

Increase of Daughter's Share in the Succession of Sonless family: Does it contravene the Spirit of Shariah Law?

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Abstract

Inheritance law is considered as an integral part of Shariah Law and its application in Islamic society is a mandatory. Muslims inherit their predecessors in compliance with the rule as stated in the holy Qur'an. Though the Qur'an improved the status of women by identifying their share of inheritance in clear terms, Islamic law led to a number of problems and controversies that Muslim jurists have solved in different ways like, by using of deductive reasoning (*Qiyas*), Electicism (*Takhayyur*). In recent time Islamic society goes through a crucial situation and now a question arises what the position of collaterals is with daughter of the deceased in absence of son? Is it possible to increase daughter's share excluding the collaterals in the succession of sonless family? These crucial questions have not been solved till now. For the very reason, authors are driven to do this study with an aim at finding out an objective solution to this debated issue. Author's research will address the question whether increase of daughter's share in the succession of sonless family would contravene the spirit of Sharia law. This study examines the provisions of Qur'an, Sunnah, Ijma, Qiyas, Authentic *Tafseer* (commentaries on the Qur'an) and different doctrines on the daughter's share in the succession of sonless family. Author also tries to explore comparative study from the practices on the daughter's share in the succession of sonless family of different Islamic Countries.

Key words: Succession; Daughter's share; Increase of daughter's share; Sonless family; Doctrines of Islamic law of inheritance.

Introduction

Shariah law of inheritance is a complicated system of rules applied in distributing the property left by a deceased Muslim among his heirs. There is no part of the Islamic law which is more typical of both the spirit and letter of the Sharia than is the Islamic law of inheritance². The prophet (pbuh) terms this law as "half of all knowledge"³.

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² J. N. D. Anderson, 'Recent Reforms in the Islamic Law of Inheritance', The International and Comparative Law Quarterly, Vol. 14, No. 2, (Apr., 1965), p. 349.

There can, indeed, be little question about the accuracy and perfection of the Shariah law of inheritance as a whole. However, N.J.D. Anderson detects some defects of this law. One of the defects is the emphasis in Sunni law on the agnates and consequently, where a parent dies leaving, for example, only one daughter, she will inherit no more than half the estate while the other half may go to a distant cousin whom she may not even know⁴.

The rule of distribution of property, in Sharia law of inheritance, on the death of a propositus is that the son will get double of the daughter and in absence of son the only daughter will get half and if more than one will get two-third of the property collectively⁵. The collaterals of the deceased i.e. brothers and sisters are excluded in presence of son, son's son how low so ever⁶.

Now a question arises whether the collaterals would inherit when they are with daughter of the deceased in absence of son? In response to this question, Sunni and Shia schools of law have differential approaches. According to Sunni school; collaterals will inherit the residue, if any, after satisfying the shares of daughter and other sharers as per prescribed in the Holy Quran⁷.

However, Shia school has taken a different and more progressive view of the issue. According to Shia school, daughters will exclude the collaterals from inheritance and daughters with other sharers would be entitled to the residue, if any, after exhausting the claims of the sharers on the basis of doctrine of *Radd*⁸ in the proportion of their respective shares provided that there are no residuary in the class to which the sharers belong⁹. Thus

³ *Ibn Majah*, Hadith No. 2710.

⁴ J. N. D. Anderson, *Islamic Law in the Modern World*, New York, 1959, pp.78-80.

⁵ Quran 4:11.

⁶ Quran 4:176.

⁷ Haque Dr. Muhammad Ekramul, *Islamic Law of Inheritance: Rules and Calculatons*, London College of Legal Studies (South), Dhaka, 2009, pp. 159-160.

⁸ *Radd* means 'return back'. If, on distributing their shares to the sharers, it is found that the total of the shares does not exhaust the whole property, the residue will go to the residuaries. But if there is a residue left after satisfying the claims of sharers and there is no residuary, in this case the residue reverts to the sharers in proportion to their shares. This right of reverter is technically called *Radd* or Return. see M. Hidayatullah and Arshad Hidayatullah, (eds.), *Mullah Principles of Mahomedan Law*, N.M. Tripathi Private Ltd., Bombay, 1990, p.60; Haque Dr. Muhammad Ekramul, *Islamic Law of Inheritance: Rules and Calculatons*, London College of Legal Studies (South), Dhaka, 2009, pp. 148-158.

⁹ M. Hidayatullah and Arshad Hidayatullah, (eds.), *Mullah Principles of Mahomedan Law*, N.M. Tripathi Private Ltd., Bombay, 1990, pp. 82-93.

daughter's share is increased in Shia law of inheritance. There is no such room for increasing daughter's share in Sunni law as daughter here is not excluder of collaterals¹⁰. In this respect, Iraq and Tunisia, through legislative instrument, have allowed a daughter of the deceased to exclude from succession the collaterals of the deceased and other remote male residuaries¹¹.

On May 8, 2012, the law commission of Bangladesh sent a report¹² to the government recommending increasing daughter's share in the succession of parents' property in absence of son. They claimed that the recommendation had nowhere violated the basic injunctions of the Qur'an and the Sunnah¹³.

Presently it has become a debated issue that whether such proposal of the law commission would violate injunctions of the Qur'an and the Sunnah.

Aims and objectives of the study

General objective: The general purpose of the study is to find out the aspect of the Sharia law regarding the probable increase of daughter's share in the succession of sonless family.

Specific objectives:

- a) To find out arguments of the people who advocate for the probable increase of daughter's share in the succession of sonless family.
- b) To find out counter-arguments of the opponents of the probable increase of daughters share in the succession of sonless family.
- c) To find out practices of the prophet (pbuh) after revelation of the verses of inheritance.
- d) To identify the relevant Qur'anic verses and reach a harmonious and rational interpretation in conformity with Sunnah.

¹⁰ Coulson, N. J., *Succession in the Muslim Family*, Cambridge University Press, 1971. p.29.

¹¹ Ibid, p.141.

¹² Bangladesh Law Commission's Report No. 113, Titled "Recommendation of the Law Commission for Possible Increase of Daughter's Share in the Succession of Parents' Property in Absence of Son" Available at <http://www.lawcommissionbangladesh.org/reports.htm>, last visited on 17 May, 2014.

¹³ Ibid.

Justification and relevance of the study

Islamic law as a divine law has known continuity and a settled form for more than twelve centuries. But the socio-economic structure of almost all societies including Islam has undergone major changes in modern times because of industrial and technological revolution. The concept of a modern family is the reflection of such changing nature of society and social values. Consequently, Islamic jurisprudence is in need of a basic system of principles with which to answer the problems of present-day Muslim society without contravening the spirit of Sharia law.

