

DISSERTATION

ON

**Doctrine of Representation: A Critical Analysis from the
Perspective of Shariah**

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The dissertation titled **Doctrine of Representation: A Critical Analysis from The Perspective of Shariah** prepared by Rifat Al Haque, ID- 2017-3-66-006 submitted to Nadia Rahman, Lecturer of the Department of Law for the fulfillment of the requirements of Course 406 (Supervised Dissertation) for LL.B. (Hons.) degree offered by the Department of Law, East West University is approved for submission.

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Declaration

I, Rifat Al Haque, declare that I wrote the dissertation and that all of the works, citations, literature reviews, and so on are original and not similar to other dissertations or secondary research.

As a result, I make sure that this research paper is completely self-made and written as part of my LL. B degree requirements at East West University. Date: 08/05/2022

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(Rifat Al Haque)

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Abstract

The aim of this research is to determine the legal rights of orphaned grandchildren and other inheritors of the predeceased. The goal of this research is to examine and analyze the legal provision. The discrepancy between Shariah law and statutory law is also addressed in this research. This thesis paper is based on content analysis and qualitative research with the goal of detecting the injustices created by the statutory provision to some heirs and establishing a new process that secures the right of orphaned grandchildren without breaching Islamic law or excluding other heirs.

List of Abbreviations

DOR	Doctrine of Representation
MFLO	Muslim Family Laws Ordinance
SD	Son's Daughter
SS	Son's Son
DD	Daughter's Daughter
DS	Daughter's Son
PHC	Peshawar Hight Court
LHC	Lahore High Court
PSC	Pakistan Supreme Court
SC	Supreme Court
PLD	Pakistan Legal Decisions

Chapter One

Introduction

1.1 Background of this study

In today's world, one of the most contentious topics of Islamic law is the inheritance right of the grandchildren from a predeceased child of the propositus. In general, any son of the deceased eliminates such grandchildren under the traditional views of Islamic law.¹ However, many nations have made amendments to the established principles of Islamic succession law to achieve this goal.² But Section 4 of the MFLO made the most significant alteration in Pakistan in 1961.³ The same law has been also applied in Bangladesh through the promulgation of the 'Laws Continuance Enforcement Order, 1971'⁴ but it hasn't yet concentrated on academic debate or judicial interpretation. The doctrine was adopted in Section 4 of the MFLO, 1961 which is not found in Muslim law and has unduly decreased the share of certain inheritors, unfairly excluded some inheritors, and completely undermined the fundamental framework of Islamic succession law.⁵ No other country, with the exception of Bangladesh, has made this move. The purpose of this study is to raise the attention of the appropriate authorities to the need to take action to guarantee that the claim of orphaned grandchildren and other successors aren't infringed upon by the Islamic rule of succession. This research examines the Section 4 of the MFLO, attempting to elaborate and demonstrate the injustices caused to some heirs by this Section, identify the provisions of Islamic Succession Law that have been violated by this new regulation, and established a new method that confirms the rights of orphaned grandchildren while not violating Islamic law or excluding any heir.

1.2 Objective and Scope of this Study

¹ Dr. Muhammad Ekramul haque, *Islamic Law of Inheritance* (1st edn, London College of Legal Studies 2009) 236.

² Mohammad Saidul Islam, 'Application of the Doctrine of Representation relating to the Inheritance Right of the Orphaned Grandchildren in Bangladesh and Pakistan: A Critical Review of the Reforms of Islamic Law of Succession [2012] XVII The Chittagong University Journal of Law 104.

³ *ibid*

⁴ It was issued on 10 April 1971 that says '... all laws that were in force in Bangladesh on 25th March, 1971 shall subject to the proclamation aforesaid continue to be so in force with such consequential changes as may be necessary on account of the creation of the sovereign independent state of Bangladesh formed by the will of the people of Bangladesh.'

⁵ Islam (n 2).

The objectives of this study are to analyze the Doctrine of Representation from the perspective of Shariah law, to determine whether the doctrine is completely incompatible with Shariah or not, and to identify loopholes according to the Shariah law. Also, some recommendations for implementing the doctrine as closely as practicable to Shariah by applying Ijtihad in accordance with Islamic inheritance law.

The scope of this work is limited and only based on the existing provision of the Doctrine of Representation related issues of Muslim laws regarding the rights of the inheritors of the predeceased, and shows some criticism and problems which they are facing.

1.3 Research Methodology

This study takes a qualitative approach and descriptive approach to describe the existing provisions and tried to discover new meanings as well. It makes a detailed overview of the legal provision and effectiveness. To conduct this thesis, I have used the analytical method and gathered all of the information from various sources such as statues, books, journals, web links, articles, cases etc.

1.4 Research Questions

On this research topic, several questions can be framed but this research has been limited to the following questions. To fulfill the intention of this dissertation the following questions can be addressed:

1. Whether there is any inconsistency between Shariah laws and existing laws regarding the Doctrine of Representation?
2. Whether the existing law regarding Doctrine of Representation is sufficient to assure justice in terms of getting the share of the property to the inheritors of the predeceased child?

1.5 Limitation

This is a broad area for the research of Islamic law (Shariah) and for such reason I have decided to focus on this separate topic. The critical analysis of this topic might be able to provide the best result if there is no limitation of time. While doing this dissertation, I wasn't able to locate adequate information and materials regarding this matter in Bangladesh. There are not many recent case laws on this matter in Bangladesh and also are not enough resources for doing this research.

