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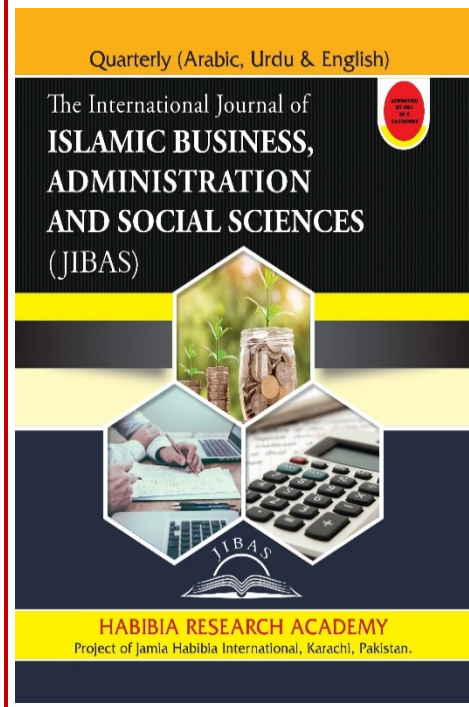
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TOPIC:

FLOUTED SUCCESSION LAWS

AUTHORS:

1. Dr. Muhammad Tahir, Associate Professor, HOD Law at Dadabhoy Institute of Higher Education Karachi. Email ID: drtahir949@gmail.com Orcid ID: <https://orcid.org/0000-0002-8921-6582>
2. Faiza Khalil, PhD Candidate, Department of Law, University of Karachi. Email ID: khalilahmedakyarn@gmail.com Orcid ID: <https://orcid.org/0000-0002-3959-362X>

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FLOUTED SUCCESSION LAWS*Muhammad Tahir, Faiza Khalil,***ABSTRACT:**

The paper intends to present an overview of local laws in the field, which have been enacted to deal with the subject of inheritance. Hypothetically, due to insufficient law making, Muslims constituting a significant part of the population in Pakistan are compelled to seek remedy from the court of law for the issues arising during the course of distribution. The relevant laws are either obsolete or piecemeal, which could hardly accommodate such complications, like ascertaining the share of legal heirs, mode of distribution amongst them, and recompensing of liability present upon the deceased. If the law of inheritance which currently exists as 'The Succession Act 1925' is reconstructed encompassing all the details, it could curb volumes of civil and criminal both categories of litigations in the courts of first instance.

KEYWORDS: *Obsolete laws, sharers, distant kindred, residuary, Inheritance, Legal heirs,*

INTRODUCTION:

“Learn about inheritance and teach it, for it is half of knowledge, but it will be forgotten. It is the first thing that will be taken away from my nation”

Prophet Muhammad (p.b.u.h.) (Ibn Majah)

Inheritance, also called succession, is the distribution of property amongst the heirs upon the demise of its owner. The formulae and procedures of inheritance are deeply rooted in civilizations but vary according to their established principles. In England usually, phrases like Wills, Probate, Succession, or Executors and Administrators are used, while in the United States, the term probate law is applied to the field as a whole.¹ Whereas, the law of inheritance in Islam originates upon certain notions. Islam aims to break the concentration of wealth and disburse it in society. The dispersal could reach distant kindred in some instances. Islam requires a follower to have the conviction that one day he will leave this mortal world and is not an absolute owner of the wealth he retains. He is merely a guardian of that wealth to a certain extent of time, and thus cannot plan its distribution after his death according to his aspirations. The injunction is aimed to unite and support the family system and provide economic opportunities to others to try their luck in the market.² The law has been declared as mandatory in nature and limits prescribed by Allah, supplementing that whoever obeys Allah and His Messenger, will be admitted into the Gardens underneath which canals flow, wherein he will remain forever, and whoever disobeys Allah and His Messenger and contravenes the limits prescribed by Him will be thrown into Fire forever.³ Almighty Allah who is the most knowing and Wise directs that since we are His creature and do not know who is more beneficial to us as regards our parents and our children. Consequently, He has apportioned their shares. The division of all shares shall take place only after the execution of the will and payment of debt upon the deceased. The share of a male shall be double that of a female. In case the heirs are two or more females, their total

share shall be two-thirds of the whole, and if there is only one daughter, her share shall be half of the whole. If the deceased has children, each of his parents shall receive one-sixth of the whole. If the deceased is childless and his parents alone are his heirs, the mother shall have one-third of the whole. If the deceased has siblings also, the mother shall be entitled to one-sixth of the whole.⁴ A husband shall receive half of what his wife has left behind if the couple was childless; but if they had children, then the share of the husband will be one-fourth in the assets of her deceased wife. Similarly, a wife shall be entitled to one-fourth of the inheritance left by her husband, if they were childless; but if they had children, the wife's share will be one-eighth. And if the deceased leaves no children and no parents behind but has one brother or one sister alive, each of them will be entitled to one-sixth of the whole. In case the brothers and the sisters are more than one then the total share of all of them will be one-third.⁵