Most Middle Eastern countries including Pakistan have sought to tackle these problems by introducing a number of reforms in divorce polygamy etc. Similarly, Tunisia and Iraq as stated earlier have enabled a daughter or son's daughter to exclude collateral male agnates from inheritance. Similarly, On May 8, 2012, the law commission of Bangladesh sent a report to the government proposing to increase daughter's share in the succession of parents' family in absence of son. But there had been a strong protest on the part of the leading Ulamas (Islamic scholars) of the country alleging that the proposal would violate some Qur'anic injunctions. This is why the author is interested in doing this study with an object to draw an end to the debate. The expected results of the author's research will help-

- a) The Parliament in deciding whether to pass law in accordance with this proposal.
- b) To fill in the gap of the existing knowledge on this issue.
- c) To encourage the future researchers to do further research as so far author know it is the first conducted research on the issue in Bangladesh.
- d) To draw a conclusion to a highly debated issue.

Limitations of the study

As no research has been conducted on the problem till now, there are no prior research studies which authors could have gone through. However, a very few numbers of books relevant to the topic are available on internet but authors could not get at them for they are not free of cost. For this reason, no literature has been reviewed in this study. Again, to say simply, authors have been given a very limited period of time where it needs more

time and study for this important issue. For the same reason, authors cannot address all points of debate between modernists and traditionalists and differential basis of Shia and Sunni legal theory in details.

Methodology

The study report will mainly take an analytical approach as a methodology. This study report will be based on comprehensive literature review on the relevant verses of the holy Qur'an along with their interpretations from Tafseer (commentaries on the Qur'an), Hadiths, the practices of the prophet (pbuh), relevant Islamic literature, Fiqh, scholarly articles and treaties.

Research questions

Author's research will conduct a systematic and objective investigation to find out answers to the following questions:

- i. Does the increase of daughter's share in the succession of sonless family contravene the spirit of Sharia law?
- ii. If contravenes, then how does it contravene?
- iii. Can an heir recognized by the prophet (pbuh) be excluded from inheritance?
- iv. Is there any way to increase daughters share without contravening the spirit of Sharia law?

Daughter's Share in Modern Islamic Countries

As stated earlier, Iraq and Tunisia modernized their law of inheritance recognizing a daughter as an excluder of the brothers, sisters and more remote male agnates of the deceased. This reform had been brought with a goal to give only daughter(s) more benefit in the property left by her parents. The Indonesian Supreme Court also so modernized through the liberal interpretation of "Sura an-Nisa" 4:176¹⁴.

Now the author will discuss the reforms in modern Muslim countries in detail.

¹⁴ H. Nur Said bin Amaq Mu'minah Case, (reg. No. 86K/AG/1994).

Iraq

The Law of Personal Status, 1959 brought an audacious innovation in inheritance law of Iraq. This law completely abandoned the Islamic law of inheritance, for both Sunnis and Shias, in favor of the law of succession-itself of German origin- which had previously been applicable only to holdings in government land (*Arddi amiriya*)¹⁵. This deviation was strongly justified by Abd al-Karim Qasim who was then in state power but faced by a fierce opposition as its Muslim inhabitants are almost equally divided between Sunnis and 'Twelve' Shias, whose laws of inheritance differ fundamentally from each other¹⁶.

After Abd al-Karim Qasim was overthrown by a military coup in 1963, the new government issued amendment to the Law of Personal Status, 1959 to cover those provisions which were not in conformity with Islamic Law¹⁷. This amendment adopted the Shia order of priority for both Shia and Sunni, under which any lineal descendants totally exclude collaterals. But a confusion arose with Article 90 (as included in the amendment of 1963), which provided that the distribution of the property of a deceased to his heirs shall be according to the rules of the Sharia which were followed before the enactment of the Law of Personal Status No. 188 of 1959¹⁸.

Tunisia

Tunisia, on the basis of the doctrine of *Radd* (return), effected reform in their inheritance law by an addendum added in 1959 to Article 143 of the Law of Personal Status, 1956¹⁹. This provision totally disregarded both Hanafi and Maliki law of inheritance into which the Muslims of Tunisia are sub-divided. The relevant portion of the Article reads; "As for the daughter, whether one or many, or the son's daughter, how low so ever, she shall take the residue of the estate by the 'return' even in the presence of an agnate in his own right, like a brother or an uncle, or the Public Treasury²⁰". So whenever there is an

¹⁵ J. N. D. Anderson, 'Recent Reforms in the Islamic Law of Inheritance', *International and Comparative Law Quarterly*, VOL. 14, No. 2, (Apr., 1965), p. 362.

¹⁶ Schacht, Josephs, *An Introduction to Islamic Law*, Oxford University Press, 1964, First Indian Reprint in 1997, Universal Law Publishing Co. Pvt. Ltd, Delhi, p.104.

¹⁷ J. N. D. Anderson, 'Recent Reforms in the Islamic Law of Inheritance', *International and Comparative Law Quarterly*, VOL. 14, No. 2, (Apr., 1965), p. 362.

¹⁸ *Ibid*, p.364.

¹⁹ J. Coulson, *Succession in the Muslim Family*, Cambridge University Press, 1971, UK, p. 142.

²⁰ *Ibid*.

occasion for *Radd*, daughter or son's daughter will be entitled to the surplus even when she is in competition with Qur'anic heirs. But the traditional Hanafi and Maliki law dictate to give the residue left to residuaries (agnatic heirs) based on the practice of the prophet (pbuh)²¹.

In effect, therefore, daughter or son's daughter virtually becomes a residuary heir in her own right, not only excluding all collaterals from inheritance but also restricting mother or grandmother to their basic Qur'anic portion of one-sixth and depriving them of the benefit of *Radd*²².

Indonesia

In Indonesia, the Compilation of Islamic Law was undertaken jointly by the Department of Religion and the Supreme Court in 1985 and was ratified in February of 1988²³. This compilation codified the traditional Shafi School of Islamic law which was then followed in Indonesia²⁴. Consequently, a daughter cannot exclude collaterals from inheritance and the collaterals become entitled to the residue as the nearest male agnate.

But the Indonesian Supreme Court in *H. Nur Said bin Amaq Mu'minah*²⁵ case based upon the liberal interpretation of Quran 4:176 where the lower courts decided the case in line with traditional doctrine Shafi School. The Supreme Court in its brief and conclusory decision, simply, stated that "so long as the deceased is survived by children, either male or female, the rights of inheritance of the deceased's blood relations, except for parents and spouse, are foreclosed"²⁶. The decision of the court referred to the opinion of Ibnu Abbas, one of the companions of the Prophet, who interpreted the word *Walad* in Quran 4: 176 as meaning both male and female children²⁷.

²¹ *Jame Attirmidi*, Hadith No.2092.

²² J. Coulson, *Succession in the Muslim Family*, Cambridge University Press, 1971, UK, p. 142.

²³ Mark Cammack, 'Inching toward equality: Recent developments in Indonesian inheritance law', *The Indonesian Law and Administrative Review*, Vol. V, No.1, (1999) reprinted 22 Dossier 1 (2000).

²⁴ *Ibid*.

²⁵ Reg. No. 86K/AG/1994.

