
SUCCESSION AND WILL UNDER ISLAMIC LAW

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INTRODUCTION

The place of women before the coming of Sharia in all the societies in the world was sympathetic, as they were seen and treated as chattels, and their personal consent in matters affecting their well-being was considered immaterial, they were not recognized as equal or even closer with the men status and were a such not entitled to a legal inheritance. No where in the world where women were allowed to own properties of their own and no society in the world recognized women's right to share in the property of their family.

When one considered the social structure of Arabian peninsular before the advent of Islam, the situation was worst, this is because of the fact that the birth of a girl child into a family was seen as an ill luck, to which the Holy Qur'an provided *"And when the female infant buried alive will be questioned for what crime she was killed"*.¹

With the coming of Islam, the place and the role of the women in the society was clearly stated, and all rights belonging to them was given to them and they were by the Qur'anic injunctions kept in the hands of the men in trust. The Holy Qur'an provides *"And Allah Has made for you your mates (women) of your own nature and made for you out of them sons, daughters and grand children and provided for you sustenance of the best"*.²

It also goes on to provide that *"men are the protectors and maintainers of women, because Allah Has given the one (i.e. men) more (straight) than the other (i.e. women) and because they support them (i.e. the women) for their means"*.³

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1 Qur'an Chapter 81 verses 8 - 9

2 Qur'an Chapter 16 verses 73

3 Qur'an Chapter 4 verses 34

With the advent of Islam, women were liberated and were given all the rights due to them. Islam gave women rights to own property of their own, and the right to inherit or be inherited from. To this end the Holy Qur'an stated that *"from what is left by parents and those nearest related, there is a share for men and a share to women whether the property be small or large, a determinate share"*¹.

ADMINISTRATION OF ESTATE

When a person dies, the things to do in the matter of administration of his estate are as follows and must be strictly adhered to:

- i. Pay for his funeral expenses. This comprises the washing, shrouding transporting, and interring of the body. All these are to be performed in a manner suitable to the deceased's position socially and financially.
- ii. Settlement of debt on the property itself, this may be form of redemption of the property (if mortgaged) or payment of Zakat which was due but was not done.
- iii. Legacies (wills) which the deceased may have made, which must be executed provided they are valid.
- iv. Payment of ordinary debts, and finally,
- v. Distribution (inheritance) of the estate to his legal heirs.²

It should be noted that every person has a right over his property and is free to share or give it out to any person during his life time as long as he is not in his death bed sickness. But he loses such right whenever, he is dead, the property then goes to his heirs, his testament (will) however is the only right he has over the property after his death.

Because of the order set out in the administration of the estate of the deceased, we decided to start with Wills as it has priority over distribution of estate to heirs.

WILLS (WASIYA): DEFINITION AND BASIS

Wills under Islamic Law is the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death.³

1 Qur'an Chapter 4 verses 7

2 A.M. Gurin "An Introduction to Islamic Law of Succession (Testate & Intestate)", Jodda press Ltd. Zaria, Pp 8-10 and A. Hussain, "The Islamic Laws of Inheritance", http://www.islamsa.org.za/library/pamphlets/islamic_law_of_inheritance.html, p1

3 A. M. Zaid, "The Islamic Law of Bequest", (1986), Scorpion Publishing Ltd, London, p.9

The law of Wills was derived from three sources: the Qur'an, the Sunna of the Holy prophet, and ijtiḥad, which also include the principles of Ijmāh and Qiyas, all of which constitutes the sources of Islamic Law.

The holy Qur'an as the first primary source, is the book of Allah which has no doubt in it, revealed to the Holy prophet Mohammad (SAW) in peace meal for the period of about twenty three years, a guidance to man, which contains rules and regulations, governing the entire human activities throughout his life time, from birth to the grave. The Qur'an provides, *"And we have sent down on to you (O Mohammad (SAW) the Book (that is the Qur'an) in truth, confirming the scriptures (that is the Books) that came before it and as a guardian over it. So judge among them by what Allah has revealed, and follow not their vain desires, diverging away the truth that has come to you. To each among you, we have prescribed a Law and a clear way"*¹.

