PRINCIPLES OF SUCCESSION: PRACTICE AND PROCEDURE-SHARIA PERSPECTIVE

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Principle of Succession: Practice and Procedure-Sharia Perspective

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In the name of Allah, most Gracious, Most Merciful.

1. Introduction

Islamic Law, the sharia, is a way of life which the Lawgiver enjoins to all those who accept Islam to follow. The word Islam itself means a complete submission to the way of God in all matters of life both in this world and the world hereafter. Sharia comes from the Arabic word *"Shar,* meaning road or path. It is therefore the road to the direction of righteousness, a road to perfection, which the Muslims are enjoined to follow. From this, it is clear that Islamic Law encompasses all human behaviour and conduct towards his Creator. The Almighty Allah; that is in man's performance of the obligatory duties.

Islamic Law is an all-embracing legal system that regulates and guides the life and conduct of Muslims concerning their rights and duties. The purpose of the law is to promote the welfare of the people both individually and collectively and its basic principles are justice, equality, liberty and fraternity, its basic sources are, the Qur'an, i.e. the revealed words of Allah; the Sunna of the Prophet (S.A.W,) i.e. his deeds, words and indirect authorization, the consensus of the Prophet's companions or qualified jurists and juristic analogy.

2. The development of the Islamic law of succession

To understand the Islamic law of succession as a whole it is useful to consider first the system of succession that operated within the Arabian penisular prior the revelation of Qur'anic Injunction on succession. Before Islam, succession to properties both among the Arabs and non-Arabs was quite unsatisfactory and not in well-defined lines. Succession among the Arabs before Islam was confined only to able male relations. Daughters, widows, mothers, minors and incapable persons had no share in the inheritance. Women were regarded as among 'the chattels. That came down for inheritance. The basic principle of inheritance among the Arabs was that one must be capable of defending the honour, of the family and tribe.

Generally speaking, the customary laws of inheritance of the tribes were almost all the same, they all have one thing it common that is, excluding females from inheritance. These inequalities and excslusion of Women from inheritance thereby, degrading them to the position of chattels or even more, to the lowest status, have been removed by the emergence of Islam, and a more equitable and just principle has been introduced and adopted in inheritance, thereby ensuring the absolute rights of women in different capacities, as mother, sister, daughter and wife. Their rights to inherit have been recognized and guaranteed by fixing specific shares for them. It has been said in the Holy Qur'an that:

> *"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."*[1]

Thus personal acquisition and labour have also been recognized for both men and women. This has been confirmed by the Holy Qur'an 4:32 saying: "To men is allotted to what they earn, and to women what they earn..." According to customary law of inheritance, parents were also excluded from inheritance, in the presence of 'children of the deceased. When Islam came it took note of the right of the descendants to inherit from their parents, but at the same time places the father and mother of the deceased in the first rank of heirs along with sons and daughters. The Holy Qur'an says:

> *And, the parents of the deceased shall have each of them a sixth part of what he shall leave, if he has a child; but if he has no children, and the parents are the (only) heirs, the mother has a third; if the deceased left brothers (or sisters) the mother has a sixth..*[2]

Indeed, it may be noted that no other legal system except Islamic Law provides for the parents to inherit from the property of their deceased children. Macnaghten in his, preliminary remarks *Principle and Precedents of Muhammadan Law,* observes:

In these provisions we find ample attention paid to the interests of all those whom nature places in the first rank of our affection; and indeed it is difficult to conceive any system containing rules more strictly just and equitable."

And the tribute paid by Rumsey is no less exalted. He remarks:

> "The Muhammadan Law of inheritance comprises beyond question-the - most refined and elaborate system of rules for the devolution of property that is known to the civilized world."

3. Nature of the Islamic law of succession

The reform introduced by Islamic Law is that, it makes the female a co-sharer with her male counterpart; and divides the property of the deceased person amongst the heirs on a democratic basis, instead of handling it all over to the eldest son. The main purpose of the Islamic system is to provide a material provision for surviving dependents and relatives; for the family group is bound to the deceased by mutual ties and responsibilities which originated from either blood or marital relationship. The manner in which this provision is to be made is prescribed by the law in rigid and uncompromising terms. Relatives are marshalled into a strict and comprehensive order of

[1] Qur'an 4:7
[2] Qur'an 4:11

priorities, and the amount of their entitlement is fixed. "Legal heirs" in the Islamic context, is a term which is properly applied only to those relatives upon whom property devolves after the demise of the owner, by operation of law; and it is the right of the legal heirs which are the key-note of the whole system of succession, for they are fundamentally indefeasible.

