

LAW REPORT

Law Commission's report on

Daughter's share in the succession of parents' property in absence of son

UNDER the Muslim Family Laws Ordinance, 1961 of Pakistan, as adopted by Bangladesh with few technical amendments, the children as the representatives of the predeceased father get per stripes the share of the father from their grandfather, which under traditional shariah law they were not entitled to. Even daughter in the absence of son of the predeceased father gets the entire share due to her father if living. However, under normal circumstances, if father dies leaving only daughter/s, she does not get the whole property, as she is entitled to get as representative of the predeceased father under the 1961 law. The part of the property also goes to collaterals i.e. uncles. Although illogicality of the position is apparent in the face, it would need proper study, rational interpretation of the holy Qur'an and Sunnah i.e. Ijtihad to bring necessary changes in the prevailing law, which the Law Commission has attempted to do and make recommendation to the government.

Doctrine of representation: Rationale
The Muslim Family Laws Ordinance, 1961 (Sec. 4) of the then Pakistan, predominantly a Sunni state, rectified the traditional law by the principle of representa-

Therefore, it is not logical or just that it should not be recognized among the lineal descendants.
d)The Qur'an has time and again expressed great solicitude for the protection and welfare of the orphans and their property. Any law depriving them of inheriting their grandfather's property would go entirely against the spirit of the Qur'an.

Increase of daughter's share in the absence of son by Ijtihad

Now the very simple and rational question is, if the daughter of the predeceased father can inherit the full share of her father from her grandfather, why she will not fully inherit her father's property after latter's death. It needs to be mentioned that legislation providing for the property rights of the children of the predeceased father in the Sunni Muslim countries was not an easy matter. They faced lot of opposition. However these countries laid emphasis on Ijtihad i.e. rational, contextual and time-needed interpretation of Qur'an and Sunnah, the gate of which was allegedly closed in the 10th century, which is not true. The notion of closure of the gate of Ijtihad gained strong ground from a decision of the Privy Council (in *Aga Mahomed v. Koolsom BeeBee* (1897)24 I.A. 196, and *Baker Ali Khan vs. Anjuman Ara*(1903) 30 I.A. 94) which was based on insufficient understanding of the spirit of Qur'an and Hadith, blocking the road of progressive development of Muslim law.

Later several different schools of thought of Muslim law emerged among which four are important i.e. Hanafi, Maliki, Shafi and Hanbali all taken together called Islamic Fiqh. There were both similarities and dissimilarities amongst them. It happened by the legitimate exercise of Ijtihad in absence of any clear guidance from the principal sources. This view has been reflected in the legislation and judicial decisions of many modern Muslim countries.

Examples of exercise of Ijtihad in modern times
The Tunisian Law of Personal Status, 1957 prohibiting polygamy and the Syrian Law of Personal Status, 1953 empowering kazi to refuse permission to a man already married to take a second wife were the result of reinterpretation of principle from main sources of Muslim laws. On post-divorce maintenance the Appellate Division of the Supreme Court of Bangladesh in a conservative judgement in *Hefzur Rhaman v. Shamsun Nahar Begum* in 1995, remarked that statutory recognition of benefits and privileges for divorced women beyond the period of iddat would not be in conflict with Muslim law if situation and justice so demands (ibid. p. 24).
So far the sub-continent is concerned, the superior courts in Pakistan have asserted two rights which no courts in other Muslim countries had done, namely, a) their right to independent interpretation of the Qur'an and b) their right to differ from the doctrines of traditionally authoritative legal texts which are not based on any specific injunctions of the Qur'an and Sunnah

(Alamgir Muhammad Serajuddin, *Muslim Family Law, Secular Courts and Muslim Women of South Asia: A Study in Judicial Activism*, Oxford University Press, 2011, p. 110). The improvement in the law of inheritance can be possible under this device. First, the Muslim Personal Law (Shariat) Application Act, 1937 only specified the area of application of Shari'a law but it did not explain or codify any rules of Muslim law. The absence of codified Muslim law practically opened the scope of legitimate interpretation of classical law.

Second, the interpretation of the rule "a nearer in kinship excludes the remoter from inheritance" and the liberal meaning of the Arabic word "Al-Khalala" (meaning child) can be used to justify the increase of share of daughter.

Resort to eclecticism for increasing daughter's share

Eclecticism, technically called takhayyur, is the device of searching for precedents, not only in the four orthodox schools but even in the opinions of individual jurists to meet the need of modern life. It is still allowed by some jurists to follow one school in one particular issue and another in others if his conscience so permitted. We followed this principle in the Dissolution of Muslim Marriages Act, 1939, allowing a Muslim wife to seek divorce on the grounds of husband's torture and desertion for a period of four or more years.

