Bukhari, Volume 8, Book 80 Laws of Inheritance (*Al-Faraa'id*), Number 724

⁶ Caste Disabilities Removal Act, 1925, section 3.

son, converts his religion to Muslim and passes away, since he has converted to Islam the succession laws remain valid in his case.⁷

HOMICIDE:

Any person cannot acquire the property of another person through the succession laws by killing the person. Even if the death was caused accidentally, the Sunni laws strictly prohibit the acquisition of the property in such cases. However, Shia laws decide upon whether the act was done intentionally or not.

ILLEGITIMATE CHILD:

The definition of a legitimate child is any child that has been born through lawful wedlock.⁸ In any such cases where the child has been conceived prior to the marriage and the natural mother marries someone else, the natural father cannot claim the child to be a legitimate child.⁹

As per the Sunni laws, any child born out of unlawful wedlock, i.e. an illegitimate child has the right to only inherit the property from the maternal side i.e. through the natural mother and the relatives of the mother.¹⁰ However, as per the Shia laws, the right for the inheritance of the property of an illegitimate child differs from the Sunni laws. Any child who is termed to be illegitimate cannot inherit the property from both paternal and maternal side, i.e. the natural father and his relatives and the natural mother and her relatives.¹¹

EXCLUSION OF DAUGHTER:

A daughter is entitled to succeed to the property of her parents in the Sunni and Shia school of laws, however, there exist certain customs¹² and statutes governing this inheritance.¹³ In the states of Jammu and Kashmir, the daughters are allowed to inherit the property only in cases where all the male members to inherit the property are absent in a family.¹⁴ Whereas, in other places, she may inherit the property only if she is a '*Khanansahin*'.¹⁵

⁷ Chedambaram v Ma Nyein Me, AIR 1928 Rang 179.

⁸ Habibur Rahman Chowdhari v. Altaf Ali Chowdhary, AIR 1922 PC 159.

⁹ Mohammed Khan v. Ali Khan Saheb, (1908) MLJ 402

¹⁰ Rehmat Ullah v. Maqsood Ahmad, AIR 1952 ALL 640

¹¹ Sahebzadee Begum v. Himmut Bahadur, (1870) 14 WR 125

¹² Muhammed Kamil v. Imtiaz Fatima, (1908) 36 IA 210

¹³ Aminabi v. Abasaheb, AIR 1931 Bom 226.

¹⁴ Aziz Dar v. Fazli AIR 1960 J&K 53.

¹⁵ Ghulam Hassan v. Saja AIR 1948 J&K 26

LAW OF INHERITANCE AS PER SUNNI SCHOOL OF LAW:

As per the Sunni Laws, the shares and heirs for the inheritance of the property are bifurcated into the following:

- a. Related Heirs
- b. Unrelated Heirs.

The related heirs are again divided into three categories sharers, residuary and distant kindred which includes the blood relatives. In cases of the unrelated heirs, there are also divided further into different groups, successor by contract, acknowledged kinsmen, universal legatee. The person belonging to the first category can inherit property through a contract, the second is a person whose ancestors are not known but the deceased has given the property in his favour and the last is a person in whose favour the will has been written.¹⁶ These shares of property are fixed as per the Islamic laws stated in the Qur'an.

GENERAL PRINCIPLES UNDER SUNNI LAWS:

Rule of Exclusion:

The Sunni laws are based on the concept of inheritance of property by the near and dear ones. All those who are remoter than the ones that are closer shall not fall under the category of near and dear ones and thus are not considered for the inheritance of property.

Return or *Radd*

As per the Islamic rules, the amount to be given to the shares remain fixed and the residue amount would be given to the residuaries. If at all there are no residuary then the amount of residuary would come back or return to the sharers and is not given to the distant kindred. The process through which the amount comes back is known as radd. The living spouse is not supposed to take the amount unless any other sharer is available or present and if any distant kindred is present.