4. The inheritable property

One of the most important essentials of Islamic Law of Succession is the estate left by the deceased person.

> *"And to everyone, we have appointed heirs of that (property) left by parents and relatives……."*[3]

In almost all other legal systems, the distinction is made between Real and Personal Property. The Natural Law of Succession refers to Personal property. The Succession of Personal Property is governed by one set of rules while succession to immovable property is based on different principles. However Islamic law makes no distinction between the succession of real or personal property, or individual or Joint Family Property. The well-known rule of primogeniture, which is the incidence of succession of real Property in various systems, is not recognized in Islamic Law. Under Islamic Law all sons inherit equally. Thus under Islamic Law, Property covers both moveable and immovable, or real and personal and make up a single entity of the estate in which each entitled heir is given a quantitative or fractional share.

Property or *"tarika"* according to its linguistic meaning is the legacy left by a dead person. Muslim jurists differ as to what type of Property may be regarded as the legacy of the dead person. According to Maliki law, which represent the majority view, " *tarika"* means the property a deceased person leaves behind after his death and this includes all other financial rights and liabilities of the praepositors whether they are in his possession or not.[4]

According, to Hanafi Law, *"tarika"* denotes a properly and/or praepositor's rights left by the deceased person free from liability of any kind. It can be inferred from this definition that, where a person died and left an incumbered estate, he cannot be said to have left any legacy,

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[3] Qur'an 4:33
[4] Ahkam al-Mawarithfil Islam, 1966 ed, M.M Shalbi

in view of the fact that the estate is not free from encumbrances. For example where the praepositor left a mortgaged estate which value is equal to the loan he received, he cannot, be said to have left an estate[5] because, according to Hanafi School, those properties in which the right of someone obtains, shall not be included in the estate.

According to another view which is not mostly accepted, *"tarika"* means the property left by the deceased person free from claims of others i.e. after settling his funeral expenses and debts whether secured or unsecured, and this is according to the maxim of the School that "there can be no legacy except after settling of debts". Therefore, *"tarika"* means, the property of the deceased left for the wills if he has one, and the entitlement of the legal-heirs.

As has been mentioned above, *"tarika"* includes also proprietary rights of the deceased -to which his heirs are entitled to inherit. Muslim jurists have divided such rights into three groups. The first group is known as purely proprietary rights and these are inheritable agreed by all Muslim jurists. The legal heir is legally entitled to step into the shoes of the former owner in taking their possession by succession The proprietary 'rights' may include debts from other people, compensation, right to build a storey building; rights of easement *(irtifaq)* etc.

The second group are rights which are partially proprietary and partially personal in nature. This type of rights includes: the right of pre-emption *(shufah);* option of condition *(Khiyar al-Sharf),* option of inspection *(Khiyar al-Ruuyah),* etc. On this type of rights, jurists differ as to whether they are inheritable or not. The majority, including Maliki, are of the opinion that they are inheritable because of the Proprietary rights involved there, while according to Hanafi jurists they are not inheritable. They argued that, the rights are more of Personal than Proprietary nature since they are connected with the "desire" and "wish" of the deceased person. He is the only one who, in his life-time, could put his desire into action. They said that succession in Islam is a Shari'a decision which finds support from texts of the Holy Qur'an or Sunnah of the Prophet (S.A.W.). A Hadith has been explicit on the issue that Succession is only based on property and not otherwise. They quoted the following Hadith in their support: "He who leaves property it belongs to his heirs": On the other hand the majority of jurists also quoted a similar Hadith which says "He who leaves property or rights they belong to his heirs." It is because of these

[5] Sharh al-Sirajiyya of Tabyin al-Haqa'iq Zaikai, as quaoted in Vol. 6. P.26

two Hadiths that benefits *(Manafia)* are not inheritable according to Hanafi Law, while they are inheritable according to majority including Maliki.

The third group of rights which are purely personal in nature are not inheritable. This is agreed upon by all Muslim jurists because they are personal rights which are limited only to the deceased person. The rights include rights of custody to a child, right to divorce one's wife, right to be appointed an agent, etc.

