

## Memorandum on the Laws of Succession

*NOTE: We take pleasure in enclosing herewith the Memorandum submitted to the Commission on the Law of Succession recently appointed by the Government of Kenya, The terms of reference being to consider the existing laws relating to marriage, divorce and matters relating there to and recommend a uniform law applicable to all persons in Kenya paying particular attention to the status of women in relation to marriage and divorce in a free democratic society.*

*The Secretariat is indebted to Maulana Syed Sa'eed Akhtar Rizvi, the resident priest of Dar es Salaam and Chief Missionary of Bilal Muslim Mission for his great efforts in preparing this memorandum. We are also indebted to Mulla Hussein A. Rahim, M. B.E., of Zanzibar, for his valued guidance.*

*We pray that God may reward them in plenty in this world and the world hereafter.*

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Hon. Gen. Secretary,  
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1. On behalf of the Shi'a Ithna-'Ashari Community of Kenya, we beg permission to make this submission for the consideration of the Commission.
2. Our remarks are confined to the religious laws appertaining to Will and Inheritance of the Shi'a Ithna-'Ashari Sect of Islam, except where it was essential to give other Sects' views to make our point clearer.
3. We have already submitted the questionnaire sent by the Commission duly completed together with the codified Islamic Laws (in English) according to Shi'a School of Law relating to Inheritance and Wills among other subjects. In this submission we will endeavor to explain the basic principles behind those rules.
4. We understand that this Commission is to 'pay particular attention to the status of women.' We venture to hope that the Islamic Law, enunciated according to the Shi'a school, would be of considerable help to

the Commission in its work in this respect.

It will not be out of place to mention that the ancient Arab custom had one principal object in view, viz., and the permanent retention of the assets in the family. With this object in view, the succession was confined exclusively to the male relatives, and even among them only to those who were capable of bearing arms.

We do not propose to dwell further on this point; suffice it to say that similar attitude, more or less, existed in all societies at that time and has survived in many societies up to now. Islam gave, by express provision of Law, right of inheritance to those who were excluded by the ancient institutions. One of the beneficial results of the new divine law was to raise the status of women in the scale of civilization, by elevating their economic and social position, and giving the widow, the mother, the daughters and sisters and other female relatives a right to inheritance.

5. This spirit has been preserved in the Shi'a school of Law, which, to quote the words of the great jurist, Sayyid Amir Ali, "is of the greatest simplicity and does not involve any discussion regarding the relative rights of agnates and cognates – 'Asabah and the Zav-il-Arham'. Then he goes on to say that the greatest distinction, in fact, between the Shi'a and the Sunni Law of Inheritance consists in the question of agnacy. The Shi'ahs repudiate in total the doctrine of Taasib or agnacy; consequently the paternal relations of the male sex or what are called 'Asbah proper' in Sunni Jurisprudence, have no special privilege, nor are they preferred to the relations connected with the deceased through females. For example, Shi'ahs consider it as contrary to justice to exclude the daughter's children in favor of the remote descendants of a brother, on the fictitious ground of their being connected with the deceased through male relations". (Mohammedan Law, by Ameer Ali Vol, 2; p. 128).

For example:

(a) If a Sunni Muslim dies, leaving behind him a daughter's daughter with a brother's son, the brother's son, would, as an Asabah (agnate), take the entire inheritance in exclusion of the deceased's own grandchild. Under the Shi'a Ithna-'Ashari Law, the grand-daughter of the deceased, as a lineal descendant takes the whole property to the exclusion of the brother's son.

(b) If a Sunni Muslim dies, leaving behind him a daughter and a brother, the daughter takes her specified share, viz., a moiety and the rest goes to the brother as an Asabah (agnate). Under the Shi'a Ithna-'Ashari Law, she takes the whole estate, half as... her specified share, and the other half by the doctrine of Return.