Shia law is similar to Sunni law to some extent and dissimilar to another extent with respect to the distribution of an estate among brothers of different kinds, i.e. Full, consanguine and uterine. Full brother excludes consanguine brother, but neither full nor consanguine brother excludes uterine brother. In Sunni law, the full sister does not exclude consanguine brother

¹⁶ Mohammed Zia-ullah v. Rafiq, AIR 1939 Oudh 214

except in a situation where the former is converted into *Ausbaat ma'a Ghayr* (the residuary together with another). Shia law is different from Sunni law on this point as full sister excludes consanguine brother generally because the former's status is equivalent to her male counterpart in his absence.¹⁷

Principle of *Aul* /Increase:

In Sunni law, whenever the calculated shares of heirs of a deceased are increased from the supposed shares of that estate, the supposed shares are increased to match the number of the calculated shares. In this manner, each sharer gets what is prescribed for him/her in the Quran in terms of numbers, though the actual amount/quantity of his/her share is reduced. As it is not possible to avoid situations that attract the application of the principle of *Aul*, Shia jurists have devised an innovative manner to resolve such situations.¹⁸ They have divided the sharers of a deceased into those whose share is susceptible to reduction and those whose share is not liable to reduction.

They have placed daughters and sisters into the first category taking into account the fact that their prescribed shares (one half and two thirds) could be reduced in those situations where there is a male counterpart who converts them into residuaries. On the other hand, there are other sharers, e.g. parents, spouse and uterine sister, whose share is minimally prescribed in the Quran which could not be reduced from that minimal amount in any case.¹⁹ So, if there are heirs from both these categories and their calculated shares are increased from the supposed shares, the heirs of the second category will have their prescribed shares, while the heirs of the first category will bear the burden of avoidance of the application of the principle of *Aul*²⁰

¹⁷ Al-Sabooni, *Al-Muwarith fi al-Shariah al-Islamia fi Zuo al-Kitab ws Sunnah* p.73-74

¹⁸ Fyzee, *Outlines of Muhammadan Law*, p.331.

¹⁹ Ameer Ali *Commentaries on Mahommedan Law*, p.1123.

²⁰ Khan, *The Islamic Law of Inheritance*, p.146.

SHARERS UNDER SUNNI LAW:

The primary heirs under Sunni laws are living spouse, son, daughter, mother and father. All these heirs have a fixed share in the deceased person's property and are termed as the legal and also the primary heir of the property.

Living Spouse:

The share of the surviving spouse varies depending upon the presence of the child or child of a son. Where the surviving spouse is the widower or the husband of the deceased woman, he takes one-fourth of her property in presence of a child or the child of a son and in their absence, it is half of the total or the property. In case a man dies, his widow takes one-fourth of his property in the absence of child of a son and in their presence, it is one-eighth of the property share. Where more than one widow is present all of them collectively take one-fourth of the property share or even one-eighth as the case maybe they will divide it amongst themselves.

There are a few differences between Sunni and Shia laws regarding inheritance of spouses. Some Shia schools recognize temporary marriage as a valid marriage. According to these schools, only permanently married spouses are entitled to the right of inheritance from each other. There is one important distinction between Shia and Sunni laws regarding the inheritance of a childless widow. In the former law, she is not entitled to land or immovable property though she has a right to her prescribed share from her deceased husband's movable assets. On the other hand, Sunni law does not differentiate between immovable and movable properties of a deceased; hence, a childless widow is entitled to have her share from the both

Daughter:

A daughter inherits as a sharer only in absence of the son. An only daughter takes one-half share in the property and if there are two daughters then they would two two-third of the property. In the presence of the son, the daughter is not a sharer but a mere residuary of the property and would take whatever is a share equal to half of his share.