²⁶ Mark Cammack, 'Inching toward equality: Recent developments in Indonesian inheritance law', *The Indonesian Law and Administrative Review*, Vol. V, No.1, (1999) reprinted 22 Dossier 1 (2000).

²⁷ *Ibid*.

Bangladesh

The Law Commission of Bangladesh, On May 8, 2012, made a proposal entitled “Recommendation of the Law Commission for Possible Increase of Daughter’s Share in the Succession of Parents’ Property in the Absence of Son” recommending the parliament to make a provision after Section 4 of MFLO of 1961 which will prohibit any part of the property of the propositus from going to his brothers whereby daughter’s share would be increased²⁸. The wording of the Commission reads:

“.....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”²⁹.

Juristic basis of reform

The modernists base their reform on the following strategies which they endeavor to establish as the juristic basis of the increase of daughter’s share when in competition with collaterals.

The doctrine of *Ijtihad*³⁰

The Law Commission of Bangladesh suggested to increase daughter’s share by resorting to the doctrine of *Ijtihad* and said that the interpretation of the rule “a nearer in kinship excludes the remoter from inheritance” and the liberal meaning of the Arabic word *Al-*

²⁸ www.lawcommissionbangladesh.org/reports.htm last visited on 10 April, 2014.

²⁹ Ibid.

³⁰ *Ijtihad* literally means ‘exerting one’s self independent reasoning to the utmost degree to attain an object’. It is a physical and mental effort expended by a jurist versed in Islamic law in finding a solution to a legal problem. It is actually a legal principle which has been defined by Muslim scholars as the competency or legal ability to deduce rules of law through juristic speculation from original sources where definite authentic decisive texts are not specific. However, it is to be remembered that *Ijtihad*, though, may be a juristic basis of reform and many innovative and striking reforms of the traditional Islamic inheritance law have been made by applying this doctrine, there will be no room for interpretation when a fact has already been cleared by the Qur’an and substantiated by the practices of the prophet (pbuh). see Rachel Anne, ‘A Critical Analysis of the Role of *Ijtihad* in Legal Reforms in the Muslim’, Arab Law Quarterly, Vol. 14, No. 2 (1999), p. 115; Asaf A.A. Fyzee, *Outlines of Muhammadan Law*, Oxford University Press (1964), p.37.

walad meaning child can be used to justify the increase of daughter's share³¹.

The Commission by referring to the rule "a nearer in kinship excludes the remoter from inheritance" perhaps intended to mean that a daughter is nearer in kinship than the collaterals.

If the proposal is accepted then not only brothers but also sisters shall logically be excluded which we think the Commission never intended.

The Doctrine of *Siyasah*³²

Another juristic basis on which the Bangladesh Law Commission relied is the doctrine of *Siyasah*. Although the Commission did not use the term "*Siyasah*", the wordings of the proposal unequivocally refers to this device. The relevant portion of the proposal reads as "The great Prophet of Islam left a very large sphere free for legislative enactments and judicial decisions even for his contemporaries who had the holy Qur'an and Sunnah before their eyes. There are practical necessities and examples of changes in Muslim law. Caliphs and their Lieutenants by issuing administrative orders and regulations brought changes in certain sectors of Muslim laws on penal, political and administrative matters"³³.

Now a crucial question arises whether the political authority has power to bring reforms in Islamic inheritance law by applying *Siyasah*. In this respect, two concepts namely *Hudood* and *Tazir* be kept in consideration. In law, *Hadd* (*Hudood*) means punishment or measure specifically prescribed or determined by Islamic law and considered as the Right of Allah and *Tazir* on the other hand is not so determined or prescribed but left at the discretion of the state or judge.³⁴

³¹ www.lawcommissionbangladesh.org/reports.htm last visited on 10 April, 2014.

³² *Siyasah* is actually a procedural device on the basis of which the political authority of an Islamic State enforces new rules of procedure through administrative orders and regulations. The caliphs often issued administrative orders to meet the new situation about which no guidelines were available in Shariah, the most important example of which are the *Siyasa* of the Mamluk sultans of Egypt and the kanunnamas of the Ottoman sultans. see H.A.R. Gibb and Harold Bowen, *Islamic Society and the West*, Vol.1, Part 1, London (1950) p.23.

³³ Mark Cammack, 'Inching toward equality: Recent developments in Indonesian inheritance law', *The Indonesian Law and Administrative Review*, Vol. V, No.1, (1999) reprinted 22 Dossier 1 (2000).

³⁴ Justice Shahzad Shaikh, *Shariat and its Structural Basis*, Mission Unto Light International, Larkana, Pakistan, 2012, p.42.

Inheritance law falls within the category of *Hudood* as Allah, after stating the prescribed shares of the sharers, says: “Those are limits (*Hudood*) set by Allah³⁵. Here the term *Hudood* has been used to mean parameter that nobody has authority to transgress. These verses also serve as warning posts for the believers. So these injunctions exclude state authority under *Tazir* or *Siyasah* to classify at will any of *Hudood*, whether as parameters (limits, boundaries) or penalties³⁶.

The Doctrine of Electicism³⁷

Bangladesh applied the doctrine of Electicism in Section-2 of the Dissolution of Muslim Marriages Act, 1939 by accommodating in the same Act almost all the grounds, recognized in different schools, on the basis of which a Muslim woman can seek divorce from the courts of law³⁸. The Law Commission of Bangladesh proposed³⁹ to resort to this principle to increase daughter’s share and asserted saying that there is no reason to undermine the Shia law where 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 transmit their entitlements to their own heirs. Earlier Recharad Kimber after a thorough research observed that Shia law is much closer than Sunni law in respect of rules laid down in Qur’an regarding inheritance⁴⁰.

The adoption of Shia law in Sunni law-following countries is not possible on the basis of this principle; because the jurisprudential basis of Shia law is totally different from Sunni law and their approaches to the interpretation of the holy Quran are also differential⁴¹. Again though Shia law gives more shares to daughter than Sunni law by

³⁵ Sura 4:12,13.

³⁶ Justice Shahzad Shaikh, Jurisdiction of Shariah and Jurisdiction of Federal Shariat Court Diagnostics & Dialectics, Mission Unto Light International, Larkana, Pakistan, 2012, p.30.

³⁷ Eclecticism, technically called *Takhayyur*, is the device of searching for precedents, not only in the four orthodox schools but even in the opinion of individual jurists, which would conform most to the need of modern life. See Sirajuddin, Alamgir Muhammad, Sharia Law and Society Tradition and Change in the Indian Sub-continent, Asiatic Society of Bangladesh, 1999, p5.

³⁸ Alamgir Muhammad Sirajuddin, Sharia Law and Society Tradition and Change in the Indian Sub-continent, Asiatic Society of Bangladesh, 1999, p.17.

³⁹ Bangladesh Law Commission’s Report No. 113, Titled “Recommendation of the Law Commission for Possible Increase of Daughter’s Share in the Succession of Parents’ Property in Absence of Son” Available at <http://www.lawcommissionbangladesh.org/reports.htm>, last visited on 17 May, 2014.