Chapter Two

Doctrine of Representation

2.1 Meaning

In personal Shariah laws or Islamic rule of succession, a new concept came through one of the major changes named the Doctrine of Representation (DOR). In general, this doctrine is not acknowledged by Shariah laws. This doctrine was established from The Muslim Family Laws Ordinances, 1961 which was enacted by Pakistan's legislative body. After that, Bangladesh adopted this enactment in 1972 and accepted this doctrine as its statutory law. The principle of DOR states that the children will be the representatives of the predeceased and will inherit his/her share from their grandfather.⁶ Generally, representation occurs when a far relative slips into the shoes of a closer relative and inherits in the same way as children of a deceased person will represent such person even if the deceased died before his parents.⁷ That means, he/she will stand where the deceased would have stood if he/she were still alive. According to this doctrine, here the children as the representatives of the deceased person will get the deceased person's portion from the grandfather per stripes because under Sharia law or Islamic rule of succession which they would have not received.

2.2 Orphaned Grandchildren inheritance right under Shariah Law

The orphaned grandchildren rule is an example of a modification implemented by Muslim countries. The grandchildren of a propositus would not inherit if their son/daughter died before them under traditional Islamic rule because the closer is supposed to exclude the far.⁸ A grandchild generally inherits only when no one in the class above them dies, according to Shariah law. Generally, in this sense, grandchildren are those children whose father/mother dies during the existence of their father/mother. Grandchildren can be categorized into four types. These are: 1)

⁶ The daily star, Law Commissions Report on 'Daughter's share in the succession of parents' property in absence of son' (*Law and Our Rights*, 9 June 2012) < <https://archive.thedailystar.net/law/2012/06/02/report.htm>>accessed 4 March 2022.

⁷ Mohammad Saidul islam, 'Application of the Doctrine of Representation relating to the Inheritance Right of the Orphaned Grandchildren in Bangladesh and Pakistan: A Critical Review of the Reforms of Islamic Law of Succession [2012] XVII The Chittagong University Journal of Law 109.

⁸ Mir Asfandyar khan mohmand, 'Inheritance Rights of Orphaned Grandchildren: A Straightforward Provision of Law?' (*Lums Law Journal*) https://sahsol.lums.edu.pk/law-journal/inheritance-rights-orphaned_grandchildren-straightforward-provision-law accessed 05 March 2022.

Son's son (SS), who is the male through a male link; 2) Son's daughter (SD), who is the female through a male link; 3) Daughter's son (DS), who is the male through a female link; and 4) Daughter's daughter (DD), who is the female through a female link. Here, these four categories of grandchildren are called orphaned grandchildren and they don't all come from the same class but they do come from various classes of heirs. All people eligible to inherit are referred to as heirs in Hanafi law, and they are divided into 3 categories; 1) Sharer; 2) Agnatic heirs or Residuary; and 3) Distant Kindred.⁹ On the other hand, DD or DS belongs to the group of distant kindred under Sunni law in terms of inheritance, whereas SD belongs as the Quranic heir and SS belongs as the Agnatic heir.

2.2.1 Distribution to Son's son (SS)

Under Islamic inheritance rule or Shariah law, SS inherits in 24 capacities as an agnatic heir. The grandson or SS receives the whole estate, completely excluding others in 14 out of 24 capacities. On the other hand, in ten cases, he succeeds 1/3 or more. He is only excluded in one case if there is a living son, whether his father or uncle.¹⁰

2.2.2 Distribution to Son's daughter (SD)

SD inherits in six capacities from the property of the deceased grandfather. She succeeds as a Quranic heir in three cases, as an agnatic heir in two cases and also excluded from her grandfather's estate in one case. The Hanafi law states that the son's daughter inherits in her own right, not as the son's representative. The daughter of the son takes per capita rather than per stripe. This indicates that regardless of the number of sons, the portion of SD is divided into as many parts as the number of sons. As a Quranic heir, in the non-appearance of a son/daughter, a single SD takes 1/2 or if there are no son's or daughter's, the daughters of two or more son's receive 2/3 of the inheritance and in the presence of a daughter, a single or many SD takes 1/6. On the other hand, as an agnatic heir, if one or more SS or lower SS are born with an SD then both become agnatic heir. When there are two or more daughters then the SD is prohibited from inheritance but if coexists with an equal or lower SS then she inherits as an agnatic heir. She is only excluded from

⁹ M Hidayatullah and Arshad Hidayatullah, Mulla's Principles of Mohammadan Law (19 edn, New Delli, NM Tripathi Ltd 12th reprint (2002) 1990) 47.

¹⁰ Serajuddin Alamgir Muhammad, "Shariah Law and Society Tradition and Change in the Indian Sub-Continent" (Asiatic Society of Bangladesh, 1999) 88. with reference to F.M. Kulay, "Grandsons Inheritance at Islamic Law-Much Ado About Nothing," ICLR 13 (1933), pp. 62-3.

the grandfather's property in the presence of the son.¹¹ In another circumstance when a SD and sister come together then the SD inherits as Quranic heir and the sister inherits as an agnatic heir.¹² In addition from all of these above, the 2/3 of inheritance that a SD inherits from his father is divided into 3 equal portions-

- One for the SD of 1 son,
- The other two for the other 2 SD of another son.