The honorable Supreme Court of Pakistan had interpreted the law holding that there is no room for departure from the law of inheritance in Islam. The rights of heirs of a deceased, in his assets, are decided by their blood relationship with him. The heirs are divided into three classes namely, sharers, residuary and distant kindred. The rule of proximity forms the basis at the time of distribution. A nearer blood relation would inherit preferably than the remote one. If the claimants are equal in degree, their rights would be determined according to the line of their relationship with the deceased. The collaterals in the order of succession, inherit after sharers and residuaries. In the presence of sharers and residuary, the estate of a Muhammadan would not devolve upon the collaterals, except in a case in which the only surviving sharer is husband or wife. In such a case, after allotting the share of the spouse, the remaining would go to collaterals. However, according to some Muslim jurists, if an intestate dies leaving no one, except a wife or a husband, the entire estate would go to her/him, whereas others say that it would go to the State. The right of a missing legal heir would only be abolished if a presumption of his being dead is raised and properly adjudicated before the concerned forum of law before the opening of the succession. It is a well-settled principle of law that a person who displaces a natural succession to the property by claiming that there is no other legal heir of the deceased except him must discharge the burden to prove that he is connected with the deceased in a manner that only he could inherit his property. Secondly, at the time of the opening of the succession, there is no other legal heir of the deceased alive to have a preferential right of inheritance over him.⁶ According to the Shari'ah, one is entitled to make a will for one-third of one's property and not beyond that so that the rights of the legal heirs are not adversely affected unless all the legal heirs consent to such exceeding amount.⁷

The Sindh Letters Of Administration And Succession Certificates Act, 2021 is an enactment to provide an initial forum for the issuance of Letters of Administration and

Succession Certificates. Notwithstanding anything provided in any other law for the time being in force, National Database & Registration Authority (NADRA) could issue Letters of Administration or Succession Certificates, to the legal heirs of a deceased for his movable or immovable property, following the record of the family maintained by them. The Succession Facilitation Unit receives applications for grant of Letters of Administration and Succession Certificates, from legal heirs of the deceased, process and assess the applications. The due fee is to be paid here. If there is any conflict about the legal heirs or the property, NADRA declines to process the application and returns the same for filing afresh before the appropriate forum under the provisions of the Succession Act, 1925 (XXXIX of 1925) or any other applicable law. However, if non-controversial details are provided, the Authority issues the Letter of Administration or Succession Certificate in favor of the legal heirs of the deceased with details of their respective shares as provided in the personal law of such legal heirs. The Letters of Administration or Succession Certificates issued under this Act shall have the same effect as if the same has been issued under the Succession Act, 1925 (XXXIX of 1925). Parallel procedures under both laws are available at the same time. However, the courts are restrained from exercising their jurisdiction until a declining letter from NADRA is presented before them. Any person objecting to Letters of Administration or Succession Certificates, after their issuance from NADRA, may challenge it under any other applicable law within thirty days against the decision of the Authority by filing an appeal or application, as the case may be, before a court of competent jurisdiction. However, no forum is specified here and the discretion is left with the applicant, which shall open another chapter to challenge the jurisdiction of the legal forum where the order of NADRA is assailed.⁸

To deal with the rules of succession, the State has federally adopted the previously existing enactment of the colonial era by amending it to a certain extent. The Succession Act 1925 is an Act to consolidate the law applicable to intestate and testamentary succession in Pakistan, which is more likely a substantive piece of legislation with some procedures incorporated in it. However, the proceedings could be regulated to a certain extent by the Code of Civil Procedure, 1908.⁹ It comprises of 10 PARTS dealing with domicile, marriage, consanguinity, intestate succession, testamentary succession, representative title to property of deceased on succession, and similar aspects. Only Part IX deals with Probate, Letters of Administration, and Administration of assets of the deceased, and PART X with Succession Certificates. Chapter IX deals with the person who may be granted administration, grant of probate to the executors, administration pendente lite, grants for particular purposes, powers or duties of an administrator. While chapter X deals with the merits and procedure for granting of succession certificate. Section 28 in Part IV, deals with the computation of degrees of kindred relatives of the deceased but it does not apply

to Muslims. On the face of it, the colonial enactment is a mixture of substantive and procedural laws, without determination of the shares of the legacies in it. The legal heirs become victims of the dilemma when they do not have knowledge about the divine as well as land laws and want to distribute the inheritance suitable to the majority of them.

The court, while dealing with an application for a grant of succession under the Succession Act 1925 after its decline from NADRA, adopts the civil procedure and ascertains the legitimacy of the subject property as well as the legal heirs. However, the law is deficient in a penalty in case of any illegality conducted by the legal heirs. Whereas, most of the substantive and special laws in the field determining the rights and obligations of the litigants provide penalties in case of noncompliance and playing fraud with the court. The anguish here for the legal heir is to bear expenses the second time as such they had already borne expenses at NADRA.