The property forming the estate must be lawful within the definition of Islamic law. It is said to be lawful if there is no textual prohibition as regards its use. The property must be capable of being used. Thus its utility must be allowed under Islamic law. These are the two main conditions which a property or proprietary right must satisfy before it can be regarded as property under Islamic law and transferable by succession.

When a person dies, his property is not subject to inheritance until after all existing liabilities are paid from it. When these liabilities are discharged and still there is something remaining, then what remains goes to the .heirs. These liabilities are given priority one over the other and the priorities must be followed accordingly and strictly, even if one or a number of them will exhaust all the estate.[6]

The property left by the deceased is subject to five charges, these are:

i. **Secured Debts**

First, is the liability on the property itself in the form of:

(a) Redemption of the property itself. If for example the property has been mortgaged by the deceased, the mortgage has to be redeemed. This is agreed by all jurists except Hambali School.

(b) Giving out Zakkat on his existing animals when the timefor doing so was due during his lifetime and he did not do that. Also if the deceased left some farm produce from which he did not pay out Zakkat, the payment has to be made, i.e. one-tenth of the produce must

[6] Mawahib-ul-Ialil, Commentary of Mukhtasar-Khalil Vol. V. Page 406

be given out as Zakkat.

According to Maliki School the payment of Zakkat must be mandated by the prepositor before his death. This is the view of the majority of the Jurists. But to Hanafi School, Zakkat has been referred to as debts of Allah (Dainullahi), and therefore by death of the prepositors it lapses.

ii. **Funeral Expenses**

It is the responsibility upon every Muslim to pay for his funeral expenses if he leaves anything. If he has nothing, then the duty is on the Muslim Community. Therefore, out of the deceased property if there is something left after settling his secured debts, the next thing is to pay for his funeral expenses. This is agreed upon by all the Schools of Jurisprudence except Hanafi School which has given funeral expenses priority over secured debts. Funeral expenses may be the payment for the Shroud *(Kafari)*, the scent, the digging of the grave, cost of transporting the corpse and such other necessities, all of which must be without extravagance nor deficiency. This should be made according to his status in life. The Shroud of an ordinary man consists of three pieces of cloth, while that of a female consists of five. Islam prohibits extravagant spending of a dead person's property or that of any other volunteer on his behalf.

iii. **Payment of Unsecured or Ordinary Debts**

The next thing to be followed is the settlement of ordinary debts of the deceased out of what is left of his property. According to Maliki and others, all unsecured debts will be treated equally, while according to Hanafi School the debts for the purpose of the payment have been divided into three:

1. debts incurred during health
2. debts contracted during sickness, and
3. debts contracted partly in health and partly in sickness.

If they are wholly debts of health or wholly debts of sickness they are all alike, and none is entitled to any preference. If they are partly debts of health and partly of sickness, the former are to be given preference if the latter can only be established by the acknowledgment of the deceased. But when the debts of sickness can be established by proof of evidence, or have been

openly incurred for known purposes, the debts of sickness are on the same footing as those of health.

Debts not actually due at the time of the debtors death, becomes payable immediately on the occurrence of the death, because the privilege of postponement is a personal right which dies with the praepositus. The heirs are not personally liable for the debts of the deceased, and if the deceased has not left enough assets to satisfy his debts, the heirs cannot be held responsible for the payment of the whole or partly unpaid debts. But the heirs especially his sons and daughters may on their own, volunteer to settle their father's debts.

iv. **Wasiyyah (Wills)**

The next thing to be done is the execution of his will if he has left any. All legacies are to be paid out of a third -of the remaining property after deducting the debt and funeral expenses,

> *The Prophet (SAW) as reported by Sa'ad bin Abi Waqas , limited the testamentary power to one third ……."*[7]

but not out of a third of the original assets. *Wasiyyah* is one of the very important branches of Islamic Law and has. its own set of rules and regulations[8].

What is left from the property of the deceased after deducting funeral expenses, debts, and legacies, is to be divided amongst the heirs of the deceased.

5. Ground of Inheritance

For someone to inherit from another's property, he must have a connection with the prepositus, or that he must be related to him. The causes of this relationship are two. These are *nasab* (i.e. blood relationship) and marriage, in both cases of *nasab and* marriage the tie with the praepositus must be a legal tie, that is to say the blood relationship must be one which is legitimate in the eyes of the law, and the marriage must be one which was valid and subsisting at the time of death.