When more than one child descends from separate fathers, the inheritance is divided per capita rather than per stripe.¹³

2.2.3 Distribution to Daughter's daughter/son (DD/DS)

Generally, the DD/DS is distant kindred. The distant kindred inherit the deceased estate only if the sharers and residuaries are absent. But any Quranic heir, except the spouse relict or any male agnate, no matter how distant, will completely exclude them.¹⁴ DD or DS belongs to group 1 which consists of 4 groups of distant kindred and they have priority over the heirs.¹⁵ Basically, in the existence of a male child, it is a well-known tenet of Islamic succession law that the grandchildren would be excluded from the succession of the grandparents on the grounds that closer in kinship eliminates that distant. This norm has been adopted by all Sunni and Shia law schools and sub-schools. In certain circumstances, the exclusion of grandchildren from a grandparents' succession has become a source of worry and debate in today's society. Many efforts have been done by many Governments throughout the world to lessen their grief and misery. However, for orphaned grandchildren, Bangladesh and Pakistan have recognized the system of representative succession.

2.3 Orphaned Grandchildren inheritance right under MFLO, 1961

Though Shariah Law does not recognize the DOR but the Commission on Marriage and Family Law recommended that a law upholding the DOR be enacted in order to alleviate the grief of orphaned grandchildren. Section 4 of the MFLO, 1961 was adopted in Pakistan based on the

¹¹ Mohammad Nurul and Amin, Fatwa and Masail (Islamic foundation Bangladesh, Dhaka 2001) Vol.6 541.

¹² *ibid* p. 544.

¹³ M Hidayatullah and Arshad Hidayatullah, Mulla's Principles of Mohammadan Law (19 edn, New Delli, NM Tripathi Ltd 1990, 12th reprint 2002) 51.

¹⁴ NJ Coulson and Amin, Succession in the Muslim Family (Cambridge, Cambridge University Press 1971) 91.

¹⁵ A. Asaf Fyzee, A, Outlines of Muhammadan Law (4th edition, Oxford University Press, Delhi 1974) 431.

commission recommendations and it was similarly accepted in Bangladesh after independence. Instead of specifying the specific situations of exclusion, all such cases were generalized by this legislation and created a new mechanism for property distribution, including DOR in the body of Islamic succession law. As a result, according to section 4, under Shariah law or awarded a portion, he/she will receive the property under the new arrangement. According to this novel arrangement, such a grandchild will inherit the share of his/her deceased parents' estate that he/she would have gotten if they were still living.¹⁶

The children of a pre-deceased daughter, who died in 1942, were allowed an inheritance from their grandfather's estate into *Federation of Pakistan v. Mst. Farishta*¹⁷. Although the West Pakistan Muslim Personal Law (Shariat) Application Act, 1962 was mentioned in this case, but the children of predeceased daughters have been ruled entitled to their grandparents' property under the premise of section 4 of the MFLO, 1961.

¹⁶ Muhammad Ekramul haque, 'Inheritance of Orphaned Grandchildrens under Islamic Law of Succession: A Study of the Impact of section 4 of the Muslim Family Law Ordinance 1961' [2006] 3 Rajshahi University Law Journal 115.

¹⁷ Federation of Pakistan v. Mst Farishta [1981] PLD SC 120

Chapter Three

Legal framework and reformation regarding the Doctrine of Representation

3.1 Background to the 1961 enactment of Section 4 of the MFLO

The previous system of succession which exempted orphaned grandchildren from their grandparent's property sparked much concern and debate.¹⁸ After that, many Muslim countries adopted this concept and the ratio of such children diversified from country to country. This legislation was enacted as a result of the commission on marriage family laws report. Pakistani Gov't then established a 7-member panel on marriage and family related laws to investigate the provisions, with special observation to the preservation of women's rights. This panel was not entitled to make remarks about the topic of orphaned grandchildren's succession. The panel recommended that the orphaned grandchildren's representational rule of succession be included.

3.2 Section 4 of the Ordinance

Section 4 of the MFLO, 1961 says that “*if any son or daughter of the propositus dies before the succession opens, then the children of such son or daughter, if any, existing at the time the succession opens, shall per stripes get a portion equal to the share that such son or daughter, as the case may be, would have gotten if alive.*”¹⁹ It can be said that section 4 of the MFLO, 1961 ensured the DOR by suspending the norm of closer excluding the distant. The orphaned grandchildren are now given the part that their dead parents would have received if he/she had remain alive.

3.3 The 1961 reform addressed an apparent injustice

The orphaned grandchildren become socially and economically unsafe as a result of being excluded by heirs of higher degrees.²⁰ Jurists throughout the Muslim world considered and attempted to address this dilemma, employing various procedures to protect the orphaned grandchildren's stake in the property of the propositus.²¹ After that, Pakistan established a new

¹⁸ Shkeh Md muhibbullah, 'Doctrine of representation in Islamic inheritance: Daughter's share demands reconsideration' (*The daily observer*, 3 September 2015) <https://www.observerbd.com/2015/09/03/108490.php> accessed 23 March 2022.

¹⁹ The Muslim Family Laws Ordinance 1961, s 4.

²⁰ Professor Dr A.W.M Abdul huq, 'Section 4 of the Muslim Family Laws Ordinance, 1961: A Critic' [2010] 1 (ISSN 2218-2578) *The Northern University Journal of Law* 8.

²¹ *ibid.*

type of representation philosophy in 1961. Then Pakistan Government passed the MFLO²² which addressed some of the most important aspects of Islamic personal law.