6. The guiding rules may be stated shortly in the following words:–

(a) The heir most nearly related to the deceased inherits in preference to one more remotely connected;

(b) Whoever is related to the deceased through any person does not inherit while that person lives;

(c) Full brothers and sisters are preferred to consanguine brothers and sisters; but uterine brothers and sisters will inherit with all of them.

(d) When the relationship is equal, a male gets usually double of a female's share; except in case of the heirs related through the mother who generally divide the inheritance among them equally without distinction of sex.

It may be asked why a woman's share is, normally, half of that of a man. In fact, it is quite logical. Islam has made male responsible for the maintenance of the family. No such burden is laid upon woman. Even a rich wife is entitled to get her maintenance from her husband though he may be poor. As the man has to bear all the expenses he has been given double share" in almost all inheritances. Also the woman gets the dowry which goes from man to the woman. Thus the ratio of the shares as laid down in the Qur'an is the most reasonable.

7. Groups and Classes of Heirs: In the Shi'a Ithna-'Ashari shariat, heirs are divided into two groups, viz., those who inherit by right of Nasab (consanguinity); and those who inherit by right of 'Sabab', main of which is Matrimony. Both groups inherit side by side.

The First Group, i.e the relations who are entitled to inherit by virtue of consanguinity are divided into three Classes:

(a) First Class:

(i) Parents and

(ii) Children (or in their absence grand-children, how low-so-ever).

(b) Second Class: If there is no heir at all in the First Class, then the Ascendants and Descendants of the parents of the deceased will inherit. It means:

(i) the deceased's grand-parents (how high-so-ever) and

(ii) brothers and sisters (or in their absence the descendants of the brothers and sisters).

(c) Third Class: If there is no heir existing either in the First or the Second Class, then the descendants of grand-parents (how-high-so-ever) will inherit. It means the deceased's paternal and maternal uncles and aunts (or in their absence, their children how-low-so-ever).

As explained above, the husband or wife or wives of the deceased will inherit with all these classes.

8. Dhul-Fardh & Dhul-Qai abat: It is necessary to mention that, under the Shi'a Law, heirs, to which ever Group or Class they may belong, are divided into three categories, in respect of the right which entitles them to participate in the inheritance:

(1) Dhul-Fardh: Those who have right to a specified share in the inheritance. They are:

(a) The Mother

- (b) The Husband
- (c) The widow or widows
- (d) The person or persons related through the same mother only.

(2) Dhul-Qarabat: Those who take the inheritance by virtue of their relationship with the deceased, but whose share fluctuates according to the number of heirs and circumstances. They are:

- (a) The son or sons
- (b) Full brothers, or in their absence half brothers on father's side
- (c) Grand-parents
- (d) Paternal uncle and aunts
- (e) Maternal uncles or aunts.

(3) Dhul-Fardh Wal-Qarabat: These are the heirs who inherit some times by virtue of their relationship and at other times according to their fixed shares. They are:

- (a) The father, who inherits a fixed share when there is a child of the deceased; and takes by relationship when there is no child of the deceased.
- (b) The daughter or daughters who get their fixed share when without the deceased's father or her or their own brothers; and take by relationship when with anyone of them.
- (c) Full sister or sisters or in their absence, a consanguine sister or sisters, who get their fixed share when without a grandfather or brother or brothers of the same degree as themselves, and take by relationship when with anyone of them.

**Note:** When there is only one heir, whether a Dhul-Fardh or a Dhul-Qarabat, or one entitled by virtue of the special relationship of sabab (matrimony), such heir takes the entire inheritance. For example, an only daughter takes her appointed share, viz. one-half, and the remainder goes to her by Return. An only son takes the entire estate by right of Qarbat, there being no specified share assigned to him by the law. When the deceased is a female and leaves behind her no relation excepting a husband, who is entitled to succeed by virtue of the matrimony, he takes the entire inheritance, first his specific share, and the remainder by Return.