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[7] Reported by Bukhari, Muslim, Ibn, Tirmidhi and others.
[8] Qur'an 2;180 and 240

i. ***Nasab***

Nasab is a blood relation which was arrived at through *Ijma*-based on Quranic verses. These people must be first either direct descendants of the deceased or those who are connected to him through his direct descendants; or secondly his direct ascendants how high so ever. For example:

a) Sons and daughters

Son's Sons and Son's daughters how low so ever.

b) Mother and father.

Grandfather and grandmothers how high so ever.

All of these people have to be connected to the praepositus through a male issue. There must be no female intervention between the living and the praepositus, e.g. the son of daughter, daughter's daughter, mother's, father, sister's daughter, mothers' sisters or daughters of maternal uncles are all excluded from the list of heirs according to Maliki School, despite the fact that they are blood relations of the deceased. They are not inheriting because they are connected with the praepositus through a female. They have been taken as those who affiliated themselves to other homes from where they will get inheritance. But in Hanafi and Shafi'i schools these groups of relatives inherit in the absence of the above mentioned people.

c) Collaterals - i.e. Brothers and sisters

- Germane brothers and sisters
- Consanguine brothers and sisters.
- The male issues of germane and consanguine in order of priority and uterine brothers and sisters. Their issues whether male or female would not inherit under Maliki law as mentioned above.

d) Uncles - on condition that the claimant himself must be a male issue and his link to the praepositus must be through a male issue.

Under this heading, we have only the paternal uncles; germane and consanguine and their male issues are entitled to inherit excluding both the paternal aunts and maternal uncles and aunts and their children.

(ii) Nikah - (Marriage)

Any valid and subsisting marriage at the time of the death will give right to inheritance according to all jurists, but they differ as to whether a *fasid* (irregular) marriage will give right to inheritance or not. A *fasid* marriage is the one the validity of which is disputable, in the sense that the marriage ranks as valid in one school and irregular *(fasid)* according to another. For example in Hanafi School, an adult woman has capacity to contract herself in marriage without the consent of her *wali,* (marriage guardian) while according to Maliki school, she can only do it through her *wali.* This type of marriage is valid under Hanafi while it is irregular under Maliki pending the approval of her *wali*. According to Hanafi, Shafi'i and Hambali Schools, a *fasid* (irregular) marriage cannot create right of inheritance. But Maliki School examined the illegality and divided it into two; disputed illegality and undisputed illegality. If the illegality of the marriage is disputed and if one of the parties died before they are separated, such marriage will create the right of inheritance. For example, the question of *wali and* witnesses in the view of Malikis and-Hanafis. But, on the other hand, if the illegality is not disputed it will not create any right of *inheritance, for example, the marriage of fifth wife,* sister, etc.

6. Distribution of Estate

The ancient Arab customs has, in the succession of a deceased person's property, one principal object in view, that is, the maintenance of the property in the family. With this view; the succession was confined exclusively to the male relations, and even among them to those who were capable of bearing arms. The daughters, the widows, the mothers, as well as the minors were directly or indirectly excluded from succession; the daughters, because their birth was regarded as a misfortune[9] and because by marriage they ceased to be members of the family; the widows, unless mothers of children were treated as part of the husband's estate; the minors because they were unable to defend by their arms for tribal rights and privileges, and their goods therefore belong to their tutors.

The reform introduced by Islam in the rules of inheritance is two fold:

(1) it makes the female a co-sharer with the male; and

(2) divides the property of the deceased person among the heirs on a democratic basis,

[9] Qur'an, Chapter 81:8

instead of handing it all over to the eldest son, as is done by the law of primogeniture, that is by giving rights of inheritance to those excluded by the ancient law.

These changes are mirrored in the novel rules of rights of succession introduced by Islam. Briefly, the Qur'an established rights of inheritance between husband and wife and in favour of certain close females blood relatives, the, mother, the daughter and the sister by prescribing fixed fractional parts *(faraid)* of the deceased's estate as their heir entitlement. The new rules introduced by the Holy Qur'an do not altogether abrogate the customary system but merely modify them by imposing upon it a new class of legal heirs. The male agnates, those who used to inherit in *jahiliyya* period still inherit but now after the satisfaction of the claims relatives introduced by the Qur'an.