Both Sunni and Shia law recognize the basic rules of inheritance laid down in Qur'an but they interpret it differently. Under Shia law all heirs of the same relationship to the deceased, whether male or female, agnatic or non-agnatic, have the same ability to exclude other heirs and to transmit their entitlement to their own heirs (NJ Coulson, *Succession in the Muslim family*, Cambridge 1971, pp.108, 133). There is no reason to undermine the Shia version. In this context, some modern Muslim nations have adopted combined rules from two or more different schools or have created modern inheritance laws based loosely on traditional jurisprudence but suited for modern times.

Conclusion and Recommendation

The above examples and arguments amply testify that the status of daughter can be equated with that of son in certain cases of inheritance i.e. when father dies leaving daughter/s, but no son. This also conforms to frequent present-day practice in Sunni families. Parents having only daughter/daughters and no son desire that their daughters do not share the inheritance with collaterals. So they make gifts or Hiba to their daughters.

In the light of the above discussions, the Law Commission strongly recommends a new section be added after Section 4 of the Muslim Family Laws Ordinance 1961 with the provision of increasing the share of daughter/s by prohibiting any part of the property going to the collaterals i.e. uncles in the absence of son in usual course of inheritance.

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tion, meaning the children as the representatives of the pre-deceased shall inherit his or her share from the grandfather. The previous rule of succession excluding orphaned grand children from their grandparent's property aroused much attention and controversy. The Commission on Marriage and Family Laws in Pakistan which recommended 1961 legislation gave the following reasons and arguments for inheritance of the children of predeceased father:

- a) There is no Qur'anic verse or authoritative Hadith which excludes orphaned grandchildren from inheriting their grandfather's property.
- b) The exclusion was based on pre-Islamic practice, which gave all property rights to male members capable of carrying arms to defend the interest of the tribe or the family, and assumption that economic security of the female members would be taken care of by the male members, although Holy Qur'an and Sunnah later recognised many property rights of the women.
- c) Where the father of the propositus has predeceased him, the grandfather gets the share that the father of the propositus would have got. This means that the right of representation is recognized by the classical Shari'a law amongst the ascendants.

LEGAL MAXIM



- Nam nemo haeres viventis** - For no one is an heir of a living person.
- Naturae vis maxima est** - The force of nature is the greatest.
- Necessitas inducit privilegium quoad jura privata** - With respect to private rights necessity induces privilege.
- Necessitas non habet legem** - Necessity has no law.
- Necessitas publica est major quam privata** - Public necessity is greater than private necessity.
- Negligentia semper habet infortunium comitem** - Negligence always has misfortune for a companion.
- Nemo admittendus est inhabilitare se ipsum** - No one is allowed to incapacitate himself.
- Nemo bis punitur pro eodem delicto** - No one can be twice punished for the same offence.
- Nemo cogitur suam rem vendere, etiam justo pretio** - No one is bound to sell his own property, even for a just price.
- Nemo contra factum suum venire potest** - No man can contradict his own deed.
- Nemo debet esse judex in propria causa** - No one can be judge in his own case.
- Nemo plus juris transferre ad alium potest quam ipse habet** - No one can transfer to another a larger right than he himself has.

Source: Inrebus.com.



YOUR ADVOCATE

This week Your Advocate is Barrister Tanjib-ul Alam Advocate, Supreme Court of Bangladesh. He is the head of the chamber of a renowned law firm, namely, 'Tanjib-ul Alam and Associates', which has expertise mainly in commercial law, corporate law, admiralty, employment and labor law, land law, banking law, constitutional law, telecom law, energy law, Alternative Dispute Resolution, Intellectual Property Rights and in conducting litigations before courts of different hierarchies.

Query

I just graduated from University. I am looking forward to setting up a website like the ones which are advertised everywhere as 'click to earn'. I was wondering what legal processes I am required to follow in order to do so.
Thanking you in anticipation.

Nazmul Rahman Bari
Tangail

Response

Thank you for your query. You wanted to know the legal procedure for setting up a website with a provision for "click to earn". It is, however, not clear what you meant by such a website. If you meant that you will sale your website space to your potential client for their advertisement, then the following steps will have to be taken:
(a) Registration of domain name. While obtaining registration of a domain name, you need to be aware of the fact that you will not be allowed registration of a domain name which is a trade name of another company.
(b) Development of your website. This will involve creating content for the website as well as designing the same. In developing content and designing the site, you should not copy the intellectual property of another



website.
(c) Obtain regulatory approval for doing business in Bangladesh. These would involve obtaining (i) a Trade License from the local authority, (ii) Tax Identification Number from the local income tax office, (iii) VAT registration with the relevant VAT Office and (iv) membership with the relevant trade association.
Once you take the above steps, you are ready to start your business. Good luck.