⁴⁰ Richard Kimber, ‘The Quranic Law of Inheritance, Islamic Law and Society’, Vol.5, No.3.

⁴¹ For details see- N. J Coulson, Succession in the Muslim Family, Cambridge University Press, 1971, pp.125-134.

applying *Radd*, they do justice by reducing her share applying the doctrine of *Awl* (increase)⁴².

So if Shia law is applied on the basis of Electicism, then it will be illogical not to apply their doctrine of increase which ultimately results in the reduction of a daughter's share.

An examination of and responses to the justifications of the supporters of probable increase of daughter's share in the succession of sonless family:

There are many arguments and counter arguments as to the probable increase of daughter's share⁴³. Instead of terming some as "traditionalists" and "modernists", the arguments as well as counter-arguments have been studied and summarized academically below.

Argument-01: There is no Qur'anic verse or Hadith which bars the probable Increase of daughter's share in the succession of sonless family. Only a blind adherence to the traditional interpretation makes collaterals heirs.

Counter-argument: The holy verse of Sura Nisa clearly specifies what a daughter will inherit from her parents⁴⁴. If the Qur'an intended to give a daughter more share, there was nothing to prevent the almighty to reveal His purpose in the form of an express injunction. So in the presence of the clear verse of the Qur'an the question needs to be framed in a positive rather than a negative form. If the question is framed so as to solicit views on the subject in the following form, the result must unequivocally be different:

"Is a daughter entitled to an increased share in the succession of sonless family excluding collaterals of the deceased?"

⁴² *Awl* literally means 'increase'. This doctrine, according to Shia law, means if the sum total of the shares exceeds unity, the fraction in excess of the unity is deducted invariably from the share of the daughter or daughters; or full or consanguine sister or sisters. The reason behind the doctrine is that since a daughter when co-exists with full or uterine brother or sisters, she gets the full benefit of the "return". It will be justice that when the sum total of the shares exceeds unity, she should bear the deficit and for the same reason, full sister also should bear the deficit. See M. Hidayatullah and Arshad Hidayatullah, (eds.), *Mullah Principles of Mahomedan Law*, N.M. Tripathi Private Ltd., Bombay, 1990, p.98.

⁴³ Bangladesh Law Commission's Report No. 113, Titled "Recommendation of the Law Commission for Possible Increase of Daughter's Share in the Succession of Parents' Property in Absence of Son" Available at <http://www.lawcommissionbangladesh.org/reports.htm>, last visited on 17 May, 2014.

⁴⁴ Quran 4:11.

In the presence of clear wordings of the verse of 4:11, no verse was specifically required in the Qur'an mentioning that daughter is not entitled to an increased share.

So it is obligatory for us to submit ourselves to the shares ordained by Allah as He says: "These are settled portions ordained by Allah and Allah is All-knowing, All-wise"⁴⁵.

The proponents of the probable increase of daughter's share should have substantiated their arguments by mentioning Qur'anic Verse or Hadith. But they never did so rather they relied on merely logic which is not any basis for reform without showing its linkage with primary authority i.e. Quran and Sunnah.

Argument-02: Brothers are made heir along with daughters on the basis of pre-Islamic practices. So after the advent of Islam, brothers should no longer be allowed to be heir with daughter.

Counter-argument: This argument requires drawing Shia-Sunni differential approaches to the concept of Islam. Shia believes that Islam is a complete replacement of pre-Islamic Arabian practices. But Sunni takes Islam as reform of pre-Islamic practices as Joseph Schacht says: "Muhammad (pbuh) had little reason to change the existing customary law. His aim as a prophet was not to create a new system of law; it was to teach men how to act, what to do, and what to avoid in order to pass the reckoning on the Day of Judgment and to enter paradise"⁴⁶.

The pre-Islamic practices continue even after the advent of Islam. The prophet (pbuh) recognized brother as a residuary when in competition with daughters even after the revelation of the holy verses of inheritance. This proves that Islam does not completely obliterate rather continues pre-Islamic practices subject to the reforms brought by the Qur'an and Sunnah. The Qur'anic system of inheritance, therefore, complements the old agnatic system. The synthesis of the two systems as worked out initially by the Sunnah of Mohammad (pbuh) represents the Islamic law of inheritance; the Qur'anic heirs are first given their share, and the residue is then distributed to the nearest agnate⁴⁷.

⁴⁵ Quran 4:11.

⁴⁶ Schacht, Josephs, *An Introduction to Islamic Law*, Oxford University Press, 1964, First Indian Reprint in 1997, Universal Law Publishing Co. Pvt. Ltd, Delhi, p.11.

⁴⁷ David Pearl, *A text Book on Muslim Law*, Croom Helm London 1979, p.122.

Argument-03: The Qur'anic verse 4:7 states 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". This verse is the basis of the principle that "a nearer in kinship excludes the remoter from inheritance". By interpreting this principle, a daughter may be allowed to exclude collaterals as a daughter is nearer in kinship than the collaterals.

Counter-argument: The argument stated above is misleading. The prophet (pbuh) says: "Give the fixed portion to those who are entitled to them, and what remains should go to the nearest male agnate"⁴⁸. So the fact is that only after allocating the fixed shares to the Qur'anic heirs, the principle of "a nearer in kinship excludes the remoter from inheritance" shall apply⁴⁹. This has also been proved by Practice of the Prophet (pbuh)⁵⁰. So there is no scope for interpretation when Sahih Hadith and established Practice of the Prophet (pbuh) exist.

So if the surviving relations be a daughter and a brother, the daughter takes $\frac{1}{2}$; and the brother takes the residue. The reason is that the daughter in this case inherits as a sharer, and the brother as a residuary, and the principle stated above applies only as between relations belonging to the same class of heirs. The principle "a nearer in kinship excludes the remoter from inheritance" may, therefore, be read thus: "Within the limits of each class of heirs, the nearer in degree excludes the more remote"⁵¹.

Argument-04: By liberally interpreting the word "*Walad*" of the holy verse 4:176, a daughter may exclude collaterals. The literal meaning of the word is a male or a female child. But the four Sunni schools mean by this word male child only, which is not acceptable.

Counter-argument: The practices and Sayings of the prophet (pbuh) are direct explanation of the Qur'an. So each and every word or verse of the Qur'an is to be interpreted in consonance with Sunnah. In this respect, practices of the companions of the prophet (pbuh) should also be considered. There is no place for an isolated interpretation. On consideration of the practice of the prophet (pbuh), the meaning of the

⁴⁸ Bukhari 85:6.

⁴⁹ Sirajuddin, Alamgir Muhammad, *Sharia Law and Society Tradition and Change in the Indian Sub-continent*, Asiatic Society of Bangladesh, 1999, p.87.

⁵⁰ *Jame Attirmidi*, Hadith No. 2092.