Thus, the Islamic Law of inheritance rests basically upon the recognition of two distinct categories of legal heirs; the newly introduced Qur'anic heirs, who are called *(ahl al-Fara'id)* i.e. those with prescribed shares and the male agnates or *(asabat)*, the heirs of the customary law. These two distinct basic groups were fused together into a cohesive system now known as the Islamic Law of Inheritance. When the new rules were first introduced, some of the companions thought it very hard and complained to the Prophet (SA.W.) saying that they were required to give half of their property to a daughter who did not ride on horseback or fight with the enemy.[10] The general principle of inheritance is first laid down in the following Qur'anic verse:

> *"For men is a share of what the parents and the near relatives leave, and for women a share of what the parents and near relatives leave, whether it be little or much."*[11]

This verse was revealed after there were so many complaints over the denial to daughters and wives of the rights of inheritance. It was narrated that when Aus bin Thabit al-Ansari died leaving his wife, three daughters and his two nephews, the nephews took away all his wealth without leaving anything for the daughters and their mother. So, the wife went and complained to the Prophet (S.A.W.) who sent for the nephews and asked them about the matter. They complained by saying that:

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[10] Jarnral Bayan Fi Tafsir a-Qur'an iv, p.171
[11] Qur'an 4:7

> *"Oh the Messenger of Allah. Her children do not ride, on a horse and do not bear arms and do not destroy the enemy."*

Then the Prophet (S.A.W) said, leave me until I see what Allah causes to happen about their affairs. Then the Almighty Allah revealed the above quoted verse. After that the Prophet (S.A.W.) sent for them (the nephews) and ordered them not to take anything of Aus's property. The distribution of Aus's estate did not take place until after the revelation of verse 11 of chapter 4. Similar incidence has also happened when the wife of Sa'id bin Rabi'a came to the Prophet (S.A.W.) with her daughters and said:

> *"Oh Prophet of Allah, these are the daughters of Said bin-Rabi'a. Their father died a martyr's death beside you in the battle of Uhud. But their uncle has taken the whole of Said's estate - and they cannot marry unless they have property."*

After this, the verse of inheritance, i.e. (verse 11 of chapter 4) was revealed and the Prophet (S.A.W.) sent for the uncle and said to him:

> *"Give the two daughters of Sa'id two-thirds of the estate, give their mother (Sa'id's widow) one-eighth and keep the remainder yourself."*

After this verse, verses 12 and 176 of the same chapter were also revealed to complete the laws of inheritance. These verses introduced six fractional shares for the heirs mentioned in the verses, namely, ½, ¼, $^{1}/_{8}$, $^{2}/_{3}$, $^{1}/_{3}$ and $^{1}/_{6}$. For the purpose of distribution of inheritance, one should be proficient in dealing with numbers and fractions which are the basic rules to be used in distributing an estate.

A fraction generally denotes a part of a whole and consists of two rational numbers. It can also be through of a ratio of one numbers to another. The bottom number is called the denominator and it tell on how many parts the whole has been divided into. The top number is called the numerator and tell us how many parts are being considered

The persons spoken of in these verses, as inheriting the property of the deceased, may be divided into two groups, the first group consisting of children, parents and husband and wife, and the

second consisting of brothers, and sisters. All the people mentioned in the first group are immediate sharers, and if all the three of them are living, they share all of them a right in the property, while the members of the second group inherit only if all or some of the members of the first group are wanting. Both groups are capable of further extension; as for instance grandchildren, or still lower descendant taking the place of children; grandparents, or still higher ascendant taking the place of parents; and uncles, aunts and other distant relatives taking the' place of brothers and sisters.

All jurists are generally agreed on the principle by which individuals who are entitled to inheritance in the estate of the deceased can be distinguished from those; who have no right. For example, somebody may die and leave behind him numerous relatives, in the absence of a certain determine rule, it would be extremely difficult to distinguish between the inheriting and the non-inheriting relations. In order to prevent this difficulty and to render it easy to distinguish between the two classes, it is recognized as a general rule that when a deceased person leaves behind him two relations, one of whom is connected with him through the other; the former shall not inherit whilst the intermediate person, is alive. For example, if a person on his death leaves behind him a, son and a son's son, the son's son will not inherit his grandfather's estate while his father is alive except in the case where the father is not entitled heir to the grand father's estate. Also this rule is subject to one exception that the mother of the deceased does not exclude his brothers and sisters, whether germane or uterine, from inheritance.