3.4 An Assessment and responses to the supporters of this doctrine's rationale

Many traditionalists enthusiastically welcome this change for a variety of reasons. The most prominent person Kemal Faruki explains that, the rule that the closer in degree excludes the far doesn't apply in all instances under Islamic inheritance rule; likely father doesn't exclude maternal grandmother, daughter doesn't exclude SD and full brother/sister doesn't exclude uterine brother/sister.²³ Under traditional law, the rule "nearer excludes remote" only applies to agnatic heirs. The above-mentioned people are sharers whose share has already been determined by the Quran or Hadith. Ibn Abbas ® says, "*Pay the specified portions to the Quranic heirs, and the remainder to the next male person after that.*"²⁴ Faruki also stated that the Hanafi rules of succession accepted the DOR for distribution among distant kindred. This doctrine is used in Islamic law only for distribution among the extended family, but its acknowledgement in no way undermines the norms of exclusion by degree. The most extreme examples of this doctrine that follows the regulation that nearer in degree exclude the remote are, Imam Muhammad-Al-Shaybanis per stripe distribution, the general Shia concept of representational entitlement, the Shafi and Hambali's 'doctrine of tanzil,²⁵' and Imam Cadi Abu Yusuf's concept of per capita distribution between the relatives of the external family.²⁶ Faruki also stated that there is no Quranic statement that excludes grandchildren like SD, DD or DS.²⁷ Another prominent follower Malvi Mohammad Usmani states in his strong arguments²⁸ by supporting the doctrine that the word *Awlad* in verse 4: 2²⁹ includes not just sons and daughters, but also grandsons and granddaughters (H.L.S). So, as son/daughter of propositus, they will inherit what their respective

²² 'The Muslim Family Laws Ordinance, 1961, Ordinance No. VIII of 1961, 2nd March 1961.

²³ NJ Coulson and Amin, *Succession in the Muslim Family* (Cambridge, Cambridge University Press 1971) 150.

²⁴ Bukhari: Book 8: vol: 80 hadith 724,727,729 & 738, see also Chapter Faraid in Muslim Sharif, Abu daud Sharif, Jamy at tirmijiy, Ibna maja and Muskatul Musabi.

²⁵ Coulson (n 23).

²⁶ Shaukat Mahmood and Shaukat Nadeem, *Principles and Digest of Muslim Law*, (4th edition, Legal Research Centre, Noor Villa, 5, Lahore 1993) 78.

²⁷ Coulson (n 23) p 151.

²⁸ M Hidayatullah, and Arshad Hidayatullah, *Mulla's Principles of Mohammedan Law*, (19th edition, New Delli, N.M. Tripathi Ltd 1990, 12th reprint 2002) 79-80.

²⁹ "Allah ordains you in respect of your children that the share of one male is equivalent to that of two females."

father/mother would have inherited if they were still living.³⁰ That means, child includes also grandchild and it was a common practice of Arabs. Grandchildren are not genuine children, but metaphorical children and a real male child exclude the metaphorical child. Giving an inheritance to a distant grandchild appears to be a breach of Allah's command and Hazrat Muhammad's (SM) commandment. The majority of supporters, as well as the commission, agreed that there is no prohibition in Islamic law against providing inheritance to orphaned grandchildren. These remarks appear to be a clear breach of Quran, Hadith, Izma and the whole Islamic rule of inheritance. Under this reform, SS will get half and SD will also get half, and son and SS both come in the same status. It is blatantly against Quran and Sunnah. Besides this, great scholar Zayd Ibn Tabith ® said that when a son is living the grandchild will not get an inheritance from that grandparent.³¹ It can be said that all of the reform proponent's arguments are based on nothing and are useless. So, this reform was enacted to protect the orphaned grandchildren's right to inherit without taking into account the impact on the other heirs.

3.5 The effects of the reforms on the Other Heirs

The doctrine was included in Muslim personal law for the allocation of grandparent's property to grandchildren without taking into account the impact on the other heirs. As a result, in many circumstances, this new doctrine causes grave unfairness to some heirs. Here are some examples:

- If a propositus dies and leaves a SD and a daughter, the daughter receives $1/2 + 1/4 = 3/4$ and the SD receives $1/6 + 1/12 = 1/4$, but under the MFLO, the daughter receives $1/3$ and the SD receives $2/3$. When a distribution is held between two females (one is closer and the other is remoter) then the remoter receives a larger portion than the closer. It is possible that it isn't genuine justice.³²
- A person who leaves a SD and a full brother. According to Islamic succession law, the SD receives half and the brother receives half. However, according to the MFLO, the SD receives the entire inheritance, excluding the full brother.³³

³⁰ Shaukat Mahmood, Shaukat Nadeem, Principles and Digest of Muslim Law, (4th edition, Legal Research Centre, Noor Villa, 5, Lahore, 1993) 79.

³¹ Maulana Muhammad Abdur Rahman, Islamic Inheritance Law, (1st edition, Research Paper collection-6, Research Department, Bangladesh Islamic Centre, Dhaka 2009) 47.

³² J.N.D Anderson, 'Recent Reforms in The Islamic Law of Inheritance', (International and Comparative Law Quarterly Vol 14 No 2, 1965) 357.