⁵¹ M. Hidayatullah and Arshad Hidayatullah, (eds.), *Mullah Principles of Mahomedan Law*, N.M. Tripathi Private Ltd., Bombay, 1990, p.59.

word “*Walad*” stated in the verse 4:176 has been adopted by Sunni as male child⁵².

Argument-05: If the daughter of the predeceased father in the absence of son inherits the full share of her father from her grandfather under “the doctrine of representation” incorporated by section 4 of the MFLO, 1961, why she should not be allowed to fully inherit her father’s property excluding her uncle’s after her father’s death in the absence of son.

Heir	Share	Reasoning
Daughter of predeceased son	Full	As she represents her father under section 4 ⁵³ of the MFLO, 1961
Full Brother	Excluded	Full Brother is excluded by son i.e. Father of the daughter.

Illustrations:

But daughter cannot so exclude a full brother of the deceased.

Heir	Share	Reasoning
Daughter	$\frac{1}{2}$	As Quranic sharer
Full brother	$\frac{1}{2}$	As Asaba

So logics say that daughter should exclude full brother as she is more nearer to the deceased than daughter of predeceased son.

Counter-argument: The doctrine of representation itself is problematic and contradictory with Shariah law⁵⁴. If a daughter is allowed to fully inherit her father’s property on latter’s death in the absence of a son as she does in case of the principle of representation, then the following problems will arise:

Wife, who is a Qur’anic sharer, shall be excluded. Full sister who is a residuary heir with daughter shall also be excluded. Then what would be the consequence?. For the purpose of promoting one woman’s right

⁵² Abu Dawud, Hadith No. 2885.

⁵³ Section 4 of the MFLO, 1961 provides that in the event of the death of any son or daughter of the propositus before the opening of succession, the children of such son or daughter, if any, living at the time the succession opens, shall per stirpes receive a share equivalent to the share which such son or daughter, as the case may be, would have received if alive.

⁵⁴ Haque Dr. Muhammad Ekramul, Islamic Law of Inheritance: Rules and Calculatons, London College of Legal Studies (South), Dhaka, 2009, pp. 244-256.

another woman full sister or wife or both are being excluded from inheritance. This approach is not only against the spirit of *Ijtihad* but also against equality, justice and good conscience⁵⁵. So an argument which diminishes or adversely affects the right of any rightful heir should not be accepted. In the name of doing more justice to a daughter no injustice should be done to a wife or collaterals of the deceased.

Argument-06: The notion of tribal ties and responsibilities was the basis of the traditional Islamic society when the holy Qur'an revealed. But owing to the impact of the industrial technological civilization, the socio-economic structure of almost all societies including Islam have undergone major changes in modern times and this changing nature of society and social values are visible in the concept of a modern family⁵⁶. Today, therefore, the focus of family ties has narrowed to centre upon what sociologists call "the nuclear family", the more limited group made up of parents and their lineal issue⁵⁷. In the light of this change in social structure and family ties, a daughter as a member of nuclear family should exclude uncles who is made heir on the basis of the bonds of *Asabiya* meaning tribal tie.

Some people, however, argue that the passage of time itself is a sufficient ground for the need of reform and, hence, a religion which was revealed some fourteen centuries ago must necessarily grow obsolete and become a thing of the past, not suited to the needs of the new age.

Counter-argument: The notion of permanence is deep-rooted in Islamic law. As an eternal religion, the basic rules and principles of Islam are unchangeable for they have been revealed by Allah who knows all about the past, present and future and whose knowledge is above all the limitations of time and space. Nothing can be relied upon as the source of real knowledge except what is revealed by God Who alone knows the objective good and who is not only omnipotent but also omniscient⁵⁸. As God is the Sovereign and Lord of the World, the command is for none but God⁵⁹ and as such, His law alone has the power to control everything, and social change cannot be an exception to it. Again, the holy verse 6:115 of

⁵⁵ Dr. Shahjahan Mondol & Dr. Reba Mondol, Daughter's Share in Succession: Our Reply, The Daily Star, July7, 2012, p.22.

⁵⁶ Sirajuddin, Alamgir Muhammad, Sharia Law and Society Tradition and Change in the Indian Sub-continent, Asiatic Society of Bangladesh, 1999, p.74,75.

⁵⁷ Coulson, N. J., Succession in the Muslim Family, Cambridge University Press, 1971, p.135.

⁵⁸ Muhammad Muslehuddin , 'Islamic Law And Social Change', Islamic Research Institute, International Islamic University, Islamabad, Islamic Studies, Vol. 21, No. 1 (Spring 1982), pp. 23-54.

⁵⁹ Quran 12: 40.

the Qur'an says that no one can change the words of Allah, and verse 33:62 adds that no one can change the way of Allah. The holy verse 5:3 of the Qur'an also specifies, "This day I have perfected your religion for you, completed my favor upon you, and have chosen for you Islam as your religion".

It has been established from the verses stated above that the words of the Qur'an are not open to modification or change. All that could be changed rulings that earlier scholars had made on those texts.

Law in the Islamic concept does not grow out of society but is imposed upon society from above⁶⁰. However, there may be a valid reform through *Ijtihad* if it is shown to be in conformity with Quran and Sunnah.

Argument-07: Daughter may be allowed to exclude collaterals on the basis of family custom. The Hanafis, and the Malikis referred to custom as a source of Islamic law and they have taken steps towards recognizing custom⁶¹. The prophet himself accepted some of the pre-Islamic customs which formed the basis of Islamic law of inheritance⁶². Not only was the retention of custom in regard to matters on which the Qur'an and the Sunna were silent, local custom was, on occasions, strong enough to override the reported practice of the prophet himself⁶³. Numerous groups of convertees to Islam also retained their customary laws and usages in many spheres of life, though they often ran counter to the prescriptions of the Shariah. For example, the Berber people of North Africa and some tribes of Kenya and Nigeria followed their customary law in family and inheritance matters even after their conversion to Islam⁶⁴.

In Java the regulation of succession by customary principles foreign to Shari'a law were so firmly and widely established in social practice that the competence of the Sharia tribunals in this respect was ultimately abolished in 1938⁶⁵.

⁶⁰ Coulson, N. J., Succession in the Muslim Family, Cambridge University Press, 1971, p.135.

⁶¹ The Role of Customs In Islamic Personal Law By Mr Abhik Majumdar, Faculty of Law, National Law University, Orissa. Electronic copy available at: <http://ssrn.com/abstract=1750423>.

⁶² *Abu Dawud*, Hadith No.2885.

⁶³ N. J. Coulson, 'Muslim Custom and Case Law' *Die Welt des Islams*, New Series, Vol. 6, Issue 1/2 (1959), pp. 13-24.

⁶⁴ Schacht, Josephs, *An Introduction to Islamic Law*, Oxford University Press, 1964, First Indian Reprint in 1997, Universal Law Publishing Co. Pvt. Ltd, Delhi, p.109.

⁶⁵ Bousquet, *Islamic Law and Customary Law in French North Africa* (a Special University Lecture delivered in the University of London) (1945).

