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Women and the Islamic Law of Intestate Succession

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The Islamic law of succession consists of two parts namely voluntary and compulsory. The voluntary part rears to the limited freedom of testation where a Muslim can dispose of 1/3 of his/her assets via a will. Normally this 1/3 cannot be bequeathed to the compulsory (Quranic) heirs whose shares are fixed and determined by divine revelation. However, this general law is subject to exception in that it could take place if heirs consent thereto after the testator's death. It must be noted that there is no increase in testamentary freedom. Rather it is seen amounting to a gift from consenting heirs. The policy of Islamic law is thus to allow a man to literally "gift" away all his property inter-vivos but to prevent him, except for the 1/3 of his estate, from interfering by will with the Quranic devolution of property. (1)

The second part of Islamic law of succession deals with the remaining 2/3 of the deceased estate which devolves automatically and compulsorily upon the legal heirs determined at the time of death in accordance with the portions prescribed by the Quranic laws of inheritance. If no will had been made, these rules apply to the whole of the testator's estate. This part is equivalent to what one would call "intestate" succession.

Islamic law of succession is based on blood relationship (consanguinity - the nearer degree excludes the more remote) and marriage (affinity). In Islamic law there is no succession by representation (2) in what we

would call **intestate** succession. In Islamic law **succession** is per capita (per head) and not per stirpes (root). Where relatives are related **equally** in degree to the deceased, **relationships** by fullblood **exclude** relations by half blood.

Shares of the Primary Female Heir

The primary **heirs** are relative-heirs whose **shares** are fixed by the Quran itself for example 1/2; 1/4; 1/8. **These** are precise fractional shares. The shares have **precedence** over all other heirs. (3) I will **briefly** describe the share of a **wife** as sharer by affinity, via **marriage** as an example but **before** doing so it must be **understood** that in Islam a wife **means** a Muslim wife. If she is a "Kitabiyyah" wife, that is a **Christian** or **Jewess** she may only **inherit** via a will and not as a **sharer**. Factor's like divorce, for **example**, obviously also affects a **wife's** inheritance.

A wife, where **there** is no issue (children or **agnatic** grandchildren), gets 1/4 of her husband's estate. (4) If **there** are issue or **agnatic** grandchildren she gets an 1/8 of it. (In contrast the husband gets 1/4 and 1/2 of his wife's estate respectively.) Bearing in **mind** that a husband may have up to **four** wives simultaneously, if he has more than one wife **and** there are no issue, 1/4 or, if **there** are issue, 1/8 then it is **divided** amongst all of the wives as the case may be. It does not **matter** which of the wives has **issue** and which

not, hence if the first wife has no issue but there are issue from the other wives of the husband then her share is the 1/8 to be shared by all of them. The Quran thus provides that all of the surviving wives shall inherit the portion of only one wife. (5)

The same pattern occurs for all the other female sharers by lineage that is, the mother, daughter and sister. (6) It is clear that the "double share to the male" is fundamental to the Islamic law of succession. (7) There thus exists inequality in the inheritance shares between mother and father (not forgetting the inequality between sister and brother). I am of the opinion that legislative changes in testamentary succession (ie. to the law of 1/3 bequest) as implemented by several Middle East and North African countries places wives, daughters and mothers in a more favourable position as compared to the traditional law, but the augmentation of their shares is not without criticism since it violates the prophetic traditions in this regard. (8) Bearing this in mind, and also favouring the improvement of the "lot" of the woman, I have after examining the "intestate" shares of these woman and its implications in modern society, come to the conclusion that it is not the law per se that must change since the social of moral implicity or explicitly found therein, such as justice and equality, are eternal. (9) It is my contention that since society has changed it must accordingly adapt to its changed circumstances, hence the law must be interpreted so

as to accommodate the changed society and adapt the intention of God to the changed circumstances.

As far as the law of inheritance is concerned, its only deficiency in the twentieth century, as far as woman are concerned, is the fact that the women's share is no longer considered equitable due to her changed economic role in society. However, having evaluated the Quranic justification of a women's share, I am of the opinion that it is after all not necessary to change any of the laws of succession as suggested by modernist interpretations in this regard (albeit via a testament or inheritance) but the same effect can be achieved by offsetting conservative interpretations in this regard merely by the wife making effective use of the tool of dower (which must be distinguished from dowry) in her possession, if not at the beginning of her marriage, then during her marriage (deferred dower), to give effect to the eternal intention of God which was always based on equity (already at the inception of Islam). (10)