³³ *ibid.*

- When a person is left behind by his son's wife and SD then the son's property is completely taken over by the daughter under the MFLO, depriving her mother.
- When a person has a son and SD, the son is legally bound to support his parents by providing maintenance in all circumstances, whether he has any means or not, but SD has no obligation to the grandparents. However, under the MFLO the SD will take the same share of the son, which is an outright injustice to the SS.
- A person passes away, and he leaves three SS from one of his predeceased sons and one SS from one of another predeceased sons. The MFLO divides the property among the grandsons in such a manner that the first 3 grandsons from a son each receive half and individually $\frac{1}{6}$, and the grandson from another predeceased son receives half. Under similar conditions, the MFLO appears to have turned prejudiced towards the SS of the same grade.³⁴

³⁴ Muhammad Ekramul haque, 'Inheritance of Orphaned Grandchildrens under Islamic Law of Succession: A Study of the Impact of section 4 of the Muslim Family Law Ordinance 1961' [2006] 3 Rajshahi University Law Journal 120.

Chapter Four

Implementation, Legal - Philosophical Interpretation and Inconsistency

4.1 Inheritance right of grandchildren under Islamic law

The inheritance rule of Islam does not completely deprive the propositus grandchild's ability to inherit. They are included into the list of Quranic sharers under Sunni law. Unless they are specifically excluded, they can succeed from their grandparents. When their shares are allotted, the DOR is called into question.

4.2 Reason for the adoption of the doctrine in Pakistan

At the very least, the doctrine of representation is adopted for two reasons:³⁵

Firstly, to figure out who is eligible to inherit. The concept of exclusion of nearer in degree excludes the distant is not reduced or suspended while utilizing the doctrine to determine who is eligible to inherit. As a result, if 'R' dies and leaves his surviving son and grandchildren with a predeceased son then the grandsons are not eligible to inherit because of their uncle. They don't stand in for their father's place, because if he survived then he would have been an heir. It is considered in both Shia and Sunni law.

Secondly, to establish the heir's portion of the estate. However, if both son's died before the propositus, leaving 3 grandsons from one son and 2 grandsons from the other, then all of the grandchildren become heirs. In this situation, Shia law uses the concept of representation to determine each grandson's part of the inheritance. But if the doctrine is followed, then the inheritance of the propositus will be divided into stripes and will be handed to the grandchildren. The grandsons of one son will be divided into 3, and each grandson of the other son will be divided in half. On the other hand, Sunni law doesn't identify representation in this situation.³⁶ The 5 grandchildren will succeed per capita in their own right as inheritors of the propositus, but not as representatives of the pre-deceased son/daughter.³⁷

³⁵ M Hedayatullah and Arshad Hedayatullah (ED), Mulla's Principles of Mohammadan Law, (19th Edition, Tripathi, 1990) Para 93(1) 85.

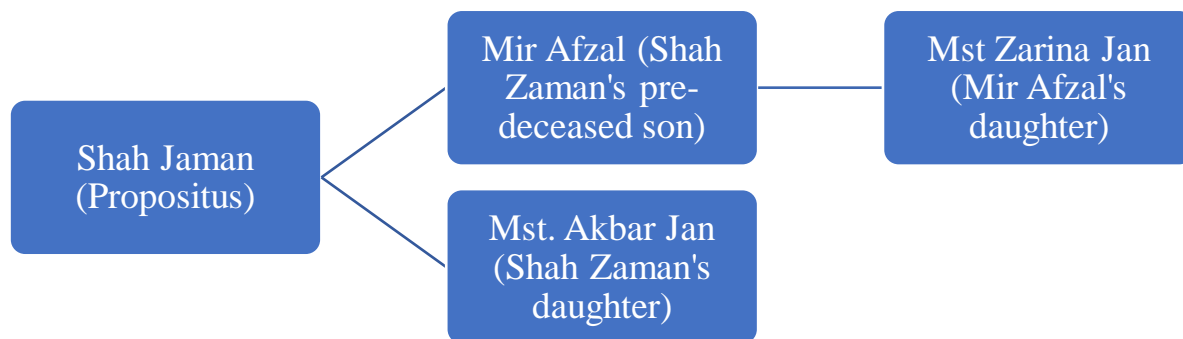
³⁶ Professor Dr A.W.M Abdul huq, 'Section 4 of the Muslim Family Laws Ordinance, 1961: A Critic' [2010] 1 (ISSN 2218-2578) The Northern University Journal of Law 8.

³⁷ Syed Amir ali, Mahomedan Law (5th edn, Reprint Himalayan Books, New Delhi 1985) 132-134.

4.3 Exceptions to Section 4 in Pakistan’s point of view

The concept was developed to address the issue of the children’s share in their predeceased parent’s share. However, it was unclear whether Shariah law would be followed or not in allocating the portion of the deceased, who would have been entitled to the property if he/she had been living. This space of stipital legacy has resulted in some exceptions with the Pakistani Courts. These are:

4.3.1 Loopholes in the doctrine



In the case of *Mst. Zarina Jan vs Mst. Akbar Jan*,³⁸ the propositus was Shah Zaman. He had one daughter, Mst. Akbar Jan and one granddaughter Mst. Zarina Jan (the daughter of his predeceased son Mir Afzal). If Mir Afzal would be alive then he will get 2/3 and Mst. Akbar Jan would get 1/3 of the property individually. The point of contention was whether Mir Afzal’s whole share (2/3) should go to his sole daughter (Mst. Zarina Jan) under section 4 of the MFLO, 1961 or not. Or whether Mir Afzal’s sister (Mst. Akbar Jan) will succeed from her brother’s share or not.