Father:

The father is the primary sharer of the property. He has a share of one-sixth of the property which he inherits along with the child or son of his child. In their absence, he inherits as a residuary and can take to the extent of the total property in the absence of any other sharer. The presence of the father excludes the brothers and sisters whether full, consanguine, or uterine

and a true grandfather from inheriting the property. This exclusion is based on the principle that where a person is related to the intestate through another person, he is excluded in the presence of the relative who is in the connection. Brothers and sisters are father's children and would be excluded in his presence

Mother:

The mother's share varies considerably depending upon the presence or absence of the heirs of the deceased. Her share is fixed as one-sixth in the presence of the child or child of a son and when there two or more brothers irrespective of uterine relationship. Her share is enhanced to one-third in the absence of the child or child of a son and where only one brother or sister may or may not be present. The situation in which her share changes in the absence of child or child of a son, presence and absence of only one brother or sister but the presence of the spouse and the father of the deceased. Then the mother takes one-third of what remains after deducting the spouse's share. The presence of the mother excludes a true grandmother from inheriting under the rule of nearer blood excluding the remoter

True Grandmother and Grandfather however so high:

Their share is based on the principle of near and dear and therefore the share of the true grandfather and true grandmother would depend on the absence of the mother or father. In absence of father the grandfather can inherit one-sixth of the property, this is applicable to the paternal grandfather. In the absence of the mother, the paternal grandmother would inherit one-sixth of the total share of the property. In cases where both maternal and paternal grandmothers are present, they can both collectively inherit one-sixth of the total share of the property.

Son's Daughter however so low:

A son's daughter can only inherit the property in cases of absence of a son or the absence of the son's son. Her share would be half if she is the only daughter and would two-third if in the case there are two daughters as the sharer.

Uterine brother and sister:

In such a case the share would be one-sixth and in a situation where there are more than one both together can take one-third of the total share of the property.

Residuaries by another (‘*Asabah bil -ghair*’)

This category has 4 heirs. They are:

- a) Daughter
- b) Granddaughter through son
- c) Full sister
- d) Consanguine sister

Each is entitled to $\frac{1}{2}$ of the estate if alone while two or more share $\frac{2}{3}$ of the estate equally if they are not excluded.

They cannot be excluded. Now, if any of these listed heirs are inheriting along with her male counterpart (i.e. son, grandson, full brother and consanguine brother respectively), she is no longer given $\frac{1}{2}$ or $\frac{2}{3}$ as the case may be.

She becomes residuary with the male. This has already been discussed in the last chapter under the subheadings: son(s) and daughter(s), grandson(s) and granddaughter(s), full brother(s) and full sister(s) as well as a consanguine brother(s) and consanguine sister(s)

SIMILARITIES IN SHIA AND SUNNI LAWS:

Shia and Sunni laws of inheritance are characterized by multi-layered differences as explained above. There are some similarities between them due to the fact that both laws are derived from the same Quranic verses. Some of the similarities have already been pointed out in the preceding analysis while explaining the true import of distinctive features of Shia law. These laws are on the same page as to who are Quranic sharers, they agree on their prescribed shares and conditions under which their entitlement is regulated to a large extent. There are twelve sharers according to Sunni law out of which Shia law recognizes nine sharers.²¹ The agreed-upon sharers are husband, wife, father, mother, daughter, full sister, consanguine sister, uterine brother and uterine sister.

These legal traditions differ with each other on three persons' status as sharers: son's daughter, true grandfather and true grandmother. According to Sunni law, they are included in Quranic sharers as they step into the shoes of daughter, father and mother respectively in their absence. According to Shia law, the son's daughter may inherit when there is no son and daughter of the

²¹ Ibid, p.78-87; 124-129.

²² Ibid, p.124

deceased alive, but she is not a Quranic sharer as regarded by Sunni law. Moreover, true grandparents are placed by Shia law in class 2 along with false grandparents and their inheritance is dependent on the absence of heirs of class 1

GENERAL RULES REGARDING LEGAL HEIRS AND SHARERS:

1. Father: In case the father is the sole bearer of the property without any successor he can take the whole property but if he has a son then he can take 1/6 of the property.
2. True Grandfather: The father's father and his father can be a part of the inheritance of the property.
3. Half Brother by the same mother: In case of the absence of children they take if one child 1/6 or if two or more divide amongst them by 1/3.
4. Daughter: In case of no sons then the daughters take the share of if one 1/2 and if two or more than 2/3
5. Son's Daughter: In case there is one daughter they can take 1/6 of the property.
6. Mother: She takes 1/6 when there is a child, she takes 1/3 when there is no husband or wife and both parents, she takes 1/3 when there is no grandfather.
7. True Grandmother: When no mother she takes 1/6 portion of the property.
8. Husband: If no child or son's child he takes 1/2 or 1/4
9. Wife: If she bears no child or son's child, she takes 1/4 or if widow 1/8.