The Sunna, which is the second primary source of Sharia, comprises of the saying, the doing, and tacit approval of the Holy prophet (SAW), which serves as a complement to the Holy Qur'an, the interpretation and the explanation of the provisions of the Holy Qur'an. The Holy on this note provided that *"We have sent down to you also (O Mohammed (SAW) the message that you can explain to man what has been sent down to them and that they may give thought"*².

The principles of Sharia developed with the development of the society, to meet the demands of all and to address new issues as they come, through Ijtiḥad, which some Islamic scholars have defined to have included, Ijmāh, and Qiyas.

In the first source which is the Qur'an, it provides³:
*"It is ordained for you that anyone who is at the point of death and has goods to leave, should bequeath equitable to his parents and hear relatives, this is an obligation upon the pious"*⁴.

In the same Qur'an it was stated, *"such of you as die leaving wives should bequeath to them maintenance for one year"*⁵.

1 Qur'an Chapter 5 verse 48

2 Qur'an Chapter 16 verse 44

3 In relation to what is expected of a Muslim to do with the property entrusted in him, at time of death.

4 Qur'an Chapter 2 verse 180

5 Qur'an Chapter 2 verse 240

In the second source i.e. the Sunna of the Prophet (S.A.W) it was stated; "What right has a Muslim having something which may be bequeathed, to sleep for two nights unless his bequest is written"¹.

The third source is the collective or individual striving of guided by what the companions of the Prophet (S.A.W) and guided scholars after them. An example is Khalifa Abu Bakr bequeathed the Khalif to Umar to be Khalifa after his death, so also Khalifa Umar bequeathed it to a consultative body of the six companions called Al – Shura to choose one of them to succeed him as Khalifa. And in the area of Inheritance, the principles of Radd and Awl came into being through Ijtihad, and many more aspect of the Sharia in relation to Wills and succession.

The making of such Wills was universally acknowledged so that no Muslim ever refuted, rejected or denied the act of Wasiya (Will)².

The legal position of Wills (Wasiya) at the beginning of Islam was that it is incumbent upon every one to bequeath amongst his parents and near relatives. This provision was important at that material time as the Muslims were very few and most of their relatives were not opportune to revert into Islam.

The Mandatory nature of Wills (Wasiya) becomes optional by later Qur'anic provisions in Qur'an chapter 4; verses 7, 11, 12, and 176, which provided for heritable portion to heirs. It should be noted that it was on the strength of these provisions that the Prophet (S.A.W) expressly prohibited bequest to be made in favour of heirs³.

ESSENTIAL OF WILLS

There are four essentials to Wills:

- i. Testator
- ii. Beneficiary and Limitation of testamentary power,
- iii. Formalities and\
- iv. Object of Wills

1 Hadith of the Holy Prophet (S.A.W) reported by Buhari and Muslim

2 A. M. Zaid, Op Cit p.9

3 N. J. Coulson, "Succession in the Muslim Family", 1973, Cambridge, p 214

TESTATOR

For the testator to be legally capable to make a will, he must possess the following:

- a. He/she must be sane
- b. Must be a Muslim and of age.¹

The age of fifteen years is generally accepted as attaining puberty.² By this the testator must be of full control of his mind and senses and must know and understand the nature of the act of testamentary disposition he is carrying out. It should be clear that any Will made or effected under duress, coercion or undue influence, or procured by fraud shall not be valid.

Any Will made by an insane person during a lucid interval shall be valid, but where such a person subsequently becomes insane and remain so for a long period than such a Will becomes invalid. The same principle applies to a sane testator who subsequently becomes insane and remains so for a long period.

BENEFICIARY AND LIMITATION OF TESTAMENTARY POWER

The testator can make a Will only in favour of those who are not his legal heirs and where he made a Will in favour of any of his heirs then the Will has to be ratified or consented to by the other heirs before it becomes valid.³ In support of this is the tradition of the Prophet (S.A.W) which says: "God had given to each what he deserved so that there is no will (bequest) in favour of an heir".⁴

A Muslim is entitled to make a Will, and by that Will to dispose of 1/3 (legal third) of his estate to persons who are not his heir entitled to share his estate, and the remaining 2/3 to be distributed to his heirs as if he died intestate and he cannot by that Will effect any alteration of the share of his heirs in remaining 2/3. Where the Testator made a Will in ultra vires of the allowed 1/3, then it must be cut down to 1/3 of the net estate after the settlement of funeral expenses and debts.⁵