In India, Custom has been recognized as a source of Islamic inheritance law through judicial decisions, such as, in the case of *Parandhamayya v Navaratna Sikhmani*⁶⁶, the court held that the custom of allowing the son-in-law a share of the property was well established in the community as it was being practiced for 40 years and thus would be preferred to the Islamic laws of inheritance.

In Malaysia, the law of matrimonial property is not pure Islamic law rather it is a combination of Muslim law and Malay custom⁶⁷. The High Court Division of Tanzania also recognized custom as a source of Islamic inheritance law⁶⁸.

So through developing family custom where collaterals will be excluded, the share of a daughter in the absence of son may be increased.

Counter-argument: There is no doubt that the prophet accepted some of the pre-Islamic customs but he denounced the remaining customs which were not in accordance with the teachings of the Qur'an⁶⁹. Though customs are now regarded as a legitimate source of law, they are considered to be inferior in position to the Qur'an, Hadith, Ijma and Qiyas. The only yardstick for adopting a custom is whether it is in consonance with the above mentioned four sources of Shariah law. The companions of the prophet also followed this yardstick.

So after revelation of the verse 4:11 specifying daughter's share, there is no room for increasing such share excluding collaterals on the basis of any family custom. The holy Qur'an Says: "It is not fitting for a believer, man or woman, when a matter has been decided by Allah and His Messenger to have any option about their decision: if any one disobeys Allah and His Messenger, he is indeed on clearly wrong Path"⁷⁰.

Again, in some circumstances adherence to custom causes injustice to a rightful heir. For example, in *Abdul Hussein v Bibi Sona Dero*⁷¹ the plaintiff claimed a property on the basis of the custom that in their family women were denied from inheritance if married. The judges were

⁶⁶ A.I.R (1949) MAD 825.

⁶⁷ I. A. Ibrahim, "The Muslims in Malaysia and Singapore: The Law of Matrimonial Property" in J. N. D. Anderson (ed.), *Family Law in Asia and Africa*, London, 1968, p.183.

⁶⁸ 1971 HCD, Vol.5, N.8.

⁶⁹ Schacht, Josephs, *An Introduction to Islamic Law*, Oxford University Press, 1964, First Indian Reprint in 1997, Universal Law Publishing Co. Pvt. Ltd, Delhi, p.11.

⁷⁰ Quran 33:36.

⁷¹ I.A (1917) 45 I.A. 10.

convinced that the custom had been prevalent and gave the judgment which preferred custom to the Islam law of inheritance.

In Bangladesh, Section 2 of the Muslim Personal (Shariat) Application Act, 1937 provides that notwithstanding any custom or usage to the contrary except questions relating to agricultural land, the property of a deceased Muslim will be distributed according to the Sharia law.

Argument-08: Recognition of collaterals with daughter in the succession of sonless family may cause gross injustice to the family of the deceased. For example, a person spends his entire life sweating so that his daughters and wife have a happy living. Will it not be an injustice to his wife and daughters when his brothers not being his family members come and take their share on his death?

Counter-argument: In fact, the author finds no injustice here. First of all, if the wife had a son she would inherit only one eighth of the husband's estate. But since he doesn't, she inherits one quarter.

Secondly, the daughters will also get more shares. For example, if daughter is with sons, she would get half of son but now she is getting half of the whole estate or $\frac{2}{3}$ of the whole estate if more than one. Now because there is no son here the uncles will also inherit. The uncles, however, are duty bound to take care of the orphan girls and provide for them. In the case of non-performance of this duty by uncles, a legal obligation through enacting new law may be cast upon them to abide by their duty.

Does the Increase Contravene the Spirit of Sharia law?

Though Sharia law is divine and nobody has authority to change it, the door to reinterpret the law is not closed. But the only restriction is that such interpretation is in consonance with the texts of the holy Qur'an and the practices of the prophet (pbuh) and his companions. The prophet (pbuh) asked his companions and followers to exercise their own rational judgment regarding situations and problems for which the holy Quran and the Sunnah did not provide any definite guidance⁷².

If daughters share is increased through excluding collaterals in the absence of son of the propositus, there will be no way but to contravene not only some holy verses of the Qur'an but also some established practices of the prophet (pbuh) and his companions. Now the author will examine how the

⁷² *Jame Attirmidi*, Hadith No.1327.

probable increase of daughter's share would contravene the spirit of Shriah law.

1. Repugnance to the Qur'an and the Sunnah

Increase of daughter's share contravenes the holy verses of the Qur'an and the established practices of the prophet in the following ways.

1.1. Contravention of the Clearly Expressed Injunctions of Verse 4:11

The shares of daughters are vividly described in verse number 11 of Sura Nisa. The relevant portion of the verse is as follows: "Allah (thus) directs you as regards your Children's (Inheritance): to the male, a portion equal to that of two females: if only daughters, two or more, their share is two-thirds of the inheritance; if only one, her share is a half".

According to the verse, if there is only one daughter, she is entitled to $\frac{1}{2}$ and if more than one, then $\frac{2}{3}$. This has been expressed by the almighty in clear, unambiguous and unequivocal words which keep no room for hesitation and it is one of the fundamental principles of *Usulul Tafseer* (principles of Interpretation) that when the words of the Qur'an are clear and definite, the room of interpretation to adopt a different meaning without reference to Sunnah shall remain closed⁷³. So when the Qur'an is providing a clear solution to a problem, there is no scope for interpretation. If the Qur'an intended to give daughter a share more than $\frac{1}{2}$ or $\frac{2}{3}$, there was nothing to prevent the Almighty to express his purpose in this verse. In the same verse Allah says "Ye know not whether your parents or your children are nearest to you in benefit"

Someone may think that daughter is nearer to her deceased father than the collaterals and it is more reasonable to give the only daughter the whole of her parent's property in exclusion of collaterals but aforementioned portion of verse 4:11 reminds us that our knowledge is not conclusive regarding who is nearer to us from the view point of benefit.

In *Mst. Farishta Vs. Federation of Pakistan*⁷⁴, the court observed that those who begin to question the dictates of Allah and interpret them by giving their own reasoning regarding the usefulness of this or that heir in a way question the knowledge or wisdom of Allah who has specified the shares.

⁷³ Dr. Ebrahim Khalil, Principles and history of Tafsir literature, Metit Prokashon, Dhaka (2013) p.163.

⁷⁴ PLD 1980 Peshawar 47 (Shariat Bench) pp.49-50.

Again, the last Para of verse 4:11 declares “These are settled portions ordained by Allah and Allah is All-knowing, All-wise”. So no Muslim should have confusion as to the portion settled by the almighty is doing justice towards daughters.

1.2. Contravention of the Principle of *Tasib*

The proposal as given by the Bangladesh law Commission contravenes the principle of *Tasib* established and substantiated by Qur’anic verses. This principle means that a male relative converts his counterpart female heir of the same class, degree and strength of blood-tie into a residuary⁷⁵. For example, a brother converts his sister into residuary. Of the group of female Qur’anic heirs only the wife, grandmother and uterine sister are unaffected by *Tasib*⁷⁶.