The lower Appellate Court held that, “*Section 4 of the Muslim Family Laws Ordinance, 1961 has given a right to the heirs of a predeceased son to inherit the share of their father in the property of their grandfather. This section has not ousted the application of Shariat in other matters of inheritance and it has just given a right to the heirs of a pre-deceased son to inherit the share of their father in the property of their grandfather. Thus, Shariat will apply to the inheritance of Mir Afzal, father of Mst Zarina Jan.*”³⁹

³⁸ Mst. Zarina Jan vs Mst. Akbar Jan PLD [1975] Peshawar 252

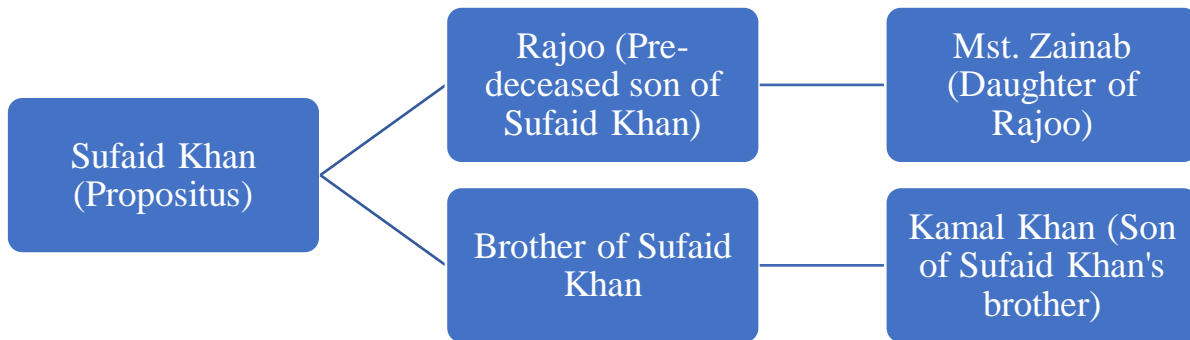
³⁹ ibid p. 253.

Here, if we follow the verdict of the lower appellate court then Mst. Zarina Jan will receive $1/2$ of $2/3 = 1/3$ from the property of her father, while Mst. Akbar Jan will receive $1/2$ of $2/3 + 1/3$ (from her brother) = $2/3$ of the property.

The PHC on the other hand overturned the ruling by awarding Mst. Zarina Jan the entirety of her fathers’ portion, and also denies Mst. Akbar Jan any interest in her dead brother, and held that, “Under the Ordinance Mst. Zarina, daughter of Mir Afzal is entitled to inherit the same share to which her father Mir Afzal was entitled in the inheritance of his father Shah Zaman. The reason is that the Ordinance by adopting the principle of per stripes distribution of inheritance meant to keep intact the share of the predeceased son or daughter to be inherited by his son or daughter according to it, the heirs of the predeceased issue will inherit from propositus what their predecessor-in-interest would have inherited.... The impugned interpretation militates against the letter and spirit of Section 4 of the Ordinance which could not be the intention of the Lawmakers.”⁴⁰

4.3.2 Philosophical explanation behind Section 4 of the MFLO, 1961

The LHC disagreed with the PHCs’ decision in the case of *Kamal Khan vs Mst. Zainab*.⁴¹



In this case, the propositus was Sufaid Khan. Sufaid Khan’s predeceased son was Rajoo, who would have received the whole estate as a residuary if he had lived. Rajoo’s daughter was Mst. Zainab and Sufaid Khan’s nephew was Kamal Khan. If Rajoo had survived then he would have excluded Sufaid Khan’s brother. The question was whether Mst. Zainab can exclude Kamal Khan

⁴⁰ ibid p. 253-254.

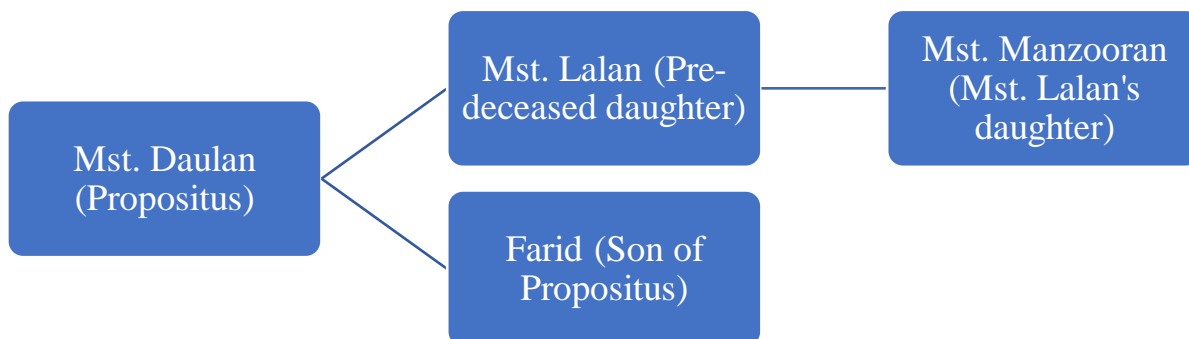
⁴¹ Kamal Khan vs Mst. Zainab PLD [1983] Lahore 546

and acquire the whole estate as residuary under the concept of representation or is entitled to 1/2 of the property under Shariah law (Quranic sharer) as son's daughter or not.