WOMEN'S RIGHTS AND SHARE:

In Islam, women are entitled to the right of inheritance. In general, circumstances, though not all, Islam allows women half the share of inheritance available to men who have the same degree of relation to the decedent. For example, where the decedent has both male and female children, a son's share is double that of a daughter. Additionally, the sister of a childless man inherits half of his property upon his death, while a brother of a childless woman inherits all of her property. However, this principle is not universally applicable, and there are other circumstances where women might receive equal shares to men. For example, the share of the mother and father of a childless decedent. Also, the share of a uterine brother is equal to the share of a uterine sister, as do the shares of their descendants.

However, there are also situations where women can equally share in the property as men. If there exist only parents and a husband, then the father will get 1/6, the husband will get half and the mother will be entitled to 2/6th of the property. Also, in the case of *kalalah* relations where an individual person leaves behind neither child nor parents then the women get equal share in the inherited property. A Muslim woman has the right to keep her property or wealth, whether earned or inherited and can spend it as she may please without being questioned by anyone even her husband. According to Shariah Law, a woman's right to her money, real estate or other properties is fully acknowledged. This right undergoes no change whether she is single or married. She retains her full rights to buy, sell, mortgage, or lease any or properties. It is also worth mentioning that such right applies to her properties before marriage as well as to whatever she acquires thereafter by way of inheritance, maintenance, dower and gift or by any means.

AFFECT BY PRESENCE OF MEN ON WOMEN:

In Islam, it is the duty of the husband to maintain his wife and children. Being the husband, he is expected to provide maintenance to his wife, he has to look after his daughter until she gets married and is also expected to look after his widowed daughter. The Sharia law is obligated the husband to provide his wife with food, clothing, accommodations, and other necessities of life and thus proper maintenance of wife is essential according to the Islamic laws. According to the Holy Quran, the husband is ordained to maintain

an 'equitable standard' in providing maintenance to the wife, as the Almighty Allah said: "*But he (husband) shall bear the cost of their food and clothing on equitable terms*"²³

However, the wife's right to maintenance ceases on the death of her husband, for her right of inheritance supervenes. The widow is, therefore, not entitled to maintenance during the *iddat* of death. But under Muslim Law, a divorced wife is entitled to be maintained by her former husband during the period of *iddat*

The possessions of the deceased went to their sons or eldest son only, and girls were deprived of inheritance altogether unless a father determined an amount in his will or his sons took pity

²³ *Surah Al-Baqarah, verse-233*

upon their female siblings and gave them something. Thus, when the verse of inheritance gave women a *definite share* in the legacy, some people were astonished.

The reason that women receive half the share of men from an inheritance is that when a woman marries, she takes and the man gives; for this reason, men have a larger share. Another reason is that a wife is the dependant of her husband and he must pay for her expenses, but a wife is not required to pay her husband's expenses or financially support him in need.

ANALYSIS:

There are often arguments and debates of the fact that Sharia law regarding property inheritance is discriminative and does not provide an equal proportion to the female section of the society and does make women dependent on men. This law has in fact given an equal right to property and that in Islamic law women are much more favoured financially than males. Nevertheless, it cannot be denied that in most of the cases, women inherit half of what their male counterparts inherit. But it is not true that all the women get half of the share which their counterparts receive by way of inheritance. In case the deceased has left no ascendant or descendent but has left the uterine brother and sister, each of the two inherits one-sixth. It should also be mentioned here that both the father and mother of a deceased get equal share i.e, each of them gets one-sixth of the property of the deceased son or daughter if the deceased has any male child. The reason that women may get lesser share than men in property is also because of the fact that women inherit property from their spouse after getting married and in order to prevail equality between both the gender the share is less in cases where women have a chance of inheriting property in the future from their husband.