The basis of the principle of *Tasib* has been propounded in the following verses of the holy Qur’an. Verse 4:11 says, “Allah (thus) directs you as regards your Children's (Inheritance): to the male, a portion equal to that of two females”: accordingly, if a daughter is with a son, the son will convert her into residuary. Verse 4:176 says, “If there are two sisters, they shall have two-thirds of the inheritance (between them): if there are brothers and sisters, (they share), the male having twice the share of the female”.

So if a sister is allowed to inherit with daughter excluding brothers, then the principle of *Tasib* will be violated *i.e.* the Qur’anic injunctions will be disregarded.

1.3. Contravention of Verse No. 4:7

The Qur’anic verse 4:7 says, “From what is left by parents and those nearest related there is a share for men and a share for women, whether the property is small or large, a determinate share”. According to this verse, both male and female are entitled to inherit his/her nearest relative, so if a Muslim dies leaving a daughter, sister and brother, after satisfying daughter’s share, both brother and sister will inherit the residue. But the proposal⁷⁷ given by Bangladesh Law Commission results in exclusion of

⁷⁵ Haque Dr. Muhammad Ekramul, Islamic Law of Inheritance: Rules and Calculatons, London College of Legal Studies (South), Dhaka, 2009, pp. 188-189.

⁷⁶ Coulson, N. J., Succession in the Muslim Family, Cambridge University Press, 1971. p.42

⁷⁷ Bangladesh Law Commission’s Report No. 113, Titled “Recommendation of the Law Commission for Possible Increase of Daughter’s Share in the Succession of Parents’ Property in Absence of Son” Available at <http://www.lawcommissionbangladesh.org/reports.htm>, last visited on 17 May, 2014.

brothers of the deceased. This is a clear violation of the injunctions of the almighty Allah.

1.4. Violation of the Established Practices of the Prophet

Increase of daughter's share excluding brother or both brother and sister will violate the following established practices of the holy Prophet.

Sa'd's Case Jabir bin 'Abdullāh said "The wife of Sa'd bin Ar-Rabi' came with her two daughters of Sa'd to the Messenger of Allah and said: 'O' Messenger of Allah! These two are daughters of Sa'd bin Ar-Rabi' who fought along with you on the Day of Uhud and was martyred. Their uncle took their wealth, without leaving any wealth for them, and they will not be married unless they have wealth.' He said: 'Allah will decide on that matter.' The verse about inheritance was revealed, so the Messenger of Allah sent (word) to their uncle saying: 'Give the two daughters of Sa'd two thirds, and give their mother one eighth, and whatever remains; then it is for you'"⁷⁸.

In this case, the prophet recognized brother as legal heir along with daughters even after the revelation of the verses of inheritance.

Abu Musa and Ibn Mas'ud Case Narrated by Huzail bin Shirahbil: "Abu Musa was asked regarding (the inheritance of) a daughter, a son's daughter, and a sister. He decided that the daughter will take one-half and the sister will take one-half and said that if you go to Ibn Mas'ud, he will give you the same verdict. Later Ibn Mas'ud was asked and was told of Abu Musa's verdict. Ibn Mas'ud then said that I would stray and would not be a follower of the right path if I give the same verdict. The verdict I am going to give here will be the same as the Prophet did, *i.e.* one-half is for daughter, and one-sixth for the son's daughter, *i.e.* both shares make two-thirds of the total property; and the rest is for the sister. Afterwards we came to Abu Musa and informed him of Ibn Mas'ud's verdict, whereupon he said, "So, do not ask me for verdicts, as long as this learned man is among you'"⁷⁹.

Here in the above stated hadith, a sister has been allowed to inherit with daughters. So the increase of daughter's shares excluding collaterals either brother or sister goes against the spirit of Shariah law.

⁷⁸ Jame Attirmidi, Hadith No.2092, et al. Abu Dawud, Hadith No.2885, Coulson, N. J., Succession in the Muslim Family, Cambridge University Press, 1971. p.29.

⁷⁹ Volume 8, Book 80, Number 728.

1.5. Violation of Sahih Hadith of Bukhari Sharif

Narrated by Ibn 'Abbas- the Prophet (pbuh) said “Give the shares to the sharers who are entitled to receive it first. Then whatever remains, should be given to the residuary who is closest male relative of the deceased”⁸⁰.

It is clear from the above stated Hadith that if there remains a residue after satisfying share of daughter, brother of the deceased as residuary is entitled to the residue unless he is otherwise excluded and daughter cannot exclude him. But if daughter's share is increased the result will violate the Hadith of the prophet (pbuh).

2. Conflict between Quran and Sunnah: A Harmonious Solution

Verse no.176 of Sura Nisa says “You (prophet) are asked by the people for a legal decision. You inform them that Allah directs about the deceased leaving no descendants or ascendants as heirs. If the deceased is a man and leaving a sister but no child, the sister would get half the inheritance. If the deceased is a woman and leaving no child, her brother would be her heir”.

This verse apparently declares that brothers and sisters are entitled to inherit in the absence of any child (*Walad*) of the deceased. But in Sad's case, the prophet allowed brother to inherit with daughters and in Ibn Mas'ud case, sister to inherit with daughter. Again, the Hadith of Bukhari also substantiates the practices of the prophet. These practices and Hadith are authentic and therefore binding. So there is a conflict between the text of the Qur'an and the decisions of the prophet.

2.1. Sunni Approach to this Conflict

The primary method of interpreting the Qur'an is to interpret one verse with the help of another verse and then to remove ambiguity and if it is not possible, then to interpret with the help of Hadith as Hadith or Sunnah of the prophet has been recognized as the best commentary on the Qur'an⁸¹.

If there is a conflict between the Qur'an and Sunnah, the Sunni approach is first to endeavor to reconcile between the two. This is harmonious construction of the texts of the Qur'an. If no reconciliation is possible, then Sunni resorts to any of the following two ways⁸².

⁸⁰ Bukhari Volume 8, Book 80, Number 724.

⁸¹ Dr. Ebrahim Khalil, Principles and history of Tafsir literature, Metit Prokashon, Dhaka(2013) p.271.

⁸² Ibid.

- a. The Qur'an will prevail or
- b. In some circumstances, the Hadith will prevail over the Qur'an.

Sunni legal theory admits in principle that a precedent or Sunnah of the prophet may repeal or abrogate a text of the Qur'an⁸³. So to reconcile the conflict between the word *Walad* (child) in verse 4:176 and the practices of the prophet (pbuh), the Sunnis took the word *Walad* to mean "son or agnatic grandson". However, they accepted the term "*walad*" as it occurs elsewhere in the Qur'an to mean "any child or agnatic grandchild".