Another rule, developed in distinguishing between the inheriting and the non-inheriting heirs is that the nearer in degree of relationship excludes the more remote. Though this rule is covered by the former, the jurists differ as to the mode of its application in consequence of the difference in the classification of heirs. The Sunni jurists divided the heirs into two, viz, agnates and cognates, who are sub-divided into three classes, i.e. descendants, ascendant and collaterals. The purpose of this division and sub-division is to indicate the order of succession, and the rule applies to, each class of heirs but not to the heirs of different classes. For example, a 'son will take in preference to a son's son, though both being first class of heirs, but a son's son, will take residue in preference to the father, although the latter is nearer than the former, because the father is included in the second class of heirs.

7. Classes of Heirs

The majority of Muslim jurists divide heirs into three principal classes:

1. Qur'anic Heirs - *dhawul-fara'id(*called sharers)
2. Agnatic Heirs - *Asabah* (called Residuaries)
3. Uterine Heirs - *dhawul-arham* (called distant kindred).

This third class of heirs is added only by Hanafi School. This school (Hanafi), further added four subsidiary classes. We shall here only discuss the principal classes.

Accordingly, the property of the deceased goes in the first instance, to the Qur'anic heirs, if the estate is not exhausted by them, or in their absence, it goes to the agnatic heirs. And finally, in the absence of heirs of classes one and two, the property is distributed among the uterine heirs according to Hanafi Law, but to Maliki Law, the remaining property will go to the public treasury *(Bait almal).*

Class 1 - The Qur'anic Heirs

Qur'anic heirs consist of certain close relations of the deceased to whom a specific share is allowed in the Qur'an. These include four male and eight female sub-classes. The male sharers are the husband, the father, true grandfather how high so ever, and the uterine brother. The female sharers are the wife, the mother, the true grandmother, daughter, the son's daughter, how low so ever, the germane sister, (i.e. full sister), the uterine sister, (of the same mother but not father), and the consanguine sister (of the same father).

Three out of these sharers (i.e. the granddaughter, grandfather and grandmother) were not in fact specifically mentioned in the Qur'an as legal heirs; but rather they were added to the list of ahl al- Fara'id through the doctrine of *Qiyas* (analogy). The presence of two *asabah* (residuaries) relatives in the group, the father and the grandfather, is explained by the fact that their inclusion was designed to enable them to share in the inheritance when they would otherwise be excluded through the rule of class, as applied in the pure agnatic system, by a son or grandson of the praepositors. The remainder of the *ah-al-fara'id* (the husband, uterine brother and eight females), are of course, relatives who do not rank as legal heirs at all under the customary tribal Law.

It should be pointed out that some of these sharers exclude others completely or partially, and that their sharers may exhaust the property by reaching a unity. Sometimes, however, the fixed share may add up to more than a unity as, for example, with a wife $^1/_8$ two daughters $^2/_3$, a father, $^1/_6$ and a mother $^1/_6$.

In this case, the sharers are more than unity and this type of case is called *"auf*, and the fractional shares are proportionately reduced. Sometimes also the sharers may not reach a unity, in which case the remainder will be divided among the heirs and sharers proportionately increased by way of *"radd'* of (returning) according to Hanafi Law, or the remainder will be transferred to the Bait-el-mal (Public Treasury) according to Maliki Law. See the table which contains in the first column a list of sharers: the second column specifies the normal share of each sharer, the third column specifies the conditions which determine the right of each sharer to a share, and the fourth column sets out the shares as varied by special circumstances.

Among the people mentioned under class one, i.e. Qur'anic heirs may be given as follows:

1. ***One-Half***

Among the Qur'anic heirs, five of them will get one half of the deceased's estate and these are:

i. A husband where the wife left no child.[12]
ii. A daughter if she is alone or son's daughter if she is alone in the absence of a son, daughter and a son's son.
iii. A sister either germane or consanguine if she is alone and in the absence of germane or consanguine brother,

2. ***One-Quarter***

Two out of the Qur'anic *heirs* get one quarter of the estate. These are:

i. A husband if the wife had left a child
ii. A wife if the husband left no child.