It is a sad fact that very many women are ignorant of the fact that the solution to their problem lies not necessarily in changing the laws of succession but in this very powerful tool which can be used even during her marriage if she did not make effective use of it at the inception of her marriage. Of course there also remains the other possibility of the husband, son and father making provision for the wife, mother and daughter

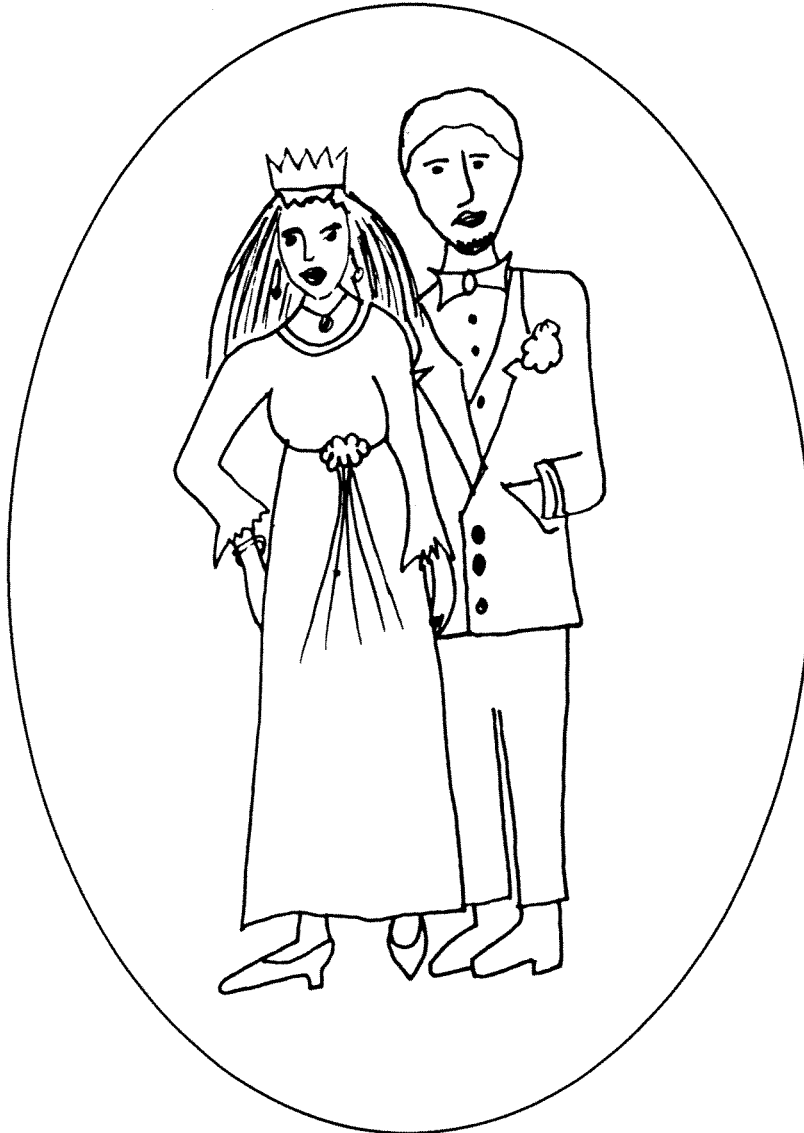
via gifts inter vivos (and dowry for the daughter, which is not obligatory in Islam) which would also have the same effect, that is, improving her economic status while not interfering with any of the Quranic injunctions in this regard.

In my evaluation of the Quranic justification of a woman's share I have demonstrated that the diminished role as far as the responsibilities of extended families in present day societies are concerned, (where we have the increasing emergence of the nuclear family and the breakdown of the extended family) can also lead to two arguments in favour of changing the Quranic law. (11) On one hand it can be argued that the financial needs of the nuclear family are great and is usually only catered for by the husband and wife and possibly their children as breadwinners and that the absence of other relatives, for example the husband's brothers and sisters in contributing to the creation of the nuclear family's wealth should hence be seen as an argument favouring the fact that their right to inherit should also therefore be absent. This argument is questionable because in terms of Islamic law wealth creating is basically in the hands of the husband but does not preclude the wife from sharing in the wealth. Abd al Ati (12) is however of the opinion that being a member of a nuclear family does not preclude one from fulfilling one's religious obligations which would include complying with the fixed shares of inheritance to compulsory heirs. On the

other hand it can also be argued that because of the greater economic contribution of working wives to the present day nuclear family, it should naturally result in greater rights as to their share of inheritance. Whether these arguments really have any Quranic justification is another matter altogether. Another point to remember is that if one is going to tamper with the wife's share, then it is inevitable that the shares of the other heirs must naturally also be affected.