A similar approach the Sunni has adopted in case of Umariyyatan principle which is based on the decision of Omar (pbuh). This principle gives the father twice as much of the inheritance as the mother when the parents succeed along with the spouse relict⁸⁴. But the holy Qur'an in this regard says "For parents, a sixth share of the inheritance to each, if the deceased left children; if no children, and the parents are the (only) heirs, the mother has a third"⁸⁵. To avoid conflict between the decision of Omar (pbuh) and the Qur'anic verse, the Sunni had to read into this text the word "alone" after "parents" or the words "of the residue" after "one-third"

2.2. Recognition of harmonious construction in interpretation of statutory law

When one provision of a statute is contradictory with another provision of the same statute, the court will try to reconcile between them. In *CIT Vs. Hoosen Kasam Dada*, the High Court Division of the Supreme Court of Bangladesh held that "if two sections of the same statute appear to be inconsistent with each other, the court will be required to harmonize the two provisions so that both can be operative."⁸⁶

It is well known that the holy Qur'an is the direct intention and the practices of the prophet are indirect intention of Allah as the Qur'an says "The prophet (pbuh) does not say anything of his own wish but what he says is the inspiration sent down to him from Allah"⁸⁷. The Qur'an as primary source of Shariah law provides skeleton and the Hadith as explanation of the Qur'an provides flesh to that skeleton. So in a sense, they constitute a single statute incorporating the will of the Almighty. So if

⁸³ N. J., Succession in the Muslim Family, Cambridge University Press, 1971 p..66.

⁸⁴ Ibid, pp.132-133.

⁸⁵ Quran 4:11.

⁸⁶ 12 DLR 161.

⁸⁷ Quran 53:3,4.

any inconsistency arises between the two, that interpretation which gives effect to both by harmonizing them would be preferred. Only when all efforts so to harmonize those fails, the texts of the Qur'an shall prevail based on the contention that it speaks the direct will of the Almighty.

2.3. Shia Approach to this Conflict

Shia considers the Sunni approach to the meaning of the term “*Walad*” is wholly an unwarranted process of interpretation that forces the text of the Qur'an to conform to their preconceived notions of succession. According to Shia, the term “*Walad*” in 4:176 means either male or female child and accordingly, a brother or sister may inherit only if the deceased dies leaving no child (*Walad*).

The Shia completely ignore the decisions of the prophet in Sad's case and rely instead upon the contradictory principle voiced by the Imam Jafar: “Dust in the teeth of (residuary)”⁸⁸. Imam Jafar al Sadiq was not any companion of prophet but he is considered by Shia not only a distinguished Imam but also a man well versed in law and science⁸⁹.

2.4. Author's Approach to this Conflict

The conflict may be solved even without interpreting the word “*Walad*” to mean son only. We can solve the conflict even adopting the literal meaning of the word “*Walad*”. The verse 4:176 deals with cases of “*Kalala*” meaning a person who has neither ascendants nor descendants. When a person dies leaving daughter along with brother; he is no longer a “*Kalala*”. So the verse does not cover this situation and consequently, collaterals cannot be excluded on the basis of this verse. As the situation is not covered by this verse, we have to look for other verses or Hadiths to cover this situation. In this respect, we cannot help but to resort to the decision of Sa'd's case. Accordingly, after satisfying daughter's share the residue, if any, would go to collaterals of the deceased.

3. Repugnance to Ijma and Qiyas

There is Ijma *i.e.* the verdicts of companions and their successors which never have been disputed right from the time of Khulafa —e- Rashdeen till date by any Fiqh of Muslim Ummah that daughter in the absence of son

⁸⁸ Coulson, N. J., Succession in the Muslim Family, Cambridge University Press, 1971, pp.130.

⁸⁹ Asaf A.A. Fyzee, Outlines of Muhammadan Law, Oxford University Press (1964), p.40.

cannot exclude collaterals⁹⁰. So full brother will inherit as a residuary where his brother dies leaving daughters only.

From the above it squarely follows that in the presence of direct mandatory injunctions of Holy Qur'an itself and also the Hadiths there is no occasion and can possibly be none ever to add anything to the prescribed share of a daughter or exclude a recognized heir like collateral in the matter of inheritance.

Conclusion

It may be seemed that giving the only daughter the whole estate of her deceased father excluding her uncles would do justice but the concept of our justice based on the literal interpretation of the Qur'an without taking into account the practices of the prophet and his companions is fallible as Allah says "But it is possible that ye dislike a thing which is good for you, and that ye love a thing which is bad for you. But Allah knoweth, and ye know not"⁹¹.

The Peshawar High Court, while considering the repugnance of Section 4 of the Muslim Family Law Ordinance, 1961 to the injunctions of Islam, said after surveying the relevant Qur'anic verses, Hadith, some explanatory notes and *Fatwas* on the subject of inheritance "The conclusion is, therefore, irresistible that those who confine themselves to the text of the holy Qur'an alone are violating the injunction of the Qur'an when they exclude the consideration of the Hadith of the holy prophet in the matter of inheritance"⁹².

The established principle is that the Qur'anic heirs do not exclude other agnatic heirs as prophet ordained that first Qur'anic heirs are to be satisfied and the residue if there is any will go to nearest male agnates⁹³. In *Tafseer-e- Ibn Kasir*, the great interpreter Ibn Kasir while interpreting the verses of inheritance mentioned the following hadith "If sister dies sonless, her brother will inherit her. If we consider both the Hadiths together, it will establish and re-express the principle "Qur'anic heirs are not excluders". Except the father and grandfather, no Qur'anic heirs exclude any other

⁹⁰ The presence of Ijma can easily be drawn from the following evidences: Jame Attirmidi, Hadith No.2092, et al. Abu Dawud, Hadith No. 2885, Coulson, N. J., *Succession in the Muslim Family*, Cambridge University Press, 1971. p.29; Bukhari Volume 8, Book 80, Number 724.

⁹¹ Quran 2:216.

⁹² PLD 1980 Peshawara 47 [Shariat Bench) at 66.

⁹³ Bukhari Volume 8, Book 80, Number 724.

relative of the inner family i.e. Sharers and residuaries and, notwithstanding the superiority of their relationship with the deceased. Thus no rule of priority applies to the Qur'anic heirs⁹⁴. So a daughter or granddaughter neither exclude any ascendant nor any agnatic collateral relative, male or female, although she does exclude uterine brothers or sisters⁹⁵. The deceased of sonless family in this regard may, during his lifetime, make a gift of the whole of his estate in favor of his only daughters.

Islamic law of inheritance is a total scheme which may look like illogical or incomplete, if is considered isolated from the entire scheme. So to answer the question whether the probable increase of daughter's share in the succession of sonless family contravenes the spirit of Shariah law all the sources of Shariah law must be discussed instead of just relying on logic or literal interpretation of the holy Qur'an. Again, unnecessary incorporation of foreign elements in this field is also not desirable.

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⁹⁴ Coulson, N. J., *Succession in the Muslim Family*, Cambridge University Press, 1971, p.37.

⁹⁵ Ibid.

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