**9. Shares:** As far as shares are concerned they are six in number, viz.:

- (1) One-half,
- (2) One-Fourth,
- (3) One-eighth,
- (4) One-third
- (5) Two-thirds
- (6) One-sixth.

(1) **One-half:** The following are entitled to one-half of the inheritance:

- (a) The husband, when wife leaves no descendant;
- (b) A daughter, when there is no son;
- (c) A full sister in default of other heirs who have been mentioned earlier;
- (d) A consanguine sister when there is no brother and no full sister.

(2) **One-fourth:** The following are entitled to one-fourth:

- (a) The husband, when there is a lineal descendant of the wife;
- (b) The wife, when there is no Lineal descendant of the husband.

(3) **One-eighth:** This is taken by the widow or widows when there is a lineal descendant of the husband.

(4) **One-third:** The following are entitled to One-third:

- (a) Mother, when there is no lineal descendant of the deceased, nor has he left two brothers, or four sisters or one brother and two sisters.
- (b) Uterine brothers and sisters, when two or more in number.

(5) **Two-Thirds:** The following are entitled to Two-thirds:

- (a) Two or more daughters when there is no son;
- (b) Two or more full sisters when there is no full brother or when there are no half-brothers (on father's side)

(6) **One-sixth:** One-sixth is taken by the following

- (a) Both father and mother when the deceased has left lineal descendant
- (b) The mother, when there exists with her two or more brothers of the full blood, or one brother and two sisters or four sisters of full blood (or by the same father only the father being in existence).
- (c) A single uterine brother or sister.

**10. Division of Estate:** When there is only one of the above-mentioned heirs he or she gets the full estate. If he is a Dhul-Qarabat, he gets it by virtue of the relationship; if he is a Dhul-Fardh, he first gets his appointed share, and then the residue is given to him as 'return' (Radd).

If there are two or more heirs, it will be divided in the following sequence: First the husband, or the wife or wives will take their share; then the Dhul-Fardh relatives will get their shares; then the residue will be divided among the Dhul-Qarbat heirs.

An Example: To give an example of our method, let me suppose that a man dies leaving his father, mother, wife, four sons, five daughters, three grandchildren, a grandfather, three brothers and two aunts.

As he has left parents and sons and daughters, who belong to the First Class of the heirs, the grandfather and the brothers (who belong to the second class) and the aunts (who belong to the third class) will be excluded from the inheritance.

Likewise, the grandchildren will be excluded because of the presence of the children, on the basis of the nearer excluding the more remote.

This system of eliminating leaves us with the following heirs: Wife, Father, Mother, the four sons and five daughters

The wife will get  $\frac{1}{8}$  of the estate, because the deceased has left children; Father and Mother both will get one-sixth each.

The common divisor of 8 and 6 will be 24. Thus the estate will be divided in 24 shares – out of which the wife will get 3 (i.e.  $\frac{1}{8}$ ), the father 4 (i.e.  $\frac{1}{6}$ ) and the mother also 4 (i.e.  $\frac{1}{6}$ ). It will be seen that the father is treated here as a Dhul-Fardh, not as a Dhul-Qarabat, because of the children of the deceased, and the mother gets her reduced share (i.e.  $\frac{1}{6}$  instead of  $\frac{1}{3}$ ) because of the same reason.

Anyhow, after deducting  $3+4+4$  (i.e.  $\frac{11}{24}$ ), we are left with 13 shares. This will be divided among the children, a son getting double of a daughter's share. It means that each of the four sons will take two shares (making it 8) and each of the daughters will get one share (making it 5). Thus all the shares are exhausted.