The philosophy behind section 4 of the MFLO was elucidated by the LHC that, “*The starting point is that, notionally the offspring of the propositus is deemed to be alive for the purpose of succession, at the time of the death of the propositus, and the succession of the grandchild is to be calculated again notionally as if the parent of the grandchild died after the death of the original propositus.*”⁴²

As Sufaid Khan's only son, Rajoo would get the entirety of his property, while Zainab would have inherited half of Rajoo's property and the residual half would return to the nearest agnate (Kamal Khan). But Zainab will receive her grandfather's whole inheritance according to the Peshawar ruling.

4.3.3 Motive of the Legislation



The case of *Farid vs Manzooran*⁴³ was taken up by PSC and in this case, Mst. Daulan's pre-deceased daughter Mst. Lalan would be considered as living under section 4 of the MFLO at the time of inheriting, and she would get 1/3 of the property. However, Mst. Daulan's son Farid would receive the other 2/3 of the property. The question was whether Mst. Lalan's daughter, Mst. Manzooran will inherit Mst. Lalan's whole estate or not.

According to the LHC decision, Mst. Manzooran would receive one half of the property, while the other half is going to the residuary (Farid), but the PHC states that she will receive the whole inheritance of her deceased mother.

⁴² ibid p. 548.

⁴³ Farid vs Manzooran PLD [1990] SC 511

The SC had to decide that, “*Whether it was not the intention of law-making in section 4 of the Family Laws Ordinance, 1961, to provide an opportunity of obtaining only Islamic law shares, to the children of the predeceased son or daughter of the propositus and that intention was not to increase their Islamic Law shares.*”⁴⁴”

The PSC Upheld the LHC ruling in *Kamal Khan vs Zainab* by holding that, “*Section 4 could not be interpreted against the interests of the other heirs of the deceased who were entitled to share the inheritance under the rules of Muslim inheritance laws.*”⁴⁵”

4.4 Critics of the Supreme Court of Pakistan

Dr Lucy Carroll prefers the verdict of the PHC over the decision of the LHC. She disagrees with the LHC’s theory and said that, “*The Ordinance does not say that the orphaned grandchild will receive that share of the grandparent’s estate to which he would be entitled (1) on the assumption that the predeceased parent had been alive at the time of the grandparent’s death, and (2) on the further assumption that the predeceased parent had then died leaving his notional share of the grandparents’ estate to be distributed among his heirs.*”⁴⁶”

Carroll believes that because the legislation's goal was to ameliorate the situation of orphaned grandchildren, she should get a higher portion than she would have gotten under traditional law.⁴⁷

4.5 Defending the decision of Pakistan Supreme Court

The PSC's ruling should be supported, and it should be recommended for inclusion in the MFLO, 1961 because section 4 might be viewed as an insurance policy for the orphaned grandchildren. The grandchildren will be more beneficial if their parents predecease their grandfather according to the decision of the PHC. They will now get the entire portion of their parent’s estate, which they would have had to share with other heirs of their parents, like in the case of Zarina Jan.⁴⁸ Another thing is that Section 4 seeks to provide justice to the orphans who are otherwise excluded and impoverished. If they are placed in the situation in which they would have been if their parents

⁴⁴ A.M Serajuddin, *Shariah Law and Society Tradition and Change in the Indian Subcontinent*, (Asiatic Society of Bangladesh, 1999) 102.

⁴⁵ *Ibid*, p. 103

⁴⁶ Lucy Carroll, ‘Divorce and Succession – Some Recent Cases from Pakistan’, (Islamic CLQ 4, 1984) 249-50.

⁴⁷ Serajuddin (n 44).

⁴⁸ Professor Dr A.W.M Abdul huq, 'Section 4 of the Muslim Family Laws Ordinance, 1961: A Critic' [2010] 1 (ISSN 2218-2578) *The Northern University Journal of Law* 13.

had survived then justice will be served. We can't do injustice to orphans while doing right to others.⁴⁹

4.6 Benefits of Section 4 of the MFLO, 1961

Due to two major principles of Islamic rule of succession, the pre-deceased child of a deceased person may not get property according to Shariah rule of inheritance in specific situations. One is exclusion based on the hierarchy of degrees, and the other one is the proximity of the relationship. Such legislation burdens the descendants of the departed children. Section 4 of the MFLO, 1961 was enacted in order to alleviate the pain of such orphaned grandkids. Basically, orphans are given a lot of attention in the Quran. However, the philosophy of representation as the sole approach to securing the orphan children's well-being has not been proven.

4.7 Impacts of Section 4 of the MFLO, 1961 on the Islamic succession law

One of the most significant reforms in the subject of Islamic succession law is Section 4. The influence of Section 4 of the MFLO, 1961 on Islamic inheritance rules must be thoroughly assessed. This rule has a negative impact on several fundamental foundations of Islamic law of succession. These are:

- Both males and females take rights equally under the MFLO, such as a SS and a SD.
- Section 4 completely obliterates the sequence of precedence. The MFLO has included DD/DS in the 1st and 2nd categories, like; For a person who dies leaving a DD and a son, the son receives 2/3 of the estate while the DD receives 1/3. On the other hand, a son excludes a DD under Sharia law.
- It has overturned the long-established premise of inheritance law that nearer excludes the remote.
- If a person leaves a daughter and a SS then the daughter inherits as a Quranic heir and the SS as an agnatic heir, according to Islamic rule of succession. However, they both inherit as agnatic heirs under this concept. Also, this concept distributes shares to people who died before the propositus.