The fact that in most Muslim societies the wealth of the nuclear family at the end of its life is centred around a "house" and its contents and with multiple heirs including some that are not residing at home, it is therefore almost inevitable that the biggest asset has to be sold for each heir to get their share. The other alternative is for certain heirs (mostly daughters) to relinquish their share in terms of the Islamic law of inheritance to avoid excession fragmenta-

tion of real estate. (13) This is probably not so true for South Africa because an even further option is that one of the heirs can buy the other's share from them. In pre-Islamic Arabia this was not a problem because property consisted mostly of livestock, crops etcetera and was easily divisible. F Rahman



aply sum it up as follows:

"The practical problem before most Muslim countries had actually been not so much the equality of shares as the effective allocation of any share at all to daughters from patrimony

... for fear of disintegration of patrimonial estates".

Needless to say, this point needs no further elaboration.

In the pre-Islamic era women had no rights of inheritance. These rights belonged to men exclusively. With the advent of

I s l a m changes in inheritance regulations which are still applicable today and were introduced to assure these rights to women although their portion is only one half that is given to males because, men are seen as the providers of women. (15) Generally the Quran states that spouses have reciprocal rights and duties but adds that *"men are but one degree superior to women"*.

(16) This qualifying clause read together with Quran Chapter 4 verse 34 which contains the rationale for it, namely, that *"men are the maintainers of women ... with what they spend out of their wealth,"* explains the superiority of men as being the

breadwinners and economically responsible for the sustenance of their wives (within the socio-economic context of Arabian society during the Prophet Muhammed's time-seventh century Arabia). (17)

From this, two opposite views emerged. The conservatives opine that this Quranic statement is normative and that a woman, although able to possess and earn wealth, is not required to spend it on the family which is the sole responsibility of the man. This then accounts for his superiority. The modernists on the other hand argue that this statement is descriptive and while the conservative view does not deny that women are economically independent they do not encourage as the modernists do, the view that all women should make use of this ability in today's changed society to become economically independent and in so contributing to the household, should enjoy absolute equality. It has also been suggested that since the woman also gets dower from her husband, there is no real inequality of inheritance shares. (18) This argument is not very convincing because the dower in most instances is much less than an inheritance. Also, the female inherits in her capacity as wife which flows from marriage and has nothing to do with her inheritance share. The dower argument might hold for the wife but definitely not for the daughter since dower is a solution to the problem of wife's share and not of the share of other female heirs.

The superiority referred to by the Quran is superiority of an economic position in a given society, not one of inherent inferiority of women. One can thus argue that if the wife earns approximately 50% of the income, then in terms of the modernist view there should be an equal distribution of inheritance as far as she is concerned. A further complication is the case where the wife is employed in a profession where she earns in the "super-bracket" and the husband is a layperson, in other words, a reversal of traditional roles. Does this now mean that the wife should be inheriting twice as much as her husband? These are hypothetical consequences of what scholars like Rahman are advocating if spouses are to be treated equally for he in fact openly states that the shares must change to achieve this equality.

The irony is that while Muslim women were already given many rights with the introduction of Islam as compared to her Western counterparts, today we see the reverse taking place as far as inheritance is concerned. However, sight must not be lost of the fact that in testate succession these (the latter) women or any other blood relatives for that matter may be "disinherited".

Dower, Dowry and Gift as Alternative Tools

Gift (Hiba) provides an effective solution to both the shares of the wife and mother and

daughter without tampering with inheritance shares. Islamic law recognises two kinds of dispositions of property. First, by a gift during one's lifetime called disposition inter-vivos whereby a person can transfer his whole estate. The second entails a disposition after death by a will called testamentary disposition whereby a person can transfer only 1/3 of his property. (19) Modern Arab legislation sets interesting and helpful precedents which could be of assistance to us in this regard. It must also be borne in mind how South African law will treat these gifts in so far they would have a bearing on, for example, the laws of insolvency and income tax. It should be remembered that the legislature has in these general statutes and for specific purposes, recognised polygynous unions for consideration of expediency. Nevertheless, I am only proffering an option here and details as to its operation and effect can always be worked out by legal experts when necessary.

The Law of Gift makes its possible for the son to augment his mother's share especially where she played an influential role in the accumulation of his wealth or for benevolent reasons; for the father to augment the shares of his daughters inter-vivos and can thus live with the conscience that he has treated his offspring equitably if, they are of course deserving of it. Sometimes a man's son can be the "black-sheep" in the family and knowing that his share is predetermined and therefore he cannot be disowned, will not

make him mend his ways, but this could act as a deterrent. It also allows the husband, in addition to stipulations as far as dower is concerned, to 'gift' property to his wife immediately inter-vivos, not only to indirectly augment her share, but also to simultaneously cater for the needs of their nuclear or basic family in the event he predecease his wife. This ensures for example, that their main asset which is normally their house, does not have to be sold and be divided amongst undeserving or distant and even disliked heirs in accordance with the Islamic law of succession.