1 A. M. Gurin, Op Cit Pp 88 -89

2 See Falata Vs Ya Dowana (1970) N.S.N.L.R. 10: 1 Sh L.B.N. p 24

3 N. J. Coulson Op Cit Pp. 213-214

4 Hadith of the Prophet (S.A.W) reported in Sahih Al Bukhari

5 See T.A. Vs R. Yinusa (1971) NNLR p 77, in a tradition which form the basis of the limits of what could be bequeathed, Sa'd ibn Abi Waqqas (RA) narrated: "I was stricken by an ailment that led me to the verge of death. The Prophet came to pay me a visit. I said, "O Allah's Apostle! I have much property and no heir except my single daughter. Shall I give two-thirds of my property in charity?" He said, "No." I said, "Half of it?" He said, "No." I said, "One-third of

A Will under Islamic Law enable some of the relatives of the testator who are excluded from inheritance to obtain a share in his property. It might also be to recognize the service rendered to him by a stranger, or the devotion to him in his last days. At the same time the Prophet (S.A.W) has declared that the power should not be exercised to the detriment of the lawful heirs.¹

FORMALITIES

Islamic Law did not prescribed a particular form for making a Will, so long as the Testator's testamentary intentions are manifestly clear and reasonably ascertainable. It may be oral, for which no form of particular words are required, or if it may be in writing which is not required to be signed or attested. Therefore, an ordinary letter containing testamentary directions will amount to a valid Will. Even a gesture or signs if accompanied by a testamentary intention that is sufficiently manifest, may amount to a valid Will.²

Will can only be accepted after the death of the testator and not before. The testator can at any time change, modify or revoke his Will, either in express terms in writing or orally, or impliedly by conduct, even during the last illness of the Testator.³

Object of Wills

Anything moveable over which the right of property may be exercised or which may form the subject of exchange or barter, or a fractional share thereof or the usufruct of a thing, for example land, trees etc. may be lawfully disposed of by Will.

A Will remains valid and operative, though the subject matter is made to undergo a change or improvement after the constitution of a Will, unless where the alteration is so substantial as to give rise to the presumption that the testator in making such a change or improvement intended revocation.

The next subject of discussion is succession or inheritance which is the last item in the administration of the deceased's estate.

1 Hadith of the Prophet (S.A.W) reported by Bukhari and Muslim

2 S. I. Nchi, S. A. Mohammed, "Islamic Personal Law and Practice in Nigeria", 1999 Oracle Publishing Co. Ltd. Makundi Pp.142-143

3 Ibid Pp 146- 147

INHERITANCE

Inheritance under Islamic Law is based on Qur'an chapter IV verses 7, 11, 12 and 176 and also the Sunna (tradition of the Prophet (S.A.W), verse 7 provides; *"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"*¹.

By the above provision specific shares is provided for certain relations of the deceased, most of who were females.

Verses 11 mentioned principle of Tasib i.e. where the deceased is survived by a son and daughter; the son takes twice the share of the daughter. And if he/she is survived by a daughter only, her share is $\frac{1}{2}$ and if they are two or more they share $\frac{2}{3}$ equally.

The same verse mention of the shares of parents, it provides:

*"parent, shall inherit 1/6 each, if the deceased has a child, but if he has no child and his parents be his heirs, his mother shall have 1/3, if he has brothers or sisters, his mother shall have 1/6, after the payment of Wills (bequest) and debts"*².

Verse 12 is divided into two parts. The first part mentioned of the rights of (male) spouse inheriting their wives. It provides:

*"if a woman dies leaving a husband, he is entitled to $\frac{1}{2}$ of her net estate if she is not survived by a child (whether legitimate or illegitimate). If she is survived by a child, he is entitled to $\frac{1}{4}$ of the estate left"*³.

The verse also talked of the wives right to inherit their husbands. The wife/wives have the right to inherit $\frac{1}{4}$ of the net estate left by their deceased husbands if they are not survived by a child. If they are survived by a child, she / they are entitled to $\frac{1}{8}$ of the net estate left.