#### 11. Dhul-Fardh Must Get Their Appointed Share:

In the example above, the shares have fitted with the required portions of the inheritance. But there may be cases when the appointed shares may exceed the common divisor of the shares. For example, if a woman leaves behind her a husband, two daughters and a mother, their respective shares would be one-fourth, two-thirds and one-sixth. The common divisor of 3, 4, and 6 is 12, which represents the shares into which the estate would have to be divided ... 3 being the husband's share, 8 of the daughters and 2 of the mother. But  $3+8+2$  make 13, not 12. The Sunnis accordingly divide the state into 13 shares, bringing the shortage to all. But among the Shi'as, the mother and husband, being Dhul-Fardh, must get their full shares, i.e.  $3+2$ . And the residue, i.e.  $\frac{7}{12}$  would be divided equally among the daughters, because the children are also among the Dhul-Qarabat.

Thus whenever there is any shortage in the appointed shares, it falls on the Dhul-Qarabat, whose shares are liable to fluctuation, not on the Dhul-Fardh.

**12. Imam: Heir of Heirless Deceased:** If there is no heir in any of the classes and groups mentioned above, the Imam will be his heir. As our 12th Imam is in seclusion for the time being, the Mujtahid will receive the estate on Imam's behalf and will utilize it on the propagation of the faith and the religious uplifting of the Shi'a community, preferably in the same area where the deceased lived.

A person having no heir except the Imam, has been allowed in the Shi'a Law, to dispose of by will his entire estate provided such disposition is for the interests of the Ithna-'Ashari poor, or Ithna-'Ashari orphans or Ithna-'Ashari destitute travelers only.

**13. Exclusion from Inheritance:** No testator has any right to debar any of his heirs from his due share of inheritance. Even if he makes a will to this effect, it will be null and void in law. But an heir would be debarred from inheritance if he happens to be a non-Muslim or if he has intentionally and unjustifiably killed the deceased in whose estate he would have inherited,

**14. Testamentary Wills:** The making of will is recognized and encouraged by Islamic law. A will may be oral or in writing. A testator is allowed to bequeath up to one-third of his net estate. Any bequest in excess of the one-third is void, unless assented to by the heirs. The detailed rules on this subject are given in the accompanying book "Islamic Law" and it is unnecessary to go into details here,

**15. Payment of Debts and Expenses from the Estate:** It may be noted here that in all cases debts lawfully due by the deceased together with certain expenses must take precedence on the payment of bequests and shares of the heirs.

The term "debt" means ordinary debts incurred by or on behalf of the deceased and includes also religious dues such as **Zakat** (poor-tax), **Khums** (prescribed one-fifth), **kaffara** (atonement or expiation), Nazar (vows) etc.; and the term "expense" includes the obligation to end a proxy at the expense of the deceased's estate to perform pilgrimage to Mecca if it had been obligatory on the deceased and had not been performed by him during his lifetime. Funeral expenses have also to be paid in priority.

After paying the aforesaid dues and expenses and any bequest directed by the will of the deceased to the extent of one-third of the net estate, the residue would be divided amongst the heirs.

**16.** In conclusion, we would like to repeat what we said earlier before the Commission on the Law of Matrimonial Affairs. We feel that the idea of enacting a common law to replace the existing Islamic law is not only wrong but sacrilegious from our religious point of view. It would be tantamount to imposing a common religion on all which would be a preposterous idea. Islamic law is an integral part of our religion. These laws cannot be altered or violated without incurring a sense of guilt and sin.

**17.** The rules concerning succession are laid down with utmost precision by the Holy Qur'an and are fully enunciated in the traditions of the Holy Prophet and the Twelve Imams and there is not the least doubt that these rules are in accordance with the broad principle of the brotherhood of man which Islam seeks to establish.

**18.** The Ithna-'Ashari School of Islamic law is a well-knit entity. We cannot change or amend one or two aspects of it without destroying the entire fabric. For example, in Islamic law a man cannot use anything obtained unlawfully (in religious sense) either for secular or religious purpose.

If therefore a change is made in Law of Succession, someone will naturally thereby get more than his or her due share allotted to him by the Quran and this unlawful gain would render his whole life miserable. His daily life would become a long list of transgressions; his prayers, his pilgrimage, even his food and clothing would become, in religious sense, unlawful. Thus he can never expect peace in the life hereafter.

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