For detailed query contact: info@tanjibalalam.com

LAW WEEK

Maiden human trafficking case filed

Bangladesh witnesses the first-ever human trafficking case after parliament enacted the Human Trafficking (prevention and protection) Act, 2012 in February this year. Mohammad Babu, 27, of Atrai in Naogaon, filed the case with Naogaon Women and Children Repression Prevention Tribunal on May 7 against a gang that allegedly trafficked two jobseekers to Egypt in the name of providing them with jobs in Saudi Arabia. Charges were brought against Mohammad Israfil of Andharkota and his partners, Mohammad Selim and Delwar of the recruiting agency Sonali Enterprise and Akram Hossain of Khandker Overseas in Dhaka. Offenders convicted of human trafficking would be handed down the highest capital punishment, lifetime imprisonment, different terms of rigorous jail or monetary fines or both on the basis of the gravity of their crime. - *The Daily Star June 7 2012.*

HC hits back at Speaker's comment

A High Court bench on June 5 said the Speaker of the Jatiya Sangsad had provoked people against the apex court and the government by making comments on its directive on Supreme Court land and the act amounted to sedition. The Speaker is completely ignorant about the SC and the constitution, said the bench of Justice AHM Shamsuddin Choudhury Manik and Justice Jahangir Hossain Selim. Speaker Abdul Hamid on May 29 told the House that the courts were neutral and independent, but it looked odd when they took quick decisions to solve their own problems while people had to wait years for justice. The remarks came in relation to an HC order that the Supreme Court be handed over its land, currently under the control of the Roads and Highways Department. - *The Daily Star June 6 2012.*

More arrest orders against Unipay2u officials

A Dhaka court on June 5 issued arrest warrants against the chairman and nine officials of Unipay2u Bangladesh for misappropriating Tk 46.34 lakh from an investor of the company. Metropolitan Magistrate Keshab Roy Chowdhury passed the order after Jahanara Masud, a resident of Dhaka, filed the case against the top officials of the multi-level marketing (MLM) company. The accused are Chairman Shahiduzzaman alias Shahin, Vice Chairman Masudur Rahamn Masud, General Manager Jamsedul Alam, Managing Director Muntasir Hossain Emon, Director (Finance) MA Taher, Director (Admin) MA Mukim, Director (Marketing) Shakhawat Hossain, Director Monjur Ahsan Mintu, Director Khandakar Muhith Al Mahmud and Chief Agent Minhazur Rahaman. The court also directed the officer-in-charge of Shahbagh Police Station to submit reports on the execution of the arrest warrants within July 19. - *The Daily Star June 6 2012.*

HC stays bar council polls for a month

The High Court on June 5 stayed for a month the process for holding election to the Bangladesh Bar Council, the licensing authority, which allows lawyers to practice. The order came after five Supreme Court lawyers moved three separate writ petitions claiming that there were different anomalies in the voter list and election schedule. The election was scheduled for June 17. The HC bench of Justice AHM Shamsuddin Choudhury Manik and Justice Jahangir Hossain Selim also issued separate rules upon the Bar Council authorities to explain in two weeks why they should not be directed to remove the anomalies before holding the election. - *The Daily Star June 6 2012.*

Kamaruzzaman indicted

Jamaat-e-Islami leader Muhammad Kamaruzzaman has been charged with murder and torture of unarmed civilians and complicity in other crimes against humanity during the Liberation War in 1971. After framing seven specific charges against him on June 4, the International Crimes Tribunal-2 fixed July 2 for the beginning of the trial. The charges are based on seven separate incidents of crimes against humanity that left at least 183 unarmed people dead and some women raped. During the charge framing, Tribunal-2 said Kamaruzzaman had played the key role in the formation of Al Badr with selected students of Ashek Mahmud Collage in Jamalpur. All of them belonged to ICS. Under his leadership, all members of ICS of greater Mymensingh were recruited in Al Badr, the court said while presenting a brief profile of the accused. - *The Daily Star June 5 2012.*

41 policemen sued for attempted murder

A Dhaka court on June 5 ordered a judicial inquiry into an attempted murder case hours after it was filed against 41 policemen, including the former deputy commissioner (DC) of Dhaka Metropolitan Police Khurshid Alam. Metropolitan Magistrate Joynab Begum passed the order after a pro-BNP lawyer Hossain Ali Khan Hassan filed the case with the Chief Metropolitan Magistrate Court of Dhaka yesterday morning. Hossain accused the policemen of attempting to kill him on the court premises on May 16 and mentioned the names of six police officials including the former DC of DMP (Lalbagh Division). The complainant said in his statement that he was one of the counsels for the 33 BNP leaders and activists, accused of torching a vehicle near the Prime Minister's Office during hartal hours on

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