Focusing more specifically on the patrimonial consequence of marriage, we see that dower is an important ingredient of a Muslim marriage. It is a sum of money or other property which becomes payable by the husband to the wife (not to her father/guardian) as an effect of marriage. If is a free gift. (20) The two kinds of dower are firstly, specified dower which is subdivided into prompt (paid at the time of marriage or on demand) and deferred dower (payable on dissolution of marriage by death or divorce) and secondly unspecified, proper or customary dower. (21) Dower must be distinguished from dowry which is the obligation of the bride's family. Dowry does not have its origins in Islamic law and is therefore not obligatory. It is however a well established custom which is still practiced by Muslims in South Africa. A good reform suggestion has been made to the effect that the dowry should be given

in stages - a few items up front and the rest in the form of money/securities/right to income from land and funds under the wife's control and used for a specified purpose. (22) This is another way in which the father can, during his lifetime, augment his daughter's share of inheritance by giving her a beneficial dowry on marriage. Although the wife may set her own limits, it is my contention that dower should not be seen as a symbolic or minimal sum once advocated by the Caliph Omar in his retracted his opinion, (23) but is to be seen and used as a powerful weapon at the disposal and defence of the wife. A woman who opts for a minimal sum allows herself to be exploited because she fixes her own dower and sadly in most cases has no other perception of dower except it being a symbolic requirement of marriage. In the light of this, she cannot be blamed for its ensuing consequences in the event of some or other unpleasant happenings in the future. It is such cases that the marriage officer should be encouraged to inform her otherwise.

In the Ismail case (24) it was held that a polygynous union and its unsuing customs and contractual consequences were void and unenforceable and the appellant's claim for delivery of the deferred dower should fail. Hence if Muslim Personal Law is recognised and subsequently implemented, the plight of women could be alleviated because marriage and dower go hand in hand. If the Muslim marriage is given due recogni-

tion, rights flowing from it can also be legally enforced thus safeguarding the wife as far as her dower is concerned. Until this is done, the Ismail case is evidence of what can happen.

In terms of South African law, Islamic law only allows for a marriage out of community of property with the exclusion of accrual, hence even if parties abide by this, the marriage per se provides no economic relief to the wife, thus dower effectively used can literally be seen as her 'salvation'. Dower as an ante-nuptial settlement can be effectively regulated via a *pactum successorium* which is a succession clause stipulating in an ante-nuptial contract how the parties wish their property to be disposed of after their respective deaths. In this way provision is made for a wife's deferred dower to which she is entitled besides her inheritance. Simultaneously it allows the wife to stipulate what she wishes to be done with her dower in the event of her death. In any event, the dower debt has preference over any legacies or inheritance rights of other heirs (25), and amounts to killing two birds with one stone without disturbing Islamic Law. It also prevents a possible future polygynous marriage and enables parties to regulate the disposal of their property and also comply with the Islamic law of succession.

Various systems of payment have been suggested to ease the strain on the husband. In this way for example, a government servant having a regular income

but no inheritance, could set aside a fixed proportion of his monthly income as dower. (26) This is an excellent suggestion and also makes one think of a regular investment which would achieve the same purpose.

Anderson has very ingeniously realised the inherent power of dower as an economic tool at the wife's disposal. He however, points out that the deferred dower would have an added advantage from the wife's perspective of being both irrevocable and available on divorce and widowhood.

"So the device is still of obvious value, but it might for these very reasons sometimes be less acceptable to Muslim husbands." (27)

Be that as it may, these measures do not only benefit the wife but indirectly benefit the husband because in the final analysis they offer more security to the family as a whole.

Conclusion

It is probably true to say that the majority of Muslims in South Africa are traditionally orientated and will resist any major reforms in legal and religious practice. Bearing this in mind, and in the light of the "double share to the male" being an inherent and unalterable feature of the Islamic law of succession, the liberation of which would amount to liberation from Islam itself, I propose that in the final analysis, effective use should be made of tools like gift, dower and dowry to

combat this inequality without in any way having to interfere with and change the divine blueprint of Islamic law as is in fact legislated by some Muslim countries who believe that the changed family structure of modern Muslim families and the greater financial contribution of the women in a family calls for the reconsideration of women's inheritance shares. □

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