⁴⁹ *ibid.*

- It establishes a new distribution methodology.⁵⁰ Everyone acquires the property in his/her own capacity under Islamic law. If Section 4 is used, however, every children of the dead child will always get the estate in a representative role.
- According to Islamic law, if a person leaves 2 daughters and a SD then the SD is not entitled to inherit, but the MFLO divides the bequest such that 2 daughters receive 1/2 and SD receives 1/2. This is an outright breach of Hazrat Muhammad's (SM) hadith, which states that females of the same class should not be overrepresented by more than 2/3.⁵¹
- It goes against the 'Tasib' doctrine. Even if no male equivalents are present for a SD, MFLO treats her as an Asaba in her own right.
- Regrettably, the new Islamic regulation incorporated into Section 4 of the MFLO, 1961 excludes any collateral by the SD, and also the uterine brother/sister excluded by the children of a daughter.

This new distribution scheme is cruel and inequitable to certain heirs, and it breaches Islamic succession rules.⁵² As a result, it is evident to us that this one rule has entirely demolished the pillar of the Islamic law of succession in many ways.⁵³

⁵⁰ Dr. Muhammad Ekramul haque, *Islamic Law of Inheritance* (1st edn, London College of Legal Studies 2009) 248.

⁵¹ Sirajuddin Muhammad ibn Abdur Rashid (Hanafi), *Shirazi* translated by Mawlana Bashir Uddin (2005) *Shirazi*, (Shirazee Publication, Dhaka) 30.

⁵² Mohammad Saidul Islam, 'Application of the Doctrine of Representation relating to the Inheritance Right of the Orphaned Grandchildren in Bangladesh and Pakistan: A Critical Review of the Reforms of Islamic Law of Succession [2012] XVII The Chittagong University Journal of Law 1118

⁵³ *ibid.*

Chapter Five

Findings, Recommendations and Conclusion

5.1 Findings of this Research

From the above study, it can be said that the lack of knowledge of the Quranic inheritance can be stated as a result of a lack of understanding on various levels. Even if we are authorized to the interpretation, then we only cramped ourselves within the limitations of our own school.

While interpreting the DOR, different legal judgement of higher and lower courts aim was to identify the legislative purpose. The doctrine does have certain restrictions because it did not clarify the concept or the extent to which it might be used.

In addition, this doctrine creates rights and confers only to the children of predeceased but not to the spouse of the predeceased. The spouse should be obliged to participate in the doctrine as a person who will financially and socially represent the deceased.

5.2 Implications of the findings and for the policymakers

The discussion about this study contains a number of cautions and recommendations for the policymakers of the country because everyone is prospective to contribute to the outcome. This discussion will focus on the various roles that contributors/stakeholders may play in the growth of practice as well as raising understanding of the concept, like; Solving the problems of the misunderstood doctrine of representation definitions and concepts.

Despite the possibility of interior initiatives and changes, the state's role in altering Islamic inheritance laws and practices remains critical to the good transformation process. The government must collaborate closely with the policymakers and supportive measures to reflect this.

5.3 Recommendations

By revising conventional legislation to fit the needs of current times, orphaned children have already been enhanced. It is long past time to take efforts to ameliorate the situation of orphaned grandchildren in inheritance by modernizing customary legislation. The following recommendations in my opinion could be useful to ensure justice or the rights to the inheritors of the predeceased in Muslim countries as well as in Bangladesh. These are:

- Parliament or Legislation can make a new Act or add a new section in the MFLO, 1961 similar to the provisions like the doctrine of mandatory will (obligatory bequest) which is adopted by Iraq, Jordan, Syria, Tunisia, Algeria and Morocco to protect the rights of the grandchildren of the propositus.
- Section 4 of the MFLO, 1961 can be amended by the legislation in the following manner, the predeceased son/daughter of the propositus will be counted as an alive person and if such predeceased son/daughter of the propositus left not only child but also other heirs (Quranic/Residuary), then the other heirs will be entitled to the property of such predeceased son/daughter.

In such cases, the Quranic rules will be followed. That means, after distributing the property to the Quranic heirs of such predeceased son/daughter of the propositus if any property is left then it will go back to the residuary who would have been entitled as residuary if such pre-deceased son/daughter of the propositus died after the death of such propositus.

5.4 Conclusion

The DOR is a completely recent system in Muslim law, and this one clause undermines the entire method of Islamic succession law. Despite the fact that Bangladesh is a secular state and people in this region are mostly regulated by their own personal rules when it comes to family affairs. For this reason, Bangladesh adopted the MFLO, 1961 from Pakistan which has a contentious clause in section 4. Unlike the instances in Pakistan, no one has challenged this section. However, if the doctrine had not been adopted then it may be interpreted as an injustice to the individual who was excluded only because of his/her deceased father/mother. On the other hand, Islam upholds the rights of all people and it can not make any discrimination against orphaned grandchildren. Many verses of the Quran and Sunnah just mentioned the welfare and rights of the orphaned grandchildren but did not mention any proper way in which such rights can be ensured to them. I think, to lessen different divergent views on the adoption of the doctrine, the legislator should get a better understanding of it. So, the doctrine of representation must be expanded in a broader meaning. On the other hand, at the time of applying Ijtihad, the doctrine must not violate the principles of Shariah law. It is also important to remember that, doing justice to one will not look to others as unfair.

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