The second part of the verse mentioned the inheritance right of uterine i.e. brothers and sisters, they are those heirs who share same mother only with the deceased. The part is concerned with the inheritance of a person who has neither descendant nor ascendants however distant, but only the

1 Qur'an Chapter IV verse 7

2 Qur'an Chapter IV verse 11

3 Qur'an Chapter IV verse 12

uterines – with or without a spouse. If there is a spouse widow or widower surviving she or he takes his/her specified share before the uterines. One uterine brother or sister is entitled to 1/6, if two or more, they share 1/3 of the estate equally.

Verse 176 mentioned about the inheritance of brothers or sisters both *germaine* and *consanguine* the verse provides; if a brother dies leaving nobody except his sister she is entitled to ½ of what he left. If they are two or more entitled to 2/3, if it is brother who survives his sister, he takes the whole property. If there are brothers and sister, then the brother takes twice the share of the sister.

GROUND OF INHERITANCE

Inheritance in Islamic Law is based on the following grounds:

- i. Blood relationship (Legitimate) and
- ii. Marriage tie.¹

CONDITION OF INHERITANCE

There are two conditions of inheritance:

- i. Death of the deceased which can be establish by either of the followings:
 - a) Real death or by
 - b) Judicial decree
- ii. Survival of heir – The survival of heir requires positive evidence it must be prove that the prospective heir survived the deceased.²

a) Simultaneous death:

If two or more persons died together or whether simultaneously or in circumstances where it cannot be established which died first, neither will inherit from the other:

b) Embryo:

A child in the womb is allowed to inherit if it can be shown that he or she existed in law at the time of the deceased death; that is to say that the child must be born alive and, born within the recognized period of gestation from the time of deceased.

1 A. M. Gurin Op Cit, Pp 10- 12

2 U. El- Hammad Pindiga, Practical Guide to the Law of Succession (Mirath) in the Sharia, 2001, 2nd ed, Pp ix - x

IMPEDIMENTS TO INHERITANCE

The happening or existence of any of the following will bar an heir from inheriting the deceased.

- i. Difference of religion
- ii. A person who causes the death of the deceased intentionally.
- iii. An illegitimate child cannot inherit his father
- iv. Invalid marriage.
- v. Slavery
- vi. Apostasy
- vii. Lack of knowledge as to who died first
- viii. Taking the lian oath.¹

CLASSES OF HEIRS

There are three classes of heirs:

i. Qur'anic heirs:

This class consist of a certain class relations of the deceased whom the Qur'an apportioned specific share.

The heirs are:

- The spouses i.e. Husband and Wife
- The parents i.e. Father and Mother
- Grandfather and grandmother in default of father or mother respectively
- Daughter
- Sons daughter
- Full sister (germaine)
- Half sister (consanguine) and
- Uterine brother and sister.

ii. Agnatic heirs²

This class is called Asaba (residuary heir), like son referred to as agnate on his own right. There is also agnate by another, this is where brother and sister of equal degree and strength of blood tie survive the deceased the brother takes twice the share of the sister. There is also agnate with another,

1 A. A. A. Mahmud, "Guide to Succession Under Islamic Law", (n.d), Al- Abumahdi Ltd, Yola, Pp 9 -10

2 The rights of the asaba were recognised by the Prophet Muhammad (SAW) himself. Abdullah ibn Abbas (RA) reported that the Prophet Muhammad (SAW) said, "Give the Faraid (the shares of the inheritance that are prescribed in the Quran) to those who are entitled to receive it. Then whatever remains, should be given to the closest male relative of the deceased." (Sahih al-Bukhari)

this is a situation where full sister or half sister inherit with daughter or son's daughter. The full sister or half sister inherits as residuary or agnate.

Agnatic heirs consist of son, father, father's father and brothers both full and half.¹

iii. Collaterals:

This class consists of brothers full, half and Uterines, in other words Germaine, Consanguine and Uterines brothers. Females among them are basically Qur'anic heirs, but in some circumstances are agnatic. While the male are always agnatic.

EXCLUSION IN INHERITANCE

Certain heirs referred to as primary heirs are always entitled to a share of the inheritance, they are never totally excluded. These primary heirs consist of the spouse relict, parents, the son and the daughter. All remaining heirs can be partially or totally excluded by the presence of other heirs. There are several rules of exclusion which determine the exclusion of some heirs by the presence of others. Exclusion in inheritance therefore may be complete or partial.

PARTIAL EXCLUSION

Heirs that fall under this category consist of those heirs whose shares may vary and at the same time who are not entirely excluded from inheritance.