Even though the Succession Act does not deal with shares of Muslim legal heirs, it has been aided by another enactment, the Muslim Family Law Ordinance 1961 which was promulgated to give effect to certain recommendations of the commission on marriage and Family Laws. Section 4 of it dealing with succession moves a step ahead that in the event of the demise of any son or daughter, before the opening of a succession of their parent, the children of such son or daughter of the deceased, who are alive when the succession opens, shall receive per stripe share from the inheritance of their father or mother as the case may be. However, the section is considered controversial on the ground that it goes against the injunctions of Islam and its varying application by the Courts of law. According to the Commission, the application of the Shariah rule was negatively affecting the interests of orphaned grandchildren, thus the enactment of Section 4 was intended to provide some protection to them.¹⁰

Right after Muslim Family Law Ordinance 1961, Shariat Application Act 1962 was enacted, according to which in all questions regarding succession, marriage, divorce, dower, adoption guardianship, minority, legitimacy, wills, gifts, religious usages or institutions, the criteria of decision, has to be the Muslim Personal Law (Shariat) in cases where the parties are Muslims.

Section 4 of the Muslim Family Law Ordinance 1961 was also challenged being repugnant to the injunctions of Islam. While deciding the issue, the court framed questions besides others about whether the text of the Holy Qur'an itself excludes the children of a predeceased son in the presence of a son. Further, if there is the Sunna of the Holy Prophet (p.b.u.h), which conflicts with the provision contained in section 4. The court ruled that a thing not known to Shariat could not be incorporated into it, not even through the force of law. According to the Honorable Court, the provision is a foreign body and it was the duty

of the court to sift grain from the chaff and to throw out the latter in the exercise of their Constitutional jurisdiction under Article 203-B.¹¹

Even though this decision was reversed by the Shariat Bench of the Supreme Court but section 4 was challenged again. This time the court observed that section 4 was the result of the recommendations of the Commission on Marriage and Family Laws appointed by the Government of Pakistan in 1956. According to the report of the Commission, Maulana Ehteshamul Haq was not prepared to re-open the question from the perspective that all four Imams had unanimously agreed upon the exclusion of legal heirs of a predeceased child from inheritance. According to the Honorable Court, Ijtehad could not in the least bit intrude upon any Qur'anic Injunctions or Sunnah. To find a solution to a problem or resolve a question, the sources of interpretation in Islam are to be taken into consideration in the order of priority.¹² However, an appeal against this decision is still pending before the Shariat Appellate Bench.¹³

Since the law remained under judicial consideration till today, varying verdicts have been passed by the courts of law. The Lahore High Court held that the grandchild would not be given more than his/her due share if the parent in question would have been alive at the time of the grandparent's death. In this case, Zainab was the only surviving legal heir of the predeceased. It was ordered that but she could get one half of the estate only and the rest shall go to the other legal heirs. This decision of the Lahore High Court was upheld by the Supreme Court.¹⁴

Recently another interpretation of the law has been attributed by the Honorable Supreme Court of Pakistan. The petitioners had sought leave to appeal against the judgment of the Islamabad High Court and the question of law raised before the Honorable Court was whether great-grandchildren come within the meaning of 'children' for the purposes of section 4 of Muslim Family Law Ordinance-1961. Learned Counsel for the petitioners while seeking applicability of section 4, had argued before the Court that the phrase "per stripes" appears in the section which has a technical meaning, thus, when the succession is opened, the children of any predeceased son or daughter being compact unit are entitled proportionately to the succession of their parents. However, if any of such legal heirs is predeceased then his or her children, the great-grandchildren, would receive part of the proportionate share of their parents. The Honorable Court, while interpreting the law enlightened another aspect and held that it is a fundamental principle of the law of Muslim Inheritance that the legal heirs of a person are only determined at the moment of death of the person whose succession is to be decided. Such rule is reflected in section 4 using the words "opening of succession", followed by "the children of [the predeceased] son or daughter, if any, living at the time the succession opens". According to Honorable Court,

the literal construction of the law has clearly limited application of section 4 only to those grandchildren who are alive at the time of death of the propositus as such the section does not refer to the legal heirs of the deceased but the children of such son or daughter. The Court had further held that it is a well-known principle of Muslim inheritance that legal heirs of a predeceased son or daughter do not inherit from the parent of the predeceased.¹⁵ Besides remedy under civil law, there is criminal remedy also under section 498-A PPC, a codified offense, according to which depriving women of inheriting property at the time of opening of succession by deceitful or illegal means is punishable with imprisonment of 5-10 years, or fine of 1,000,000 rupees, or both. However, the offense is non-cognizable and a private complaint by a lady is to be filed to seek redress against the wrongdoer.

Conclusion: The following steps may shorten the path to just and fair distribution of inheritance:

- The laws scattered are to be codified in a single piece of legislation.
- The law so enacted must contain fundamental principles as enshrined in the Holy Quran for the distribution of inheritance and shares of legal heirs to the possible extent.
- Strict penalties should be enacted for those creating hindrances in the distribution process.
- If the controversy about section 4 of the Muslim Family Law Ordinance 1961 is resolved, it shall not only diminish the burden upon the judiciary but also relieve the legal heirs by shortening their path to achieving their goal.
- Definite forums of law are to be prescribed for challenging the findings of NADRA.
- The least possible fee is to be levied by NADRA for the issuance of a succession certificate or letter of administration.
- Although the extent of will has been defined by the Honorable Courts in their rulings but the primary source of reliance for a judge is an enactment itself, therefore the law must contain such provision also.

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