[12] Child, means son or daughter or son's son or daughters son how low so ever

3. ***One-Eighth***

Only one Qur'anic heir will get one eighth of the estate and that is a wife where the husband leaves a child. Even if the wives are four they share the one eighth of the estate amongst themselves.

4. ***Two-Thirds***

Four of the Qur'anic heirs get two thirds of the estate and these are:

i. Two or more daughters where the deceased left no son. Two or more son's daughters, if the deceased left no son or daughter or son's son.
ii. Germane sisters, two or more, where the deceased left no father, no child and germane brother.
iii. Consanguine sisters, two or more, where the deceased left no, father, no child, no germane brother or sister, and no consanguine brother.

5. ***One-Third***

There are three heirs who get one third of an estate:

i. A mother if the deceased left no child.
ii. Uterine brothers or sisters when they number more than one. They share the one third equally amongst themselves, if deceased person left no father, grandfather or a child.
iii. A grandfather if he is inheriting with more than two brothers or more than four sisters. He inherits $^1/_3$ of the remaining property after satisfying other Qur'anic heirs excluding the Sisters.

6. ***One-Sixth***

There are seven heirs who get one-sixth of an estate end these are:

i. Where the deceased left a child, or where he leaves more than one brother or sister, whether they are germane, consanguine or uterines and whether they are inheriting or not they will reduce the mother's, share from one-third to one-sixth.
ii. A paternal or maternal grand-mother in the absence of a mother.
iii. A father where the deceased left a child
iv. A paternal grandfather in the absence of a father.

v. A uterine brother or sister, in the absence of a child, father or grandfather.

vi. A son's daughter, in the presence of one daughter who will take her Qur'anic share of one-half and the son's daughter will get one-sixth, to complete the total share of the females i.e. two-thirds.

vii. A consanguine sister when she is inheriting with one germane sister who will take her Qur'anic share of V_2 and the consanguine sister will take V_6, to complete the total share of $^2/_3$.

Class II - Agnatic Heirs

The second principal class of heirs consists of the agnates (residuaries) or *asabah* They receive what-is left, if any, after the sharers of the first principal class *(ahl-al Fara'id);* the whole property in default of any sharer, and nothing if the sharers exhaust the entire property. An interesting subclass of agnates is that of the sons. The son is not one of the strictly Qur'anic sharers; but he is a special agnate who cannot be excluded by any other heir of any class, and who exclude other heirs, agnates or excludable sharers. All residuaries are related to the deceased through male issues. The uterine brother and sister are related to the deceased through a female, that is, the mother, and they do not therefore find a place in the list of residuaries.

8. Classification of Residuaries

The residuaries have been divided into three classes, viz:

1. ***Residuary in his own right***

A residuary in his own right is every male in whose line of descent to the debeased no female intervenes and they are divided into four classes:

a) The descendants of the deceased;
b) The ascendants of the deceased;
c) Ascendants of his father; and
d) The ascendants of his grandfather.

Among these, preference is given to the nearer in degree. The first is the deceased's descendants (i.e. his son, son's son how low so ever), then his father, father's father how high so ever; next is his full brothers, his consanguine brothers and their sons now low so ever. The preference shall be given

by the strength of relationship (that is preference is given to one having double relationship over one having single relationship, whether male or female. The Prophet (S.A.W.) is reported to have said:

> "Relations by the same father and mother shall be given preference to relation by the same father only."

It is clear from the tradition that a full brother is preferred to a consanguine brother. A full sister as a residuary with the daughter will be preferred to a consanguine brother or sister, and son of a -full brother will be preferred to a consanguine brother or his son and the same is applicable in

i) Descendants of the deceased

1. Daughter's children and their descendants
2. Children of son's daughters and their descendants how low so ever.

ii) Ascendants of the deceased

1. False grandfathers how high so ever

2. False grandmothers how high so ever

iii) Descendants of parents

1. Germane brother's daughters and their descendants
2. consanguine brother's daughters and their descendants;
3. Uterine brother's children and their descendants;
4. Daughter's of germane brother's sons and their descendants
5. Sister's (germane, consanguine and uterine) children and their descendants

iv) Descendants of immediate grandparents

1. Germaine paternal uncle's daughters and their descendants
2. Consanguine paternal uncle's daughters and their descendants
3. Uterine paternal uncle's daughters and their descendants.
4. Daughters of consanguine paternal uncle's sons and their descendants.
5. Daughters of consanguine paternal uncle's sons and their descendants.
6. Paternal aunts (germane, consanguine and uterine and their descendants.
7. Maternal uncle's and aunts and their descendants.