Partial exclusion takes place in respect of the following five heirs:

- a) Husband
- b) Wife
- c) Mother
- d) Son's daughter and
- e) Full sister.²

The husband's share generally depends on whether or not his deceased wife is survived by a child. His share will be reduced from $\frac{1}{2}$ to $\frac{1}{4}$ of the net estate if she is survived by a child notwithstanding the child is not his or the child is illegitimate (out of wedlock). In case of the wife, her share of $\frac{1}{4}$ is reduced to $\frac{1}{8}$ if her deceased husband is survived by any agnatic child.

The same principle applies to the share of the mother whose shares of $\frac{1}{3}$

1 A. M. Gurin Op Cit, Pp 36 -38

2 Ibid Pp 26 - 27

is reduced to 1/6 by the presence of agnatic child or the presence of two or more brother or sisters of the deceased. In case of the son's daughter if she co-exists with a daughter of the deceased she takes as Asaba Maghairihi (agnate with another) in which case her share of 1/2 is reduced to 1/6. This preference is given to the daughter who is descendant to a sister who is collateral. The same reduction is true of the share of the half agnatic sister who co-exists with a full sister, full sister take 1/2 while half sister received 1/6. This preference is based on the full sister sharing the same father and mother with the deceased while half sister sharing only father with the deceased.

COMPLETE EXCLUSION

Heirs here are of two categories for the purpose of inheritance:

i First category:

Those heirs that fall under the first category are those that will never be totally excluded from inheritance in any case; they include:

1. Son
2. Daughter
3. Husband
4. Wife
5. Father
6. Mother

ii Second category:

Those heirs that fall under the second category are those who are either heirs entitled to a specific share or residue who inherit in one case and are totally excluded in another base on the following two principles:

- a. Any person who is connected to the deceased through any person shall not inherit while that person is living e.g. son's son co-existing with son's son's son, or father with father. An exception is mother of the deceased co-existing with uterines and;
- b. The nearest in blood relation with the deceased inherit first, then the nearest after him, then the next in order of proximity.¹

Under this principle and nearest entirely exclude the distant, e.g. the full brother co-exists with a half brother. The former excludes the later totally.

It should be noted that, any person who is excluded totally because of any of

¹ Ibid Pp 25 - 26

the impediments to inheritance (a murderer of the deceased or on difference of religion) does not under any circumstance exclude any one. But any heir excluded by another heir may also exclude others totally as well as partially. The heirs that fall under this category are all the three categories of collaterals, viz, full brothers and sisters. Also under the category are grandmothers of the deceased.

The full brothers and sister are entirely excluded by the following:

- a) Son
- b) Son's son
- c) Father and
- d) Grandfather.

Agnatic half brothers and sisters are also totally excluded by all the heirs listed above and in addition by the full brothers and sisters.

Uterine brothers and sisters are excluded from inheritance by the child of the deceased.

CONCLUSION

Islamic law of inheritance is one of the most comprehensive system of succession, it is exhaustive enough to meet most of the situations that have arise and that may arise. It pays ample attention to the interest of all those who find natural place in the first of rank of the affections of the deceased. It is difficult to find any other system of succession containing such just and equitable rule.

The matter of Wills and Inheritance under Sharia is not a matter of disbelieve,¹ Allah the regulator of man's conduct created all that is in the heavens and earth, and knows what is better for all, for the stability of the life system of man. More so that He has promised to reward man with Al- jannah in lieu of whatever man has offered in pleasing Allah.²

To justify further the principle of Sharia, wealth of whatever form is a trust in the hand of man as long as he lives, and when his term of life expires, his trusteeship over his wealth and property expires. This property has then to be redistributed in accordance with the directive of the absolute owner, Allah. It is in this vain that the Holy prophet was reported to have said in a

¹ See Qur'an Chapter 33 verse 36

² The Holy Qur'an states, "Allah has purchase from the believers their persons and their wealth in lieu of Al- jannah."

tradition narrated by Abdullah ibn Abbas (RA), "Give the Faraid (the shares of the inheritance that are prescribed in the Quran) to those who are entitled to receive it. Then whatever remains, should be given to the closest male relative of the deceased".¹

1 Hadith of the Holy Prophet (S.A.W) reported by Sahih al-Bukhari

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