The general order of succession-of-the distant kindred according to their classification:

that is, the first class succeeds first, then the second then the third, and then the ^fourth class. And the order of succession among the Individuals of each class is according to the proximity of degree of their relationship to the deceased. Therefore, the order of succession in this class is to be determined by [applying the following rules:

i. The nearer in degree excludes the more remote;
ii. Among the claimants in the same degree of relationship, the children of sharers and residuaries are preferred to those of *dhawularham*[13]

This class of heirs has generated much discussion and legal controversy among the Sunni Schools of Law. The differences over the rights of the *dhawul arham* go back to the time of companions and their early successors, some of whom interpreted the law sources allowing these relatives to inherit. These interpretations were later adopted by the Hanafis and other jurists of some major Sunni schools who held that *dhawul arham* must be given preference to *Bait ul-'Mal* (Public Treasury) whilst Malikis and other jurists held , that *dhawul arham* do not inherit; what ever is left of the property after the sharers goes to the Public Treasury instead of the *dhawul arham*. In this problem of *dhawul arham* rHanafi Law adopted the views of Caliphs Umar, Ali, Ibn I'Masud, Mu'adh bin Jabal, Ibn Abbas and others who hold that *dhawul arham* are entitled to inheritance; while Maliki , and Shafi'i, adopted the view of Zaid bin Sabit who says *dhawul arham* are not entitled to inheritance, the property is to be given to the *Bait-ul-Mal.* On each side of the debate were textual and analogical arguments produced to carry equal weight as far as internal consistency is concerned.

The mutual right of inheritance between husband and wife exists even after the woman had been divorced, provided she is still serving *idda* (waiting-period) and provided the divorce is raj'i (revocable). A divorce effected by a husband during his death sickness will never exclude the wife from sharing his estate. Divorce under such situation is valid but the wife will get her share from the husband's property even if she had completed her *idda* period and even after marrying a second husband, provided the husband died as a result of that sickness. But if the wife dies after her *idda* period expires and before his death, he will not get a share from her property. This is

[13] Durr-ul-Mukhta, page 870

the view of Maliki School.[14] According to Hambali she will inherit even after completing her *idda* period provided that she did not contract a new marriage. To Hanafis she will inherit only if the death occurred during her *idda* period.

This branch of the sacred Shariah has two basic objectives. First, to strengthen and consolidate the family, the foundation of Muslim society, indeed, of human society. "From a sociological standpoint," writes Professor N. J. Coulson in his *Succession in Muslim Family Law,*

> "The Laws of inheritance reflect the structure of family ties and the accepted social values and responsibilities within the Islamic community. For in the eyes of the law, rights of inheritance are generally regarded as the consideration for duties of protection and support owed to the deceased during his lifetime; so that the stronger the family bond the greater the right of inheritance."

Through the application of the law of inheritance the individual Muslim fulfils his supreme obligation to Islam by providing for the continuity of the family unit, "as one cell of the universal Islamic community," as Coulson aptly asserts.

The second objective of the Shariah in instituting the law of succession is justice, an uncompromising and comprehensive justice "It is difficult," a well-known critic of Islamic law concedes, as quoted above, "to conceive any system containing rules more strictly just and equitable."

Conclusion

The Islamic Law of Succession is a unique law. In its broad outline, no less than its details, it represents an outstanding and timeless innovation for which mankind is yet to produce a parallel. Because of the important of the law of succession, the Almighty Allah does not leave it for an individual human being. Allah Himself worked out the method and procedure of distributing of a Muslim estate. A judge or legal practitioner can only workout and implement what Allah (SWT) has ordained.

It is the responsibility of the Government to see that it is only those who are well learned in the law of succession that can be allowed to distribute a deceased person's estate. The problems of

[14] Jawahir-ul-ikl, L Commentary om Mukhtasar, p332-335

what is happening in the judiciary now is, unlearned persons were appointed as judge, and those who are learned were not using the knowledge. For somebody to distribute an estate he need to be knowledgeable of the